Ralf Alleweldt · Guido Fickenscher
Editors

The Police and International Human Rights Law

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Anja Bienert is a Senior Programme Officer of the Police and Human Rights Programme at the Dutch Section of Amnesty International, Amsterdam, the Netherlands.

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Ralph Crawshaw completed his service in the police in the rank of chief superintendent. Midway through his police career, he read for a degree in politics at the University of Essex. This experience led him to reflect, among other things, on the power of the state in relation to the individual and to become concerned about the abuse of that power. On completing his police service, he took a master's degree in international human rights law at the University of Essex and became a Fellow of the Human Rights Centre there.

His human rights work primarily involves delivering human rights programmes for police, military and prosecutors on behalf of various international organisations. With co-authors, he has written a text book, a teaching manual and two reference books on human rights for police and a book on the laws of war for police. He has undertaken investigations into human rights violations on behalf of an NGO and on the instructions of a lawyer representing victims of a miscarriage of justice. Because today states are assuming even more powers and limiting human rights under the pretext or mistaken belief that this provides protection against crimes of terrorism, he believes that the need to protect and promote human rights remains urgent and vitally important.

Robert Esser was born in 1970, joined the University of Passau in 2007 as Professor in Law. He holds the Chair of German, European and International Criminal Law, Criminal Procedure and White-Collar Crime. His key publications include numerous articles on European Criminal Law and Criminal Procedure, as well as on the subject of 'Human rights in criminal proceedings' (European Convention on Human Rights); co-publisher of *Löwe-Rosenberg*, commentary on the German Code of Criminal Procedure (26th Edition 2006–2014); articles on European Criminal Law in the handbooks *Internationales Strafrecht in der Praxis* (International Criminal Law – Practical Approach), C.F. Müller 2007, and *Europäisches Strafrecht* (European Criminal Law), 2nd Edition, C.H. Beck 2015. In 2012, Robert Esser's commentary on the European Convention on Human Rights (Vol. 11 of the *Löwe-Rosenberg*; 1312 pages) was published.

In 2010, Robert Esser founded the *Research Center for 'Human Rights in Criminal Proceedings' (HRCP)* at the University of Passau. HRCP is a research and advanced training centre and an expert helpdesk specialized in all branches of international protection of human rights in criminal proceedings. A special focal point of HRCP is the support of foreign governments in their efforts and endeavours of phrasing and establishing human rights standards in their national criminal proceedings—especially in South East Asia and Eastern Europe.

Since 2002, Robert Esser has given many lectures relating to human rights to the Organization for Security and Co-operation in Europe (OSCE), the Academy of European Law (ERA), the German Judges Academy and others. He is also engaged in the German–Chinese and the German–Vietnamese Dialogues concerning the Rule of Law, organised by the German Ministry of Justice.

Guido Fickenscher studied law at the Johannes-Gutenberg-University in Mainz. Since 2007, he has been teaching criminal procedure and police law at the Brandenburg University of Applied Police Sciences in Oranienburg. His research and teaching focus is on the intervention powers of police officers. From 2012 to 2014, he worked as a long-term expert in Bosnia and Herzegovina (Sarajevo) for the project IPA 2010 (Instrument for Pre-Accession Assistance to EU), Support to Law Enforcement, further implementation of the police reform. Mr. Fickenscher was responsible for the further development of several police agencies and police bodies, among others covering the following areas: police education, public procurement and anti-corruption measures. From 2005 to 2006, he worked in the Ministry of Science of the Federal State of Rhineland-Palatinate, Mainz, Germany, as an Adviser to the Minister/State Secretary of Science in legal, strategic and organisational matters. Mr. Fickenscher is a former police officer. From 1989 to 1998, he worked in the police service of the Federal State of Hesse, Germany.

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Francesc Guillén Lasierra holds a law degree, a Master in Comparative Law, and a PhD on 'Models of policing'. He was the Head of Research at the Police School of Catalonia (1992–2004). Currently, he is the Head of Projects and Organisation at the Catalan Ministry of Interior (as from 2004). He had been the executive director of CIFAL Barcelona (2007–2009) and a member of the Steering Committee of the Platform Police for Urban Development (January–December 2010).

Francesc Guillén Lasierra has been a lecturer on constitutional law at the Autonomous University of Barcelona and the Open University of Catalonia as from 1989 and 1999. Currently, he is a lecturer on 'Police and Security' at the Criminology Studies. He has participated in several missions, seminars and reports of the Council of Europe in Georgia (1998 and 2001), Turkey (2001 and 2002), Albania (2002), Armenia (2002), Moldova (2003, 2010, 2011) and Serbia (2003) and Ukraine (2014, 2015) and in several European projects such as NAPAP (NGOs and Police

Against Prejudice (1997–1999); PAVEMENT (2000); 'Illicit drug trafficking in countries of Central Europe: A comparative study of strategies and Policies in the Czech Republic, Hungary and Lithuania in relation to the European Union' (1998–2001); 'Human Rights Education at the MVD Law Institute, Russian Federation' (1998–2001); TRANSFER (2002–2004) 'Combating discrimination from the University. An idea of research and education' (2004–2006) and, currently, Margin Project 'Tackle insecurity in marginalized areas' (2015–2017). He has also participated as an expert in various projects of the European Forum for Urban Security such as Audits, Surveille and Eurosocial.

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Christina Kosin, LLM, studied at the University of Maastricht, the University of Tartu and the University of Edinburgh. She has joined the German Police University in August 2014, where she writes her PhD dissertation on the attribution of ill-treatment in the private sphere to a state under the ECtHR and the CAT. From August 2014 to January 2016, she participated in the project 'network for the law of civil security in Europe', funded by the Federal Ministry for Education and Research. She has published articles and book contributions in English, as well as in German, on topics including the European Union, as well as torture and other forms of ill-treatment under international human rights law and international criminal law.

Dieter Kugelmann studied at the universities of Mainz and Dijon. In 1991, he completed his PhD in Mainz with a study on European media law. Further academic qualification lead to a book on the rights of the citizen in information society. He did teaching at the universities of Frankfurt/Main, Cologne, Bielefeld, Passau, Mannheim and Leipzig. He is author of numerous publications, especially on media law,

refugee law, European law and security law. In 2008, he became a fully tenured professor at the German Police University with a specialization for public law with a focus on police law, including international and European law. In 2015, he was elected State Commissioner for the protection of data and the freedom of information of Rhineland-Palatinate.

Jim Murdoch joined the Glasgow School of Law after qualifying as a solicitor. He read law as an undergraduate at Glasgow and holds an LLM from the University of California at Berkeley. He was Head of the School of Law between 1996 and 2000. He has taught at the Universities of Mainz, Freiburg, Hamburg and Paris Ouest and was a professeur stagiaire with the Directorate of Human Rights of the Council of Europe in France. He is a regular participant in Council of Europe seminar programme visits to Central and East European states and has developed a particular interest in non-judicial human rights enforcement mechanisms.

In March 2012, Jim was awarded the Pro Merito medal of the Council of Europe. The medal is the highest distinction granted by the Secretary General to individuals (or organisations) in recognition of their commitment to the Council of Europe's values and work.

Kai Siegert, MSc in International Criminal Justice; is a Polizeidirektor in the Brandenburg state police service; was based in Brussels as policy officer in charge of home affairs matters at the Representation of the Land Brandenburg to the European Union; has been a police officer for more than 30 years; has held various positions at state, federal and international levels, including posts at and secondments to the Brandenburg Ministry of the Interior, the Federal Police Headquarters, the Federal Foreign Office (Advisor on Security Sector Reform to the Palestinian Authority in Ramallah), the UN (International Police Task Force in Bosnia-Herzegovina), the EU (Police Reform Twinning Project in the former Yugoslav Republic of Macedonia) and the Council of Europe (Programme Manager 'Police and Human Rights').

Graham Smith has more than 30 years of experience in the field of police misconduct and complaints. In the 1980s and 1990s, he was a civil rights activist in London and completed his doctoral thesis, *Police Crime: A Constitutional Perspective*, in 1998. Appointed consultant to the Council of Europe Commissioner for Human Rights in 2008, he drafted the Commissioner's Opinion on the independent and effective determination of complaints against the police. Since then, he has served as an international expert on police and criminal justice reform and has written extensively on the subject. Graham is a Senior Lecturer in Regulation and Director of Social Responsibility in the School of Law, University of Manchester, UK.

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Walter Suntinger is a human rights consultant, trainer and university lecturer (since 1998), a Managing Partner in HumanRightsConsulting Vienna (since 2006) and a board member of the Association for the Prevention of Torture (since 1998). He holds a law degree at the University of Graz, with a specialization in human rights law. His main working areas are human rights in the police and criminal justice system, human rights monitoring, asylum and refugee issues, business and human rights, development cooperation.

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Judith Thorn, born in 1985, studied law at the Justus Liebig University (JLU) Giessen (Germany) and the University of Nottingham (United Kingdom). Since graduation in 2011, she has been employed as research assistant at the Chair of Public Law and International Law (Prof. Dr. Thilo Marauhn, M.Phil.) at the JLU Giessen. In February 2016, Judith Thorn became a member of the research group 'UN Policing – Legal Basis, Status and Directives on the Use of Force'. This project is funded by the German Foundation for Peace Research and is implemented by the Chair of Public Law and International Law at the JLU in cooperation with the Peace Research Institute Frankfurt (PRIF).

Dimitris Xenos is a Senior Lecturer within the School of Business and Law of the University of East London. He also acts as a legal consultant for various law offices and private and public bodies. He is a Fellow at the European Public Law Organisation in Athens, book review editor for the European Review of Public Law and member of the Scientific Committee of Gazzetta Amministrativa della Repubblica Italiana.

His legal expertise and research combines both public and private law areas of domestic, European and international relevance. In the area of human rights, he has written a book on the positive obligations of the state under the European Convention of Human Rights, which was cited in the judgment of Whaling in the Antarctic (2014) (*Australia v Japan*) of the International Court of Justice (Judge Cançado Trindade's opinion). He has made frequent contributions to open consultations of public institutions, including his written submission to the European Ombudsman's public inquiry on the composition of EU Commission expert groups.

Chapter 1
Introduction: The Police, a Key Actor in Human Rights Protection

Ralf Alleweldt and Guido Fickenscher

Abstract When it comes to safeguarding human rights, the police is at a key position. This chapter illustrates briefly the importance of international human rights protection mechanisms related to policing, and gives a summary overview of the contents of this book.

Government authorities, including police forces, are created to provide security and protect the rights of citizens. Police officers must often act quickly and decisively to ensure that individual rights and the rule of law are respected. In many cases, they successfully protect citizens against criminal acts; they help the weak against the strong. Each time the police interfere lawfully for protecting life and physical integrity of citizens, each time the police secure a criminal conviction of persons guilty of murder, assault, robbery or even theft, they contribute to the well-being and security of citizens and to the protection of their human rights. In order to fulfil this task, police forces have special powers, including the power to use force and coercion if necessary.

At the same time, in many countries, serious complaints are raised about human rights violations committed by security forces, including the police. These allegations refer to torture and other ill-treatment, unlawful killings, arbitrary detention, disproportionate interferences with the right to peaceful assembly and other acts. Again and again, such complaints are confirmed by the findings of international courts or other bodies. The European Court of Human Rights, for example, has found violations of the right to life and the prohibition of torture with regard to numerous countries all over Europe.

In any case, it may happen in any country that police powers are used excessively, and it is common ground that these powers must be accompanied by

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effective legal safeguards in order to prevent any abuse from happening, or to react to alleged instances of such abuse. Certainly, in a worldwide perspective, there is a potential for improving the human rights performance of police forces.

Thus, policing always entails risks for human rights, and policing is indispensible for the effective protection of human rights, and for the rule of law. When it comes to safeguarding human rights, the police are at a key position.

The regulation and control of policing has long been considered to be an internal matter of sovereign states. Ever since the creation of the United Nations in 1945, however, governments have agreed that internal regulation of government actions affecting the rights of citizens should be complemented by international mechanisms of human rights protection.

Since then, a body of human rights law has been developed that affects all branches of government. States have agreed on basic human rights as laid down in the International Covenant on Civil and Political Rights and the International Covenant and Economic, Social and Cultural Rights, as well as in the European Convention on Human Rights and other regional instruments. They have concluded special human rights treaties such as the conventions against discrimination and torture and for the rights of the child, of migrant workers and of people with disabilities. They have created international courts like the European, the Inter-American and the African Court of Human Rights, which issue binding judgments, and other bodies like the Human Rights Committee or the Committee Against Torture, which give non-binding decisions in individual cases.

Special rapporteurs or working groups of the United Nations Human Rights Council work and report regularly on arbitrary detention, involuntary disappearances, extrajudicial executions, the right to freedom of assembly and association, the rights of migrants, torture and many other issues relevant to police work. Expert bodies have been created that inspect, on a regular basis, places where people are deprived of their liberty and give recommendations to governments with a view to improving the human rights situation of detainees. In many countries, the international community provides technical assistance in order to support local police forces in conducting their work in accordance with international human rights law.

Accordingly, in today's world, an abundance of international standards exists that aim at setting limits to the action, and sometimes to the inaction, of police forces. Many international actors and activities contribute to developing and refining these standards. In particular, by way of the ever-expanding case law of international courts and other bodies, the requirements of human rights have become more detailed in recent years, and have reached a certain degree of complexity.

It is the purpose of this book to take stock and to provide an updated picture of human rights law relating to the police as it stands today.

In Chapter 2, *Ralph Crawshaw* presents a number of fundamental issues relating to police and human rights. Recalling the basic functions of policing, he emphasizes that police forces, when enforcing the law, are naturally bound by legal rules setting limitations to their powers. He gives an overview of the international instruments relevant to the police, including the laws of war, as well as general principles

regarding the limitations of human rights. The chapter concludes that in a democratic state, policing should be based on six principles: lawfulness, non-discrimination, necessity, proportionality, accountability and humanity.

The prohibition of torture and inhuman or degrading treatment or punishment is one of the most fundamental guarantees in any state under the rule of law. In Chapter 3, *Inna Garanina* describes this guarantee in some detail, considering, inter alia, the definition of torture, the prohibition of the use of evidence obtained by torture and the duty of the state to prevent torture among detainees. Some examples of torture and other ill-treatment are given with reference to the case law of the European Court of Human Rights.

One of the most important tasks of the police is to protect the lives of citizens. At the same time, and as a consequence, police action should only very exceptionally put the lives of citizens in danger. In Chapter 4, *Robert Esser* outlines the impact of Article 2 of the European Convention on Human Rights—the right to life—on police action and delivers an in-depth analysis of the case law of the European Court of Human Rights on this matter. He deals in some detail with the requirement that (potentially) lethal force must only be used when 'absolutely necessary' and analyses several judgments where the Court interpreted and clarified the principle of proportionality in this context.

In cases where physical force or firearms are used by the police, the issue of command responsibility may arise. Drawing on findings and recommendations from a recent Amnesty International report, *Anja Bienert* looks closely, in Chapter 5, at the role of commanding and superior officers in relation to the use of force. She distinguishes three layers of responsibility of commanding officers: first, they are responsible for their own actions, orders and omissions; second, they are responsible for defining an operational framework regarding the use of force; and third, they have to supervise and control their subordinates and to ensure that they are held accountable in case of unlawful use of force and firearms. She considers that commanding and superior officers must themselves be held accountable if they fail to fulfil their responsibilities in this respect.

Human rights have a procedural side. If there is a complaint, or suspicion, that the police have abused their powers, human rights require such cases to be investigated effectively. This requirement has been developed by international human rights bodies during the last decades, in particular in the case law of the European Court of Human Rights on the right to life and the prohibition of torture. In Chapter 6, *Graham Smith* describes the conditions of an 'effective' investigation, outlining in particular the role of independent police complaint bodies in avoiding impunity of human rights violations.

If a person is arrested by the police, this is a very sensitive moment since he or she loses contact with the outside world, and his or her other fundamental rights, such as physical integrity, may be at risk. In Chapter 7, *Francesc Guillén Lasierra* presents the case law of the European Court of Human Rights on the right to liberty and security, in particular as regards the concept of 'detention' and the various safeguards laid down in Article 5 of the European Convention on Human Rights, including the protection against any form of arbitrariness.

One of the main tasks of the police is to bring criminal suspects to justice so that they may be subjected to a criminal trial. Police action may influence in various ways the fairness of criminal proceedings. In Chapter 8, *Jim Murdoch* outlines those aspects of the guarantees laid down in the European Convention on Human Rights that have an impact upon the discharge of policing, with a focus on the requirements of fair criminal investigations and trials.

In the fight against serious crimes such as terrorism, law enforcement officials and intelligence services employ secret surveillance measures to gather personal data to prevent, detect and investigate these offences. Such data are also exchanged between various actors. All these activities interfere with the right to privacy. *Dieter Kugelmann and Christina Kosin* present, in Chapter 9, relevant case law of the European Court of Human Rights in order to identify general criteria that guide lawful and proportional measures of surveillance.

Human rights do not only limit the scope of police activities; they also may oblige the police to get into action. In cases where life, liberty or other important rights of citizens are under threat, the police must take adequate measures of protection, depending on the circumstances. In Chapter 10, *Dimitris Xenos* analyses the positive obligations of the police and considers the question as to how far the protection against crime may be understood as a human right.

Experience confirms again and again that public gatherings are extremely important for the functioning of a democratic society. At the same time, they may pose great challenges to the police forces. *Kay Siegert* describes, in Chapter 11, the relevant case law of international bodies and other standard-setting documents. In order to implement the human rights requirements, and to find a proper balance between freedom of assembly and public security, it is indispensable that the police use appropriate crowd management measures. He describes good practices in this field and emphasizes that police services continuously have to adapt their strategies and tactics to new developments.

The police is an important institution in times of peace and also in times of conflict. Whoever wants to secure peace in post-conflict situations must aim to restore public order and security. Accordingly, a police component has been included in many United Nations peace missions. In Chapter 12, *Judith Thorn* highlights the legal framework for police in UN peace operations. She considers specific issues such as the extraterritorial application of human rights treaties, the applicability of human rights to the United Nations, violations of human rights by members of the police component, aspects of accountability, immunity and disciplinary measures. She also discusses various issues of practical police work, such as the protection of civilians, the use of force, as well as arrest and detention.

Human rights training is one of the typical activities proposed for improving the human rights performance of police forces. In Chapter 13, *Walter Suntinger* explores basic didactical principles of effective human rights trainings for the police, as well as some characteristics of police organizations and police culture that are relevant for understanding how such trainings could be shaped. From the practical perspective of a human rights trainer, he discusses some basic competencies that police officers should have, what they should know about human rights,

which skills they would need to acquire for successfully handling human rights principles in practical work and which attitudes should underlie and support police work on the basis of a human rights approach.

Despite their absolute prohibition, acts of police torture or other ill-treatment persist in many countries. For more than 25 years, the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment (CPT) of the Council of Europe has been visiting police stations and other institutions in order to support governments in fighting and preventing police abuse. In Chapter 14, *Wolfgang S. Heinz* offers an overview of legal standards and working methods used by the CPT, and of its practical work regarding the police. A tentative attempt is made to assess the impact of the Committee's work.

Following the first years of the European experience, an institution similar to the CPT has been established at the level of the United Nations, namely the Subcommittee on Prevention of Torture (SPT). In addition, the Optional Protocol to the Convention Against Torture also introduces National Preventive Mechanisms. In Chapter 15, *Aneta Stanchevska* describes the work of the SPT and shares some experiences regarding torture prevention activities in the Republic of Macedonia.

This book is based on the contributions given during the international conference 'The Police and International Human Rights Law', which took place at the Brandenburg University of Applied Police Sciences—Fachhochschule der Polizei des Landes Brandenburg—in Oranienburg, Germany, from 28 to 30 April 2016. This event brought together a variety of participants, including police officers, academics and human rights activists, as well as officials from government authorities and international organisations. As may be seen, the authors of this book reflect this diversity. We are convinced that further progress and development in the theory and reality of human rights will best be achieved through permanent and open dialogue and cooperation between all relevant actors, including governmental and non-governmental organisations, the police and society.

We would like to express our sincere gratitude to the German Foundation for Peace Research—Deutsche Stiftung Friedensforschung—for its generous support to the conference.

We are also grateful for the extraordinary support we received at our university, including from President Rainer Grieger and Vice-President Jochen Christe-Zeyse and from the organising team, in particular Ulrike Mauersberger and Heiko Schmidt.

We will be happy to receive any feedback at ralf.alleweldt@fhpolbb.de and guido.fickenscher@fhpolbb.de.

Chapter 2
Police and Human Rights: Fundamental Questions

Ralph Crawshaw

Contents

Abstract This chapter provides an introduction to the international system for the protection of human rights and of the laws of war and considers these in relation to policing.

Ralph Crawshaw is a former Chief Superintendent of the Essex Police and a Fellow of the Human Rights Centre at the University of Essex.

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It recalls the basic functions of policing, points out that police are officials who exercise state power and that one of the purposes of human rights is to regulate the exercise of state power. It observes that police powers and the limitations on those powers are, or should be, expressed in law and that it is incumbent on the police to obey that law. Otherwise, an absurd situation arises whereby those responsible for enforcing the law break the law in order to enforce it.

The chapter then shows how the laws of war and international criminal law are also relevant to policing, before considering specifically the relationship between human rights and policing. It discusses briefly which human rights instruments and which human rights are most relevant to policing and how the international system protects specific human rights. It outlines how human rights may be limited lawfully.

The laws of war are introduced by considering their scope and purposes, the types of conflict they regulate, how combatants and civilians are defined, the status and functions of police in armed conflict, the relationship of police to laws of war and by giving some examples of the laws of war.

The paper concludes that in a democracy, policing should be based on the principles of lawfulness, non-discrimination, necessity, proportionality, accountability and humanity.

2.1 Introduction

This chapter examines the relationship between two topics of great importance to states and to people who live within the jurisdictions of states—policing and human rights.

It is generally recognised that the primary purposes of policing are to prevent and investigate crime; to maintain and, where necessary, restore public order; and to provide aid and assistance in emergencies. It is important to remember when considering policing in relation to human rights that police are state officials, that they exercise powers on behalf of the state in order to perform their functions and that one of the purposes of human rights, if not their prime purpose, is to prevent abuse of power by the state.

Police powers and the limitations on those powers are, or should be, expressed in law, and it is the limitations on police powers that secure respect for and protection of human rights. For example, limitations on powers to use force, to deprive people of their liberty or subject them to search or surveillance operations protect the rights to life, liberty and security of person and to private and family life.

The simple message to the police concerning human rights is ‘Obey the law’. In other words, ‘Exercise your powers in accordance with the law and do not exceed them’. Otherwise, the absurd situation arises whereby officials whose responsibility it is to enforce the law break the law in order to enforce it.

In considering police and human rights, this chapter addresses eight fundamental questions:

- What branches of international law are relevant to police?
- What are the purposes and scope of these branches of law?
- What is the relationship between human rights and policing?
- Which human rights instruments are relevant to police?
- Which human rights provisions are of particular relevance to police?
- How does the international system protect specific human rights?
- What are the limitations on human rights, and how can they be restricted in times of national emergency?
- What are the laws of war, and how are they relevant to police?

It concludes by expressing six principles on which, in the author's view, policing should be based in democratic societies governed by the rule of law.

2.2 What Branches of International Law Are Relevant to Police?

Branches of international law relevant to police are as follows:

- international human rights law,
- laws of war,
- international criminal law.

International human rights law is part of the legal framework within which police operate. So are the laws of war and international criminal law, but the police are generally less aware of these.

It is important that police leaders should have some understanding of the laws of war and international criminal law for a variety of reasons, for example:

- police can, and do, become involved in armed conflict – especially non-international armed conflict;
- some police are deployed in UN missions and missions of other international organisations in post-conflict situations where awareness of these branches of law is important; and
- international criminal law is a developing field, and police work is becoming more internationalised.

2.3 What Are the Purposes and Scope of These Branches of Law?

The primary purposes of human rights law are to protect individuals from abuse of power by the state and to provide remedy and redress for victims of abuse of power.

All states are bound, to varying degrees, to protect and respect the rights of people living within their jurisdiction. Human rights law applies at all times and everywhere.

The purposes of the laws of war are to regulate the conduct of hostilities and to protect victims of armed conflict. All parties to a conflict must comply with them, and they apply when armed conflict occurs.

The purposes of international criminal law are to bring to justice those accused of crimes under international law, for example genocide, war crimes and crimes against humanity.

The provisions of all three branches of law are embodied in legally binding treaties, non-treaty texts and the jurisprudence of international courts and tribunals.

Human rights law, the laws of war and international criminal law protect countless numbers of people from harm, provide legal remedy and redress for many victims and bring to justice people who have committed terrible crimes.

2.4 What Is the Relationship Between Human Rights and Policing?

Four concepts are useful for considering this relationship. These are ‘respect’, ‘protection’, ‘investigation’ and ‘entitlement’.

The notion of respect requires the lawful exercise of powers by the police. A lawful exercise of power is a necessary element of policing; it is an entirely legitimate limitation of, or interference with, human rights, whereas an unlawful exercise of power is not.

Thus, for example, police must comply with the principles of necessity and proportionality when they use force, they may deprive a person of his or her liberty only when they have power under the law to do so and they must ensure that detainees are treated humanely.

The notion of protection refers to the protection by the police of all human rights and of specific human rights. For example, by preventing and investigating crime and maintaining public order, police can help to create the conditions whereby all human rights can be enjoyed; by protecting a specific individual or individuals whose lives have been threatened, police are protecting human rights in a very specific sense. There are many other ways in which police protect specific human rights, and the protection of human rights can be seen as a very positive aspect of the relationship between human rights and policing.

The notion of investigation refers to the fact that some human rights violations, such as the right to life and the prohibition of torture, are very serious crimes. Police have a duty to investigate these crimes promptly and thoroughly and to cooperate with investigations into such matters by other investigatory agencies.

The notion of entitlement refers to the human rights of police themselves. It acknowledges that police, as members of the human family and citizens of states, are entitled to human rights. This fact is not sufficiently recognised, especially as the unique nature of policing, with its dangers and discomforts, means that the rights of police officials require special consideration.

2.5 Which Human Rights Instruments Are Relevant to Police?

In one sense, every international human rights instrument could be found to be relevant to police in some circumstances. However, it is useful to focus here on those instruments containing provisions that affect or are affected by police powers and police functions.

For example, the Universal Declaration of Human Rights, the most fundamental of human rights instruments, sets out civil and political rights and economic, social and cultural rights and is useful for drawing the attention of police to the wide range of rights they need to respect and protect.

The International Covenant on Civil and Political Rights incorporates most of the rights directly affected by the exercise of police powers and the performance of police functions. The International Covenant on Economic, Social and Cultural Rights also contains rights that can be affected by policing, for example the right to strike. Policing can be, and has been, used to suppress this right. It also contains rights that are especially relevant when considering the human rights of police officials, for example the various rights designed to secure just and favourable conditions of work.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance each contains provisions designed to prevent very serious human rights violations and crimes. They set out action to be taken when they occur, which includes prompt and impartial investigations of allegations of such acts.

Non-treaty texts such as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment contain very detailed principles on the use of force by police and on the treatment of detainees respectively.

2.6 Which Human Rights Provisions Are of Particular Relevance to Police?

While human rights of whatever category can have some relevance to police, those of most immediate relevance include the right to life, the right to liberty of person, the right to humane treatment as a detainee, the right not to be subjected to torture or other ill-treatment, the right to private and family life, the right to presumption of innocence and the right to a fair trial.

Taking into account these rights and the basic police powers and functions, I have formulated a set of 12 principles that are derived from human rights standards expressed in the international human rights instruments cited under heading 2.5 above. The main purposes of the principles are to provide a concise summary of human rights provisions relevant to police and to illustrate the relationship between human rights and policing in a very practical sense. However, the actual instruments should be consulted for a complete account of the standards they express.

Fundamental Principles of International Human Rights Law Applicable to Policing

1. Police must respect and protect the human rights of everyone.
2. Force may be used only when it is necessary to achieve a legitimate policing objective.
3. When it is necessary to use force the level of force must be proportionate to the threat faced and to the legitimate policing objective to be achieved.
4. Firearms may not be used against persons except in self-defence or defence of others against the imminent threat of death or serious injury.
5. Police may arrest or detain a person only when they have lawful power to do so and only when it is necessary to do so.
6. No person may be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This prohibition is absolute. There are no circumstances under which torture or cruel treatment may be practised lawfully.
7. Every detained person must be treated with humanity and with respect for the inherent dignity of the human person.
8. The rights of arrested and detained persons must be respected, for example the right to be told promptly of the reason for their arrest, to be brought promptly before a judge or other judicial authority, to have their detention notified to another person of their choice, and to be detained in safe, healthy and hygienic conditions.
9. The powers to carry out search or surveillance activities may be exercised only when it is necessary and lawful to do so.
10. When investigating crime police must respect the right to the presumption of innocence of suspected persons, and do nothing that would interfere with their right to a fair trial.

11. In operations to maintain or restore order police must attempt to use non-violent means before applying force. Force and firearms may be used only in accordance with principles 2, 3 and 4 above. Wounded and sick victims of violence must be collected and cared for. Police have a duty to protect the right to peaceful assembly and association.
12. As with all members of the human family, police are entitled to human rights for their protection and well-being. These are distinct from the necessary powers they are granted to carry out their functions.

2.7 How Does the International System Protect Specific Human Rights?

Under this heading, the prohibition of torture and ill-treatment is used as an example to outline briefly how the international system protects specific human rights. Similar types of legal provision, and procedures and mechanisms, are in place to protect other human rights such as the right to life, the prohibition of arbitrary arrest and detention and other rights relevant to policing.

The prohibition of torture is expressed in legally binding instruments (treaties) and non-treaty instruments that prohibit torture and other forms of ill-treatment, set out safeguards to protect people in detention and, specifically in relation to policing, embody other measure that specify good police practice.

It is also expressed in the findings and decisions of courts and other treaty bodies that reaffirm in all of their decisions and findings the absolute prohibition of torture and pronounce on what acts or omissions constitute torture and other ill-treatment.

A number of important points about torture need to be borne in mind when considering this topic, namely:

- torture and other ill-treatment of detainees are very serious crimes and human rights violations;
- the prohibition of torture is one of only two absolute rights;
- there are no circumstances in which torture or ill-treatment can be practised lawfully;
- torture is a crime under international law and the laws of states;
- the prohibition of torture is considered to be a general principle of international law binding on all states regardless of what treaties they are signatories to;
- the prohibition is enshrined in treaties as a non-derogable provision; therefore, for example, torture cannot be practised in time of public emergency that threatens the life of the nation; and
- torture and ill-treatment are prohibited under the laws of war in times of international and non-international armed conflict.

2.7.1 The Universal Declaration of Human Rights and International Treaties

The prohibition of torture and ill-treatment can be found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the African Charter on Human and People's Rights, the American Convention on Human Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

It is also expressed in various treaties embodying the laws of war, for example the 1977 Additional Protocol l to the Geneva Conventions of 1949.

The Convention against torture provides a definition of torture, which can be summarised as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for a number of purposes, which include obtaining from him or a third person information or confession, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official. The Convention also contains a number of articles specifically concerning the police, for example on education and training and on interrogation rules, instructions and methods.

2.7.2 Measures to Prevent Torture and Ill-Treatment

There are also a number of treaties designed to prevent torture and other ill-treatment, namely the American Convention to Prevent and Punish the Crime of Torture, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the Convention against torture.

Other preventive measures include mechanisms established by the UN, for example a special rapporteur, who can also respond when instances of torture are brought to his or her notice.

2.7.3 Non-treaty Instruments

Non-treaty instruments that embody measures to prevent or respond to instances of torture include the Standard Minimum Rules for the Treatment of Prisoners, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment and the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2.8 What Are the Limitations on Human Rights and How Can They Be Restricted in Times of National Emergency?

There are only two absolute rights, the prohibition of torture and ill-treatment and the prohibition of slavery. All other rights may be lawfully restricted or limited in some way. For example, under some strictly defined circumstances, police officials may use lethal force, thus depriving a person of their right to life and, indeed, their life. Furthermore, articles in human rights treaties that express the right to liberty of person also stipulate that a person may be deprived of that right in accordance with the law.

Other articles protecting specific rights include limitations that may lawfully be placed on those rights under certain circumstances. For example, restrictions, when imposed in conformity with the law and which are necessary in a democratic society, may be placed on the right to peaceful assembly on such grounds as national security, public safety or public order.

Various human rights treaties already mentioned incorporate measures to limit human rights in times of public emergency. For example, under the International Covenant on Civil and Political Rights, states parties may take measures derogating from their obligations under the Covenant during an officially proclaimed public emergency that threatens the life of the nation. Such measures must be strictly required by the exigencies of the situation; they must not be inconsistent with other obligations under international law and they must not be discriminatory on grounds of race, colour, sex, language, religion or social origin. No derogation is permitted from a number of articles, including those protecting the right to life and prohibiting torture or cruel, inhuman or degrading treatment or punishment.

The European Convention on Human Rights and the American Convention on Human Rights contain similar provisions.

2.9 What Are the Laws of War and How Are They Relevant to Police?

Or, more specifically:

- What are the scope and purposes of laws of war?
- What types of conflict do they regulate?
- How are combatants and civilians defined?
- What are the status and functions of police in situations of armed conflict?
- What is the relationship of police to laws of war?
- What are some examples of the laws of war?

2.9.1 What Are the Scope and Purposes of Laws of War?

It is useful to recall at this stage that the primary purposes of human rights law are to protect individuals from abuse of power by the state and to provide remedy and redress for victims of abuse of power; that all states are bound, to varying degrees, to protect and respect the rights of people living within their jurisdiction; and that human rights law applies at all times and everywhere.

The purposes of the laws of war are to regulate the conduct of hostilities and to protect victims of armed conflict. All parties to a conflict are to comply with it, and it applies when armed conflict occurs.

2.9.2 What Types of Conflict Do They Regulate?

The types of armed conflict regulated by the laws of war are international armed conflict and non-international armed conflict—including high-intensity non-international armed conflict where rebels control a part of the state's territory.

They do not regulate conflict that falls below the threshold of armed conflict, that is to say internal disturbances and tensions.

2.9.3 How Are Combatants and Civilians Defined?

Combatants are members of the armed forces of a party to an international armed conflict. Those forces must be organised, placed under a command responsible to that party for the conduct of its subordinates and subject to an internal disciplinary system that enforces compliance with the rules of international law applicable in armed conflict. They are obliged to distinguish themselves from the civilian population by a uniform or by some other distinctive sign.

Combatants have a right to participate in hostilities and hence to commit acts, such as killings, which would otherwise be unlawful; they are entitled to be treated as prisoners of war if captured by the enemy; they must obey the rules of war applicable to their status; and they receive some protection during hostilities through measures designed to regulate methods and means of warfare and to protect wounded, sick and shipwrecked members of armed forces.

Non-combatants are characterised as civilians. Civilians have no right to participate in hostilities, they have no entitlement to treatment as prisoners of war if they fall into the hands of the enemy, they must obey the rules of war applicable to their status and they receive special forms of protection against dangers arising from military operations.

A civilian is any person who is not a member of armed forces, and where there is doubt as to whether or not a person is a civilian, that person is to be considered a civilian.

2.9.4 What Are the Status and Functions of Police in Situations of Armed Conflict?

Civil police agencies are not armed forces in the sense that military forces are. Civil police agencies have civilian status, and members of those agencies have civilian and not combatant status.

This point is reinforced in the 1977 Additional Protocol l to the Geneva Conventions of 1949, which states that whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces, it shall so notify other parties to the conflict.

This means that in order for a police official to be accorded combatant status, he or she must be a member of an armed law enforcement agency that is formally assimilated into the armed forces of a party to a conflict. Such an act of incorporation, coupled with notification to other parties, not only radically alters the status of members of such a law enforcement agency; it also confirms the civilian status of members of agencies to which the provision has not been applied.

The functions of police in situations of armed conflict depend on the various ways in which a country may be involved in war, for example by invading a foreign country, by being invaded and occupied or in responding to an armed insurgency within its own borders.

The various possibilities and combinations of these then impact on police functions. For example, police may have combatant status with its attendant rights and duties, they may have duties in connection with prisoners of war, they may be required to protect civilians from the effects of war, they may be required to respond to a non-international armed conflict in their own country and they may be required to investigate war crimes.

2.9.5 What Is the Relationship of Police to the Laws of War?

This can be seen in similar terms to that of the relationship between human rights and police described above: police are required to respect, and require respect for, the laws of war; in accordance with their status as either combatants or civilians, they are entitled to the protections offered by the laws of war; and police have a part to play in repressing breaches of the laws of war, that is to say in bringing offenders to justice.

2.9.6 What Are Some Examples of the Laws of War?

There are many detailed international treaties that regulate the conduct of hostilities in situations of armed conflict and protect victims of those conflicts.

Given that the four Geneva Conventions of 1949 alone contain between them a total of 426 articles, perhaps the best way to give a flavour of the laws of war is to invoke a set of fundamental rules of international humanitarian law applicable in armed conflicts first published by the Red Cross in 1978. The rules, described as informal and unofficial, summarise some of the most fundamental principles that regulate the conduct of hostilities and protect victims of armed conflicts.

1978 Red Cross Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts

1. Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.
2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat*.
3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and *materiel*. The emblem of the red cross (red crescent, red lion and sun) is the sign of such protection and must be respected.
4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.
5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.
6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.
7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.

2.10 Conclusions

Given the imperatives of international human rights law, the laws of war and international criminal law, it is argued here in conclusion that in democratic societies governed by the rule of law, policing should be based on the principles of lawfulness, non-discrimination, necessity, proportionality, accountability and humanity.

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Chapter 3
The Police and the Prohibition of Torture and Inhuman or Degrading Treatment or Punishment

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Contents

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Abstract In this article, the author introduces the main issues to be taken into consideration when looking at police powers and the application of the prohibition of torture and other inhuman or degrading treatment or punishment. The author carries out a general analysis of international law establishing the maxim that torture and other inhuman or degrading treatment or punishment must be prevented. Furthermore, the author considers problems with the implementation of this maxim in police activities.

3.1 Introduction

A person detained by the police is in an extremely vulnerable position. The police have special powers, such as the use of legitimate force, which result in the fact that the detained person is completely overpowered by law enforcement officials. Said uneven distribution of power creates a situation in which there may be a violation of human rights and torture, which are among the most serious violations of fundamental human rights. The police are able to trample on the dignity of man, his body, and soul. The use of torture also has far-reaching consequences for society. Despite its absolute prohibition under international law, torture and other ill-treatment are still ubiquitous. These horrendous acts usually take place behind closed doors, away from prying eyes. This is why independent monitoring of places of detention plays a crucial role in the prevention of any such acts violating human rights.

3.2 Police Powers and Human Rights

The police—as a service or as a force—play a critical role in protecting human rights. They are responsible for the protection and safety of persons and for ensuring compliance with the law. International law provides that police officers are obliged to respect human rights in full, but it also imposes on them the obligation to protect any person's human rights from being violated by others. Essentially, the key police functions involve their active participation in the observance of human rights.

On the one hand, the police are obliged to protect and respect the basic rights of individuals, but on the other hand, their own rights should also be respected and enforced. Consequently, despite the fact that police officers are to protect human rights, including to prevent abuse, it should be borne in mind that they as well may be victims of assaults, which can have a major impact on their treatment of detained persons.

While exercising their powers, police officers might either be violating the rights of individuals or have their own rights violated. Abuses by the police can occur for many reasons, not least because it is not easy to strike a balance between protecting the human rights of victims and observing the rights of the suspect or accused.

Human rights violations can occur due to a mistaken assessment of the particular situation. Abuse may also occur because the police using their powers permits excessive use of force for the purpose of intimidation, coercion to testify, or otherwise. Violations can also occur due to the climate of impunity within a specific context: in such cases, police officers that allow human rights violations know that they will not face any criminal or disciplinary charges.

The risk of human rights violations during the period of detention is particularly high during the first hours of police custody: in this period, detainees are most vulnerable and the police suffer the greatest pressure to obtain confessions from detainees.[1]

In criminal law systems that are based on confessions, persons who are arrested by the police are still at greater risk in terms of possibly experiencing torture or other ill-treatment. Approaches based on confessions represent a significantly higher threat to detainees than the approach relying on actual data, which is based on a thorough collection of evidence. This is due to the fact that in the course of investigations based on confessions, misconduct and systematic abuses by the police are often implicitly condoned.

Moreover, obtaining information by means of abuse often leads to false confessions, which hinders effective investigations and the prevention of crimes. In practice, gathering evidence is not easy because it often involves a step-by-step reconstruction of the sequences of events. However, as a rule, in systems relying on factual data, the public has much more confidence in the police and, therefore, gives the work of this institution greater legitimacy.

In an emergency, police powers can be expanded and freedoms of individuals might be limited, but this must be done in strict accordance with the Constitution and with full respect for the principles of legality, necessity and proportionality, as well as international human rights standards. No exceptional circumstances whatsoever, including a public emergency situation, may be invoked as a justification of torture.

3.3 Definition of Torture and/or Other Inhuman or Degrading Treatment or Punishment and Applicable Provisions

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected to medical or scientific experimentation without his free consent.—ICCPR, Article 7

> No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of

[1] Bacha (2005), p. J-1.

> torture. Order from a superior officer or a public authority may not be invoked as a justification of torture.—UN Convention against Torture Article 2

> Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that torture has been committed in any territory under its jurisdiction.—UNCAT, Article 12

The UN Convention Against Torture defines torture as the intentional infliction of severe pain or suffering, whether physical or mental, with pain or suffering being inflicted for a specific purpose, such as to obtain information or a confession from the victim or a third person, punishing, intimidating, or coercing the victim or a third person, or for any reason based on discrimination of any kind. Moreover, such pain or suffering is inflicted by a public official or other person acting in an official capacity or with the consent or acquiescence of an official.

Torture can be carried out in various ways, including the use of electric shocks, beatings on the soles or strikes, suspension in painful positions, rape, strangulation, inflicting burns on the victim with cigarettes, threats, mock executions, and deprivation of food, sleep, and social contact.

The highest risk of torture or other ill-treatment is observed in the early stages of detention, in particular during the arrest, interrogation, and investigation, which is most characteristic for jurisdictions in which torture is used as a means to obtain confessions.

Article 3 of the European Convention on Human Rights prohibits torture and inhuman or degrading treatment or punishment. The text of Article 3 is succinct: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

This guarantee is expressed in absolute terms. The European Court of Human Rights confirmed that Article 3 of the European Convention enshrines one of the most fundamental values of a democratic society. Article 3 of the Convention prohibits torture and inhuman or degrading treatment or punishment under all circumstances. As already noted in respect to Article 2 of the Convention, even the loss of life may be justified in certain very limited circumstances: by contrast, there are no circumstances in which conduct in breach of Article 3 can be legitimate, even in the context of action against terrorism[2] or organized crime.[3]

In contrast to most provisions of the European Convention, Article 3 does not contain any exceptions and deviation from it is unacceptable, even in the event of a public emergency threatening the life of the state population.[4] In the case of *Gäfgen v. Germany*, the European Court of Human Rights noted that "the philosophical basis of the absolute nature of the underlying rights under Article 3 does not allow for any exceptions or justifying factors and does not allow for a balance of interests, regardless of the behavior of the person concerned and the nature of the crime."[5]

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[2]Tomasi v France, judgment of 27 August 1992.

[3]Selmouni v France, judgment of 28 July 1999.

[4]Chahal v the United Kingdom, judgment of 15 November 1996.

[5]Gäfgen v Germany, judgment of 1 June 2010 at paragraph 107.

There are clear guidelines for the police in the context of the use of force under Article 3 of the European Convention. The European Court of Human Rights has made it clear that, in relation to any person, "any use of physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of Article 3."[6]

This provision does not only impose obligations on states to refrain from causing ill-treatment but also imposes a positive obligation on them to protect individuals and ensure the effective investigation of complaints of breach of this guarantee. Ill-treatment by the police, unfortunately, is a common feature of life in many countries.

In order for conduct to fall within the scope of Article 3 of the European Convention, it must *attain a minimum level of severity*.[7] It depends on specific facts and the circumstances of each case (for example, forcing the detainee to stand for three hours may or may not be defined as inhuman treatment, if the person is a healthy man; requiring the person to stand for any short period of time, if the person is old or suffering from any disease, may be an inhuman treatment).

Unnecessary use of handcuffs or other physical limitations may, under certain circumstances, amount to inhuman or degrading treatment.[8] An example would be where the elderly or sick person who did not pose any threat of violence or escape is handcuffed exclusively guided by police policy.

The prohibition of torture or ill-treatment may also extend to the threat of such treatment. In the case of *Gäfgen v. Germany*, the person in police custody was threatened with "extreme pain" if he would not give up the location of a missing child. The Court held that this threat, although it was not actually realized, constituted inhuman treatment.[9]

Torture is the most serious form of violation of Article 3 of the European Convention. The European Court of Human Rights has defined torture as "deliberate inhuman treatment causing very serious and cruel suffering."[10] In contrast to this definition, "inhuman treatment or punishment" involves the infliction of intense physical and mental suffering. Abusive use of force during the arrest or interrogation may constitute inhuman treatment[11] or even torture.

Aksoy v. Turkey is the first case where the European Court of Human Rights concluded that the person was subjected to "torture." Police officers stripped the plaintiff. His hands were tied behind his back. This led to the applicant's suffering from severe pain and receiving a temporary paralysis of both arms. The Court observes as a human rights violation the intentional infliction of suffering that requires *a certain preparation and effort* on the part of the police. Their goal

[6]Ribitsch v Austria, judgment of 4 December 1995 at paragraph 38.

[7]Ireland v the United Kingdom, judgment of 18 January 1978 at paragraph 162.

[8]Henaf v France, judgment of 27 November 2003.

[9]Gäfgen v Germany, judgment of 1 June 2010 at paragraphs 107 and 108.

[10]Ireland v the United Kingdom, judgment of 18 January 1978 at paragraph 167.

[11]Ribitsch v Austria, judgment of 4 December 1995.

seems to have been to get information or to receive a confession from the applicant.[12]

The infliction of ill-treatment in a willful manner for a specific purpose, such as to obtain a confession or gather information, should be considered an aggravating factor. Thus, in determining whether a treatment is *degrading*, the Court will "have regard to whether the purpose is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3."[13]

> Degrading treatment or punishment is designed to arouse in the victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their physical or moral resistance.[14]

If a person is issued with a detention order into police custody in good health but at the time of release is found to be injured, then the state has the obligation to provide a plausible explanation of how those injuries were caused. Otherwise, there is an obvious question of the behavior of police officers' conformity with Article 3 of the Convention.[15]

Therefore, when a person is taken into police custody in good health and later is plagued by injuries, it is up to the state to explain the injuries. In addition, if it is stated that the detainee had been injured before he/she was transferred into custody, the police must ensure that he/she will be examined by doctors at or shortly after his/her arrival at the police station. In the case *Lipencov v. Moldova*,[16] it was found that there had been a violation of Article 3 of the Convention where the person had not been given a medical examination or was not provided with medical treatment for injuries while he was in police custody.

The use of force against any person by the police, which is not due to his or her behavior, will raise the question of a possible violation of Article 3 of the European Convention. When the police plan an operation to arrest, they have to evaluate all possible risks and take all necessary measures for the proper arrest. This includes a commitment to minimize the likelihood of use of force.

In the case of *Rehbock v. Slovenia*, the police wanted to arrest the German bodybuilder suspected of smuggling drugs into Slovenia. He resisted the arrest and during the struggle was seriously injured at the jaw. The European Court of Human Rights ruled that a planned operation to detain the suspect required the police to observe higher standards than those that could be expected in a spontaneous situation. In the absence of credible arguments justifying the behavior of the police,

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[12]Aksoy v Turkey, judgment of 18 December 1996 at paragraph 64.

[13]Keenan v the United Kingdom, judgment of 3 April 2001 at paragraph 110; see also Raninen v Finland, judgment of 16 December 1997 at paragraph 55.

[14]Greek case, Application Nos. 3321-3/67 and 3344/67, decision of 24 January 1968 (Yearbook 12, p. 186).

[15]Tomasi v France, judgment of 27 August 1992, and the Ribitsch v Austria judgment of 4 December 1995.

[16]Lipencov v Moldova, judgment of 25 January 2011.

the Court concluded that Mr. Rehbock fell victim to a violation of Article 3 as he suffered from inhuman treatment.[17]

3.4 The Police and Persons in Situations of Vulnerability: The Prevention of Torture and/or Other Inhuman or Degrading Treatment or Punishment

The police play a crucial role in protecting and enforcing the rights of persons in vulnerable situations. They are expected to consider the interdependence of the detainee's situation with a particular society's view toward the detainee or his/her social status (for example, children, women, sexual minorities, people with disabilities, and migrants).

As a general rule, a vulnerable situation should be assumed when dealing with minorities since their minority status increases the risk of abuse: therefore, a person can be considered as vulnerable in one situation but not in another. For example, women may be vulnerable by virtue of the fact that they represent a significant minority of detainees around the world and because the officials responsible for their detention, as a rule, are men as the vast majority.[18] For these reasons, female prisoners are at greater risk of discrimination and ill-treatment when in custody.

It is necessary to examine representatives of vulnerable groups with special attention when they are arrested or detained by police officials as certain measures may be needed to meet the specific demands and needs of such persons. For example, police officers must always allow people with physical disabilities to use crutches for the sake of mobility, even if they believe that this could jeopardize security.

In some countries, the police, instead of protecting persons in vulnerable situations, are often involved in existing campaigns of persecution of these persons. For example, migrants and foreigners in xenophobic societies, as well as persons suffering from mental or intellectual disabilities in a legal system based on obtaining confessions, may face a higher risk of ill-treatment by the police.

Persons in police custody may also be at risk of abuse by other detainees. If the police do not assess risks before placing detainees in the cells, it may result in a fight, rape, and other forms of violence up to causing the death of the detainee. Race, ethnicity, and sexual orientation are key factors in the use of force in police cells. The police's silent consent to detainees causing harm to one another is inacceptable. The police are obliged to ensure the nonexistence of violence between detainees. A lack of such guarantees could be interpreted as inhuman or degrading treatment or punishment.

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[17]Rehbock v Slovenia, judgment of 28 November 2000.

[18]Balogh v Hungary, judgment of 20 July 2004 at paragraph 79. But compare Nachova and Others v Bulgaria, judgment of 6 July 2005.

With regard to people with disabilities, the police must adapt to their needs by providing "reasonable accommodation." In accordance with the UN Disability Rights Convention, providing "reasonable accommodation" where needed in a particular case means providing necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden on the detainee, in order to ensure equal enjoyment or allowing people with disabilities to live in a situation that gives them equal opportunities to all others concerning all human rights and fundamental freedoms.[19]

The authorities responsible for the detention of persons with disabilities are required to ensure reasonable accommodation for these detainees; without such adaptations, they will be at a disadvantage in standard rooms or in areas under the jurisdiction of the police. In all cases, when this obligation is not fulfilled, there is unlawful discrimination. In some, but not all cases, the degree of suffering of people with disabilities can reach the minimum level of severity, resembling a violation of the fundamental right not to be subjected to ill-treatment. Intentional discrimination against the disabled by the police can be equated to torture or another form of ill-treatment.

If discriminatory considerations play a role in the treatment of detainees by public officials, Article 14, in conjunction with Article 3, is to be considered. This phenomenon unfortunately is widespread throughout the world. For example, the police forced a group of Roma boys to "take off their clothes, stand naked against a wall, they were beaten and forced to kiss each other while police officers shouted anti-Roma statements." They filmed the incident and posted the video on the Internet. In addition, it was argued that the boys were threatened with loaded guns.[20] Racism can be noted in the actions of police officers by, for example, their excessive use of force and ill-treatment of detainees or through the use of arbitrary imprisonment.[21] However, there must be reliable evidence to support the claim that discrimination has taken place.

In the case of *Balogh v. Hungary* concerning the ill-treatment of Roma during police questioning, and the inadequacy of the investigation, the Court found that there was proof of the plaintiff's allegations that he was subjected to discriminatory treatment according to Article 3 of the European Convention.[22]

The problem in such cases is obvious: it often is easier to establish the actual abuse than it is to show that it was suffered due to the individual's membership of a minority group, even if it can be recognized that discriminatory treatment reflects the ingrained attitudes that are widespread in the police service.

[19] http://www.un.org/ru/documents/decl_conv/conventions/disability.shtml.

[20] Report by Thomas Hammarberg (2011), 4 at paragraph 37.

[21] See for example, European Commission against Racism and Intolerance (2003), paragraph 88.

[22] Balogh v Hungary, judgment of 20 July 2004 at paragraph 79. But compare Nachova and Others v Bulgaria, judgment of 6 July 2005, discussed at p. 20 above (in respect of loss of life).

3.5 Prevention of Torture and/or Other Inhuman or Degrading Treatment or Punishment During Police Detention

With the exception of specialized institutions intended for the detention of persons awaiting trial and sentencing, as well as institutions for employees serving administrative punishment, most police stations are designed for short-term detention solely for the purpose of the preliminary investigation. In these cases, the duration of "short-term" can vary from a few hours to a week, depending on country-specific legislation: it is assumed that this period is sufficient to carry out the preliminary investigation.

However, in some countries, detainees are kept in police custody for longer periods than those provided by the legislation. This usually is due to the lack of space in the prison system.[23] Since police stations are generally not designed for long-term detention of detainees and the police lack the necessary training, such a situation creates an increased risk of ill-treatment and poor conditions for the detainees during their detention.

Respecting the dignity of detainees as well as the integrity of their bodies during searches should be one of the most important moral values of police officers. This fundamental principle is clearly stated in Article 10 of the ICCPR: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

As mentioned above, torture and cruel, inhuman, or degrading treatment or punishment are absolutely prohibited and cannot be justified under any circumstances.

In certain cases, solitary confinement, restriction of motor functions, as well as the use of force and/or firearms may amount to torture or to cruel, inhuman, or degrading treatment or punishment. For this reason, the use of such measures should always be accompanied by a number of safeguards that hinder their reaching the level of torture or other ill-treatment.

It was noted that behavior according to the definition of *abuse* is common, both during detention and during the initial investigation, as well as at the time of the arrest by the police. One reason for this fact may be that many police services rely heavily on confessions in order to prevent and detect crimes. Consistent and in-full application of the detainees' procedural rights will help to reduce such ill-treatment. In addition, "more attention should be paid to modern scientific methods of criminal investigation by appropriate investments in equipment and qualified human resources, in order to reduce reliance on confessions to charge."[24] Furthermore, electronic recording of police interrogations should take place in the interest of both

[23] Balvinder (2002), p 12.

[24] Bill (2009), pp. 33–54.

sides, for individuals as a protection against being abused, as well as in the interest of the police as a protection against unfounded allegations of abuse.[25]

Detention conditions can also lead to a violation of Article 3 of the Convention. The presence of food, water, privacy, medical care, and recreation may be issues in determining whether a violation of Article 3 is taking place.[26]

3.6 The Prohibition of the Use of Evidence Obtained by Torture

Evidence obtained by the use of torture should not be admitted or used as evidence in any proceedings, except for the consideration of cases on charges of torture. The ban applies to the testimony of the accused and witnesses.

The presence of a lawyer from the moment of detention, and in particular during interrogation, is an important safeguard against forced confessions. In 2003, the Special Rapporteur on torture recommended that no confession made by a person deprived of liberty, other than one made in the presence of a judge or a lawyer, should have value in court, except as evidence against those who are accused of having obtained the confession by unlawful means.[27]

Torture is committed with the goal of forcing an accused person into confessing or providing necessary information. The fact that this information is being used, even though it was obtained through unlawful forms of coercion, is one of the reasons for torture. In many countries, officials continue to torture and otherwise ill-treat detainees into giving them necessary information for that very reason.

To use evidence obtained through torture in any proceeding is contrary to international laws protecting human rights and violates domestic laws as well[28] The importance of effective national practices to exclude such information therefore cannot be underestimated in the attempt to prevent a reliance on tortured confessions.

Practice has shown that under torture, or even when threatened with torture, a person will say or do anything to avoid the infliction of pain. As a result, there is no means to know whether or not the resulting statement is, in fact, true. Even if evidence obtained under torture were true (which it might well be), it has to be excluded from all further legal proceedings.

The recent attempts by several states to permit the admission of highly questionable evidence obtained from countries known to torture, in an attempt to address the threats posed by terrorism, is highly problematic and risks undermining the absolute prohibition of torture.[29]

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[25]CPT/Inf (2012) 11 at paragraphs 17 and 28 [Albania].

[26]Ciorap v Moldova, judgment of 19 June 2007 at paragraphs 60 to 71.

[27]Cohan (2007), p. 1587.

[28]http://www.apt.ch/en/evidence-obtained-through-torture/.

[29]Nimisha et al. (2016), pp. 2–16.

Article 15 of the UN Convention Against Torture requires that any statement made as a result of torture be excluded as evidence. This prohibition is typically achieved through legislation (e.g., Finland and Turkey, but many other countries fail to expressly prohibit it). A legal prohibition of the usage of such evidence should be unconditional and without exception; it should apply to both criminal and noncriminal proceedings.

3.7 Torture and Inhuman and/or Degrading Treatment Between Detained Persons

The police's obligation to respect human rights, as laid down in Article 3 of the European Convention, also includes the duty to protect detainees from each other. Violent acts by detainees may not be ignored (e.g., assault or sexual abuse). Victims are often silent about the violence between detainees for fear of prosecution.

As a rule, ethnic, racial, or other minority groups are most at risk of experiencing violence by other detainees. Some jurisdictional agencies name connivance as a characteristic of the attitude of detention center staff toward violence between detainees: it is believed that it is their *private matter* and they should cope on their own.[30] It should be noted that acquiescence on the part of the police could amount to torture or other forms of ill-treatment of detainees. The staff of small police stations may also claim that there is an impossibility to eliminate violence of any kind between the detainees, citing the limited number of cameras. This, however, cannot be considered a valid reason and contradicts the police's obligation to respect human rights provided for in Article 3 of the European Convention. On a similar note, referencing financial or logistical reasons for the lack of action cannot justify the use of any violence against detainees.

3.8 The Police's Obligation to Prevent Violations of Article 3 of the European Convention

Article 3, besides the prohibition of the use of torture or other inhuman treatment, also includes a positive obligation of the police to take all necessary steps required to seek to prevent torture or ill-treatment by private individuals or groups.[31] If the police have information that indicates that the person is, or could be, subject to any acts in violation of Article 3, they must take all possible operational measures within their power to prevent such acts. Examples of such measures include the investigation of claims and the arrest of suspects, where there are grounds to do

[30]Chevalier-Watts (2010), pp. 469–489.

[31]Maslova and Nalbandov v Russia, judgment of 24 January 2008.

so. For example, the European Court of Human Rights ruled that there is a positive obligation to investigate allegations of rape. The state's obligation in this context is the creation of a legal framework, which ensures adequate protection for victims of sexual crimes, including rape.[32]

Thus, this protection requires that there are reasonable and effective measures applied by the police, including measures to prevent the ill-treatment of children and other vulnerable persons, of which the authorities knew or should have known.[33] Special attention should be paid to ensure that the statements of victims of domestic violence are properly investigated and that steps are taken to protect them from further threats.

In the case of *Gldani v. Georgia*, the European Court of Human Rights considered the Georgian police's response not to have been in compliance with this positive obligation regarding allegations of ill-treatments of Jehovah's Witnesses meeting a group of Orthodox extremists. The abuse in question included beatings with sticks and crosses, causing grievous bodily harm. The police, when approached by some of the victims, did not provide any help. The head of the local police reportedly said that he would have given the Jehovah's Witnesses an even worse time. The police did not take any steps to prevent further abuse and to effectively investigate and take preventive measures against the extremist Orthodox group. The European Court of Human Rights came to the conclusion that the police and other relevant authorities had failed to fulfill their positive obligations under Article 3.[34]

In addition to the already mentioned provisions, Article 3 of the Convention establishes the positive obligation to conduct an official investigation into credible reports of ill-treatment.[35] This obligation is not limited to cases of ill-treatment by public officials.[36]

Thus, the authorities are obliged to take measures as soon as an official complaint has been filed.[37] Even in the absence of a specific complaint, an investigation should be carried out if there are other sufficiently clear indications that torture or ill-treatment may have occurred. A prompt response by the authorities and an immediate investigation of allegations of ill-treatment may be considered essential in maintaining public confidence in the police maintaining the law and in preventing any manifestations of collusion or tolerance of unlawful acts. Tolerating such acts on behalf of the police cannot have any other effect but to undermine public confidence in the principle of the rule of law and the maintenance of the state of the rule of law.

[32]MC v Bulgaria, judgment of 4 December 2003, paragraphs 148–187 (in terms of Articles 3 and 8).

[33]Mubilanzila Mayeka and Kaniki Mitunga v Belgium, judgment of 12 October 2006.

[34]Gldani v Georgia, judgment of 3 May 2007.

[35]Assenov and Others v Bulgaria, judgment of 28 October 1998.

[36]MC v Bulgaria, judgment of 4 December 2003 at paragraph 151.

[37]Lipencov v Moldova, judgment of 25 January 2011.

In the case of *Paduret v. Moldova*, it was established that a police officer attacked a citizen. The plaintiff's treatment by the officer had to be classified as torture, in accordance with the Court's position. The police officer should have been charged with torturing a civilian in accordance with the Criminal Code. The fact that the police officer was allowed to continue working as a police officer, even after the plaintiff's claims were found to be truthful, was a violation of Article 3. The European Court of Human Rights was concerned about the statement of the Moldovan government that torture "is considered a mid-level crime" and should be distinguished from more "serious forms of crime." The Court noted that this situation is totally incompatible with the obligations arising from Article 3 of the Convention, given "the extreme seriousness of the crime of torture."[38]

3.9 Some Case Examples of Torture from Case Law

The following situations are examples of the use of torture and other cruel, inhuman, or degrading treatment or punishment.

3.9.1 Palestinian Hanging

In *Aksoy v. Turkey*,[39] the plaintiff was arrested and detained in the context of the state's fight against the PKK in south-east Turkey. He was subjected to what is called "Palestinian hanging": he was stripped naked, his arms were tied together behind his back, and he was suspended by his arms. The treatment was deliberately inflicted, and a certain amount of preparation and exertion were required to carry it out. It was administered with the aim of obtaining admissions or information from the plaintiff. Not only did the plaintiff suffer severe pain, but medical evidence also showed that it led to a paralysis of both arms, which lasted for some time. This treatment was of such a serious and cruel nature that it had to be considered to be torture.

3.9.2 Electric Shocks

In *Mikheyev v. Russia*[40] (2006), the plaintiff was arrested and questioned in relation to a young lady's disappearance. He alleged that he was submitted to torture to

[38]Paduret v Moldova, judgment of 5 January 2010 at paragraphs 58 and 77.

[39]Aksoy v Turkey, judgment of 18 December 1996.

[40]Mikheyev v. Russia, judgment of 26 January 2006, http://www.legal-tools.org/doc/360632/.

make him sustain a cosuspect's confession and that police officers used electric shocks to his ears through metal clips connected by a wire to a box. He was also threatened that he would be severely beaten and that an electric current would be applied to his genitals. Unable to withstand the torture, Mr Mikheyev stated that he broke free and jumped out of the window of the second floor of the police station to commit suicide. While in custody, Mr Mikheyev was seriously ill-treated by police officers, with the purpose of extracting a confession or information about the offenses of which he was suspected. The ill-treatment inflicted on him caused such severe physical and mental suffering that he attempted suicide, resulting in a general and permanent physical disability.

3.9.3 Combination of Torture Methods

In *Abdulsamet Yaman v. Turkey*[41] (2004), the plaintiff alleged that when detained by police officers, he had been kept blindfolded, stripped naked, and immersed in very cold water. He contested that he had been suspended by the arms from ceiling pipes and made to stand on a chair and that electric cables had been attached to his body, in particular to his sexual organs. He further averred that the chair on which he had been placed had then been pulled away and he had been left hanging while electric shocks were administered to his body. He said that the police officers at times discontinued the electric shocks and squeezed his testicles. The plaintiff handed in two medical reports. Regarding the nature and degree of the ill-treatment and the conclusions that could be drawn from the evidence, it can be ascertained that this treatment was inflicted in order to obtain information from Abdulsamet Yaman about his suspected connection with the PKK. The ill-treatment caused very serious and cruel suffering that could only be characterized as torture.

3.9.4 Beating, Threats Against Life and Family, Sexual Intimidation, and Humiliation

In the case *Selmouni v. France*, the plaintiff claimed that he had been tortured during his pretrial detention.[42] The plaintiff had sustained numerous blows, evidenced by widespread marks on this body. Whatever a person's state of health is, it can be presumed that such intensity of blows would cause substantial pain, even if they did not leave visible marks on the body. Furthermore, there was evidence that the plaintiff was dragged along by his hair; that he was made to run

[41] Abdulsamet Yaman v. Turkey, judgment 14 December 1999, http://echr.ketse.com/doc/32446.96-en-19991214/.

[42] Selmouni v. France, judgment 28 July 1999, http://echr.ketse.com/doc/25803.94-en-19990728/.

along a corridor with police officers positioned on either side to trip him up; that he was made to kneel down in front of a young woman to whom someone said, "Look, you're going to hear somebody sing"; that one police officer then showed him his penis, saying "Here, suck this," before urinating over him; and that he was threatened with a blow lamp and then a syringe. Besides the violent nature of the above acts, the ECHR observed that they would be heinous and humiliating for anyone, irrespective of his/her condition. The plaintiff endured repeated and sustained assaults over a number of days of questioning. The physical and mental violence committed against the plaintiff, considered as a whole, caused *severe* pain and suffering as it was particularly serious and cruel.

In *Corsacov v Moldova*,[43] the plaintiff was 17 years old at the time he was arrested on charges of theft. He was handcuffed and assaulted all the way to the police station and further at the station. In particular, he was kicked, punched, and beaten with batons all over his body and on the soles of his feet. Then the plaintiff was suspended on a metal bar for a long period of time. He was released from detention the next evening, and the criminal proceedings against him were later dropped. The plaintiff spent approximately 70 days in the hospital at different periods as a result of his injuries. His health declined to such an extent that he was registered as having second-degree invalidity status, which, under Moldovan law, corresponds to a loss of working capacity of 50–75%. The plaintiff's young age has to be mentioned and be considered as being of importance as well.

Nevertheless, the decisive element in determining the form of ill-treatment was the practice of falaka (beating of the soles), which is a particularly reprehensible form of ill-treatment, which presupposed an intention to obtain information, inflict punishment, or intimidate and which amounted to torture.

3.9.5 *Forced Feeding in a Particularly Violent and Humiliating Manner*

In *Nevmerzhitsky v. Ukraine*,[44] the plaintiff went on hunger strike while in detention and was subjected to force-feeding, which he claimed caused him substantial mental and physical suffering. The plaintiff had frequently been handcuffed to a chair or heating facility and forced to swallow a rubber tube connected to a bucket with a special nutritional mixture. While the police authorities had complied with the rules as force-feeding was prescribed by a relevant decree, the restraints applied—handcuffs, mouth-widener, a special tube inserted into the food channel—by use of force, and despite the plaintiff's resistance, constituted a treatment of such a severe character warranting its characterization as torture.

[43]Corsacov v Moldova, judgment 04 April 2006, http://echr.ketse.com/doc/18944.02-en-20060404/.

[44]Nevmerzhitsky v. Ukraine, judgment 05 April 2005, http://echr.ketse.com/doc/54825.00-en-20050405/.

3.9.6 Rape (and/or Threat of Rape)

In (2006), the plaintiff, a 19-year-old woman, was arrested by police officers, investigating a murder in which they believed her boyfriend, L, was a suspect. They handled her roughly and made threats against her and her family during the arrest.

The plaintiff claimed that she was ill-treated in the police station. In particular, she was choked and beaten with sticks by several police officers. They also insulted her and threatened her with rape and violence against her family. Later in the day, she was taken home but then rearrested and suffered more ill-treatment. It has to be noted that the pain and suffering was inflicted on her intentionally, in particular with the intent of extracting information from her.

We have to observe that, at the time, the plaintiff was only 19 years old and, being a female, was confronted with several male policemen, thus being particularly vulnerable.[45] It further has to be noted that the ill-treatment lasted for several hours during which she was twice beaten up and subjected to other forms of violent physical and emotional mistreatment. It has to be concluded that taken as a whole and considering its purpose and severity, the ill-treatment in question amounted to torture.

3.10 Some Case Examples of Inhuman Treatment

3.10.1 Medical Intervention in Order to Obtain Evidence

International human rights law does not always confirm that an intervention was sufficient to meet the standard of the minimum level of severity test. In the case *Jalloh v. Germany*,[46] the plaintiff, who was arrested on suspicion of carrying drugs on him, swallowed a tiny bag he had in his mouth. As no drugs were found on him, the prosecutor in charge ordered that he be given an emetic to force him to regurgitate the bag. The plaintiff refused to take the medication to induce vomiting. Consequently, four police officers held him down while a doctor inserted a tube through his nose and used a salt solution and Ipecacuanha syrup by force. The doctor also injected him with apomorphine, a morphine derivative. The plaintiff regurgitated a small bag, containing 0.2182 g of cocaine. It cannot be assumed that the forcible using of emetics had been indispensable to obtain the evidence. The police authorities could simply have waited for the drugs to pass out of the plaintiff's organism naturally, which would have been the method of choice for

[45]Nimisha et al. (2016), pp. 2–16.

[46]Jalloh v. Germany, judgment 11 July 2007, http://echr.ketse.com/doc/54810.00-en-20060711/.

many other states to investigate drugs offenses. Being forced to regurgitate under such conditions must have been humiliating for the plaintiff, certainly far more so than waiting for the drugs to pass out of the body naturally.

3.10.2 Detention of Children

Under Article 37 of the UN Convention of Rights of Children, "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

Detention of children merits special attention. It is paramount that there have to be very good and urgent grounds to take a minor into detention. More than anything, this must be the ultimate remedy. Moreover, special facilities must be put in place to accommodate the needs of minors. Putting minors together with adults, in particular on their own, constitutes inhuman treatment.[47]

3.10.3 Mental Suffering

Treatment that causes mental rather than physical suffering can, under special circumstances, amount to inhuman treatment.

In *Ireland v. the United Kingdom*,[48] suspected terrorists were held for hours during which the so-called five techniques were applied to them. These were being forced to stand with their hands and legs spread apart, with their hands held above their heads; food deprivation; sleep deprivation; subjection to constant noise; and being forced to wear a dark hood over their faces. It has been ruled that the five techniques, which were applied in combination, with premeditation, and for hours at a stretch, caused, if not actual bodily harm, at least intense physical and mental suffering of the persons subjected to them and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the definition of international law.

Threats of violence against the victim can constitute inhuman treatment where such threats are perceived as sufficiently real and immediate. It must be shown that these threats caused the level of suffering normally associated with inhuman treatment. According to the Court in *Campbell and Cosans v. the United Kingdom*,[49] at paragraph 26, threats of torture made toward a detainee might constitute

[47]Feldman (2009), pp. 50–69.

[48]Ireland v the United Kingdom, judgment of 18 January 1978.

[49]Campbell and Cosans v. United Kingdom, judgment 22 March 1983, http://echr.ketse.com/doc/7511.76-7743.76-en-19830322/.

inhuman treatment if the threat is perceived to be real and immediate and causes intense mental suffering (while the plaintiff's allegations of being threatened with torture were not sufficient to amount to an Article 3 violation).

3.10.4 Degrading Treatment or Punishment

In *Ireland v. the United Kingdom*,[50] the Court held (in paragraph 167) that a treatment can be classified as degrading if it is "such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of debasing them and possibly breaking their physical or moral resistance."

3.10.5 Conditions of Detention

Even in cases where those holding a person use appropriate interrogation techniques and refrain from inflicting pain, there may still be a violation if the conditions in which a person is held amount to inhuman or degrading treatment.[51]

Overcrowding and failure to provide sleeping facilities can amount to conditions contrary to international human rights' treaties. Further, inadequate heating, sanitation, food, recreation, and contacts with the outside world can also amount to inhuman and degrading treatment.

In *Dougoz v. Greece*,[52] the plaintiff was held for several months in a dirty cell that often housed 10 persons; had no beds, mattresses, sheets, or blankets; and had insufficient sanitary facilities. The Court found such conditions to amount to degrading treatment and hence in violation of Article 3.

3.11 Conclusions

Torture can never be accepted. There are no exceptional circumstances—neither a state of war nor threats nor some public emergency—that can justify the use of torture. Torture is absolutely prohibited by international human rights law. Countries not only have an obligation to respect this absolute rule of prohibition; they also have the obligation to prevent torture and other cruel, inhuman, or degrading treatment or punishment from happening in any case.

[50]Ireland v the United Kingdom, judgment of 18 January 1978.

[51]Tomuschat (2010), pp. 15–23.

[52]Dougoz v. Greece, judgment 06 March 2003, http://echr.ketse.com/doc/40907.98-en-20010306/.

Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the internationally agreed on legal definition of torture:

> Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as to obtain information or a confession from him or a third person, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Such definition of torture contains three elements:

- the intentional infliction of severe mental or physical suffering;
- by a public official, who is directly or indirectly involved;
- for a specific purpose or purposes.

The risk of being a victim of torture or ill-treatment is higher at certain periods during a person's detention and in other certain situations, e.g.:

- the initial period of arrest and police custody;
- during transfer from one place of detention to another;
- when persons deprived of their liberty are held out of contact with others, in particular incommunicado detention or solitary confinement.

An interpretation of the provisions of UNCAT in the field of practice leads to the conclusion that the criteria for distinguishing torture from cruel, inhuman, or degrading treatment may best be understood by examining the goal attempted to be achieved by such conduct and the powerlessness of the victim, rather than by the intensity of the pain or suffering inflicted.

The prohibition of torture and cruel, inhuman, or degrading treatment is not limited to acts causing physical pain or injuries. It includes any acts that cause mental suffering—e.g., through threats against family or loved ones.

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Chapter 4
The Police and the Right to Life

Robert Esser

Contents

Abstract This contribution outlines the impact of Article 2 of the ECHR (right to life) on police actions and delivers an in-depth analysis of the ECtHR's jurisprudence on this matter. For this purpose, it is necessary to understand first the scope of the (European) human right to life. A deprivation of life stemming from actions of public forces may under exceptional circumstances be justified. As the ECtHR's case law stresses the importance of the principle of proportionality and allows, in accordance with the wording of the ECHR, the use of force only where it is absolutely necessary for specific purposes, this contribution deals in length with

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this requirement and analyzes several judgments where the ECtHR interpreted and clarified the principle of proportionality. As a matter of fact, the ECtHR had to deal with a wide range of case constellations where the right to life was affected, such as rescue operations, prevention of terrorist attacks, or, more generally, arresting alleged terrorists. However, it is noteworthy that the right to life may also become an issue in the unhappy event of an everyday situation that the police have to deal routinely with getting out of control. Lastly, a special focus lays on recent case law related to police using the relatively new device commonly known as "taser."

4.1 Introduction

"The police and the right to life" is doubtlessly a very broad topic to portray. While its direct connection to Article 2 of the European Convention on Human Rights (ECHR) safeguarding the "right to life" is quite obvious, it is even more important to note that the following lines will have to concentrate only on central parts of the whole spectrum that Article 2 ECHR and the jurisprudence of the European Court of Human Rights offer.

We will skip hereafter the issue of *effective investigation*—an investigation that has to be carried out when a person's life was put in danger—and focus instead on the wording and scope of protection granted by Article 2 ECHR with regard to the preventive perspective of police action.

In its case law, the European Court of Human Rights has continuously emphasized that Article 2 ECHR ranks as one of the most fundamental provisions in the Convention.[1] Even during a "time of emergency threatening the life of the nation," no derogation from the obligations under Article 2 ECHR[2] shall be made (Article 15 § 2 ECHR).

[1]ECtHR, McCann v. United Kingdom, judgment of the Grand Chamber of 27 September 1995, No. 18984/91, § 147, expressly referring to of ECtHR, Soering v. United Kingdom, judgment of 7 July 1989, No. 14038/88, § 88, where the Court stressed these same matters in respect of Article 3 ECHR.

[2]The exceptions mentioned in Article 15 § 1 ECHR ("time of war") and Article 15 § 2 ECHR ("except in respect of deaths resulting from lawful acts of war") do only refer to public emergencies. A terrorist attack does not fall under that provision: Esser (2012), Art. 15 ECHR, para. 24; Trechsel (2005), p. 515; Shaw (2014), p. 258; but see also: ECtHR, A et al. v. United Kingdom, judgment of 19 February 2009, No. 3455/05: Following the terrorist attacks of 11 September 2001 on the United States, the British government considered the UK to be under threat from a number of foreign nationals present in the country who were providing a support network for extremist Islamist terrorist operations linked to al-Qaeda. Furthermore, on 24 November 2015 the French authorities informed the Secretary General of the Council of Europe about a number of state of emergency measures taken following the large scale terrorist attacks in Paris on 13 November 2015 and which may involve a derogation from certain rights guaranteed by the European Convention on Human Rights (http://www.coe.int/en/web/secretary-general/news/).

In connection with Article 3 ECHR—prohibiting torture, inhuman, and degrading treatment or punishment—Article 2 ECHR enshrines one of the basic values of democratic societies making up the Council of Europe (CoE)[3] and sets out very strict circumstances under which a deprivation of life may be justified.

To start with some general considerations on Article 2 of the European Convention on Human Rights, this provision guarantees "everyone's right to life," which shall "be protected by law" (§ 1 phrase 1). What's more, "no one shall be deprived of his life intentionally" (§ 1 phrase 2). The exception "save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law" goes back to the 1950s and can be classified as "outdated" since Article 1 of Protocol No. 6 to the Convention and Article 1 and Article 2 of Protocol No. 13 to the Convention have abolished the death penalty even in times of war.

Since 1989, new member States to the Council of Europe have been required, prior to accession, to abolish capital punishment and introduce (at least) a moratorium on imposing this penalty (usually the obligation to abolish capital punishment should imply the postaccession ratification of Protocol No. 6).[4]

Article 2 § 2 ECHR turns to restrictions on the right to life, which can be regarded as justified even under human rights standards. The death of a person—described by the Convention as a "deprivation of life"—does, under specific and narrowly defined circumstances, not amount to a violation of the ECHR ("shall not be regarded as inflicted in contravention of this article") when (lit. a) "it results from the use of force which is no more than absolutely necessary in the defence of any person from unlawful violence,"[5] (lit. b) "in order to effect a lawful arrest or to prevent the escape of a person lawfully detained," or (lit. c) "in an action lawfully taken for the purpose of quelling a riot or insurrection."

Article 6 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to life in a comparable manner but resembles the state of human rights protection already developed by 1966:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law [. . .].
3. When deprivation of life constitutes the crime of genocide, [. . .].

[3]ECtHR, Makaratzis v. Greece, judgment of the Grand Chamber of 20 December 2004, No. 50385/99, § 56, emphasis added.

[4]It should be noted that as of today, only Armenia, Azerbaijan, and Russia have not ratified Protocol No. 13 whereas only Russia has not even ratified—yet signed—the Protocol No. 6 but has halted death penalty anyway. See CoE Factsheet on death penalty, http://www.coe.int/t/DC/Files/Source/FS_death_penalty_en.doc. Besides, the Parliamentary Assembly of the Council of Europe (CoE) recalls in this connection that accession to the CoE must go together with becoming a party to the European Convention on Human Rights (ECHR): http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=16442&lang=en. See also Oppermann et al. (2016), p. 283, para. 87; Streinz (2016), p. 16, 76.

[5]ECtHR, McCann v. United Kingdom (Fn. 1), § 145.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

4.2 Article 2 ECHR: Scope of Protection

Focusing on Article 2 ECHR again, it is evident that human life is guaranteed by that provision. But the precise scope of protection is not very easy to trace as far as the details in a concrete case—including police action—are concerned.

Certainly, the provision sets the framework for a general prohibition of killing for State agents, including police officers. That means that in exercising its authority, each "High Contracting State" (Article 1 ECHR) is prohibited from *actively* taking a person's life, save the limitations that are laid down in Article 2 § 2 ECHR.

But that is not the only scope of protection that the ECtHR has derived from Article 2 ECHR. The Court has constructed a "positive obligation" of the State and its representatives: hence, the Contracting States are obliged to create a public order, which provides for an adequate protection of the right to life for all persons.[6] That second "pillar" within the scope of protection of Article 2 ECHR plays a much more important role in practice than the prohibition of actively "killing" someone, especially in cases dealing with the use of force by police agents.

Concerning the extent of protection, the right to life has to be interpreted regardless of social or economic background, age, or disease. To be more precise, Article 2 ECHR prohibits any kind of killing.[7] The European Court of Human Rights has also stressed that there is no "right to suicide" and no active form of euthanasia can be accepted under the provision guaranteeing a "right to life."[8]

Approaching the concrete topic, the protection of life by police intervention, one has to take into account that every killing that is attributable (Article 1 ECHR) to a Contracting State is regarded as interference in the right to life. This even holds true for accidental killings, e.g. by police forces.[9]

The State's positive duty to protect life demands that any measure seriously threatening the life of a person—by State officials or private persons—is prohibited.

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[6] ECtHR, McCann v. United Kingdom (Fn. 1), § 161; Mowbray (2012), p. 87; *Ibid*, p. 112.

[7] *Ibid*, § 145.

[8] Note that the line between "passive" withdrawal of life support and "active" euthanasia is not a clear one. See, e.g., the United Kingdom case of Re J (A Minor) (Wardship: Medical Treatment) [1991] Fam. 33 mentioned in ECtHR, Pretty v. United Kingdom, judgment of 29 April 2002, No. 2346/02, § 18.

[9] ECtHR, Timurtaş v. Turkey, judgment of 13 June 2000, No. 23531/91, §§ 81–86; *Mowbray*, Cases and Materials on the ECHR (Fn. 6), p. 108, para. 10.

Thus, a State has to install a criminal law system, including provisions of law, that is working effectively. That means, in practice, any forcible killing of a person has to be followed by an effective criminal investigation of State authorities.

Last but not the least, the State's positive duty to protect life is also important for the protection of persons under the State's care, especially for detained persons, e.g. in police custody after arrest.[10]

4.3 Justification of a Deprivation of the Right to Life

For police forces, the reasons justifying a deprivation of the right to life and regulated by Article 2 § 2 ECHR provide abstract "minimum" guidelines for their daily work.

First of all, the Convention mentions "the defence of any person from unlawful violence." According to the jurisprudence of the European Court of Human Rights, the situation has to be assessed *ex ante*.[11] But even then, no less severe means of force must be available, i.e. the principle of proportionality must be taken into account seriously.[12] The Court, however, has not yet clearly referred to the issue whether the killing of a person to protect material goods can be justified under Article 2 § 2 *lit*. a ECHR. This is one of the topics highly debated in German criminal law that has opted for a quite far-reaching reason of justification (*Rechtfertigungsgrund*) of self-defense (*Notwehr*).[13]

[10]ECtHR, McCann v. United Kingdom (Fn. 1), §§ 211–214.

[11]ECtHR, McCann v. United Kingdom (Fn. 1), § 150.

[12]ECtHR, Makaratzis v. Greece (Fn. 3), §§ 58–59; other examples: ECtHR, Finogenov et al. v. Russia, judgment of 20 December 2011, Nos. 18299/03 and 27311/03, §§ 209, 210, 236; ECtHR, Wasilewska and Kalucka v. Poland, judgment of 23 February 2010, Nos. 28975/04 and 33406/04.

[13]Section 32 German Criminal Code (StGB). The prevailing view among academics in Germany is that Article 2 ECHR has to be seen in an overall context and that *lit*. a is only a barrier (Schranke) for the execution of *state* violence, but that it does not affect the relationships among *private* persons. Under specified circumstances, the killing of an aggressor to protect material goods is allowed until the limit of a massive imbalance (krasses Missverhältnis) is reached. The State is obliged to provide the amount of protection needed by the entitled person, that is appropriate regarding the significance of the legally protected good. While life as a legally protected good has a very high significance, the aggressor himself is not in need of protection, see Esser (2012), Art. 2 ECHR, para. 53, of the same opinion Engländer (2009), p. 352; Wessels et al. (2017), para. 514, 515. The alternative view (*Paeffgen, Zieschang, Bernsmann, Frister, Baumann*) which is internationally prevailing does not support the willful killing in order to protect a material good (see Roxin (2006), p. 15, para. 76 seq.). The State does not violate its general duty to protect the right to life by allowing the killing of an aggressor by acting in self-defense. However, the acceptance of an intended "material-good-self-defense" among private persons is not covered by this view. It has to be seen as a violation of the duty to protect. *Günther* discusses this dispute extensively in Systematic Commentary on the German Criminal Code (SK-StGB), 8th edition, Cologne 2012, p. 32, para. 112–117.

Another justification mentioned in Article 2 § 2 ECHR is the enforcement of a "lawful arrest or the prevention of escape of a person that is lawfully detained." The wording of that provision has been constructed by the ECtHR in that way that an *intentional* killing has to be seen in clear contradiction to Article 2 § 2 *lit*. b ECHR.[14]

The last justification provided by Article 2 § 2 ECHR, an "action lawfully taken for the purpose of quelling a riot or insurrection," is one of the most highly debated reasons of justification.[15] On July 15, 2016, a coup d´état was attempted in Turkey by a fraction within the Turkish Armed Forces. The attempt was carried out against State institutions, including, although not limited to, the Turkish government. During the coup, more than 300 people were killed and over 2100 were injured. The government responded by arresting masses, with more than 6000 detained, including at least 2850 soldiers and around 2700 judges.[16] In response to the attempted coup, on July 20, 2016, the President of Turkey, *Erdoğan*, announced a three-month state of emergency.[17] Moreover, on July 21, 2016, the Secretary General of the Council of Europe was informed by the Turkish authorities that Turkey would notify a derogation from the European Convention on Human Rights under its Article 15.[18]

The European Court of Human Rights has made it clear that for all of those justifications of "limitations" of the right to life, the use of force must always be *absolutely necessary*.[19] Therefore, whenever a State refers to some form of action that may come into conflict with the right to life, state officials always have to ensure that no less severe means suffice in the concrete situation.[20] What the Court is having in mind is a strict application of the principle of proportionality.

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[14]ECtHR, McCann v. United Kingdom (Fn. 1), § 148.

[15]Recent examples: ECtHR, Andreou v. Turkey, judgment of 27 October 2009, No. 45653/99; *Mowbray*, Cases and Materials on the ECHR (Fn. 6), p. 142.

[16]Http://www.spiegel.de/politik/ausland/tuerkei-nach-putsch-versuch-setzt-regierung-richter-ab-a-1103338.html; https://www.wsws.org/de/articles/2016/07/21/turk-j21.html.

[17]See further: CNN news: http://edition.cnn.com/2016/07/17/asia/turkey-attempted-coup/.

[18]See further the news release on the Council of Europe website on 21 July 2016: https://wcd.coe.int/ViewDoc.jsp?p=&Ref=DC-PR132(2016)&Language=lanEnglish&Ver=original&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE&direct=true; and: https://wcd.coe.int/ViewDoc.jsp?p=&id=2436911&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true.

[19]ECtHR, McCann v. United Kingdom (Fn. 1), § 213. In Makaratzis v. Greece (Fn. 3), the Court, having found that the law did not adequately protect the applicant's right to life and that this in itself already amounted to a violation of Article 2 ECHR, felt that it was "not necessary" to examine whether "the life-threatening conduct of the police" violated the requirement of "absolute necessity" (§ 72).

[20]See: ECtHR, Finogenov et al. v. Russia, judgment of 20 December 2011, Nos. 18299/03 and 27311/03; ECtHR, Wasilewska and Kalucka v. Poland, judgment of 23 February 2010, Nos. 28975/04 and 33406/04.

Concerning police operations, there are some aspects to be taken into consideration: during the planning of a police operation, measures against any form of escalation have to be taken into account. For instance, in case of an assembly or demonstration that might gain an aggressive use of force by the participants or some countergroups, the police has to take note of the potential high risk of any form of escalation. Police officers in charge of police tactics have to take precautionary measures to reduce the risk for the life of people taking part in such a demonstration or its counterpart. But how should such a police operation be run? And how is the operation to be executed in detail? To which extent may the use of lethal force during such an operation be allowed?

It has to be noted that, over the years, the European Court of Human Rights' jurisprudence has shaped the principle of proportionality into a so-called *principle of necessity*. Consequently, a strict and compelling test of necessity has to be applied—during the stage of the planning of a police action as well as during its execution.[21]

The use of lethal force by State organs was first addressed in the case of *McCann* and Others v. United Kingdom on September 27, 1995. In its judgment, the ECtHR laid down the principle that Article 2 ECHR allows for exceptions to the right to life only when it is *absolutely necessary* and also stressed that a stricter and more compelling test of necessity has to be employed than the one normally applicable when determining whether State action is *necessary in a democratic society*, as proscribed by Article 2 § 2 ECHR.[22]

4.4 Principle of Proportionality: Necessity of the Use of Force

This principle of proportionality clearly derives from the wording of Article 2 ECHR ("use of force which is no more than absolutely necessary") and has been established in the Court's case law.

[21]ECtHR, McCann v. United Kingdom (Fn. 1), § 149.

[22]As the Court put it in McCann (Fn. 1), § 149: In this respect the use of the term *"absolutely necessary"* in Article 2 § 2 ECHR indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is *"necessary in a democratic society"* under § 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in § 2 *lit*. a, b and c of Article 2 ECHR.

4.4.1 ECtHR, McCann et al./United Kingdom, 27 Sept. 1995, No. 18984/91

The *McCann* case concerned the death of three members of the IRA,[23] suspected of being in possession of a remote control device to be used to explode a bomb. The IRA had previously employed remote control detonators, and intelligence forces suggested that a car that the suspects had parked in a crowded place was rigged with explosives with the suspects holding the remote detonator (which later turned out to be wrong). The suspects were shot dead by Special Air Service (SAS) soldiers on the street in Gibraltar.[24]

The ECtHR considered whether the shooting was disproportionate to the aims to be achieved by the State in apprehending the suspects and defending the citizens of Gibraltar from unlawful violence.[25] The Court found a violation of Article 2 ECHR with regard to the killing of the three terrorists: it did not constitute a use of force that was *absolutely necessary*, as prescribed by Article 2 § 2 ECHR. The violation of Article 2 ECHR was found by a vote of 10 to 9 regarding the planning and control of the operation by the authorities in that it was not *strictly proportionate* to the objectives to be achieved, i.e. saving lives.[26]

4.4.2 ECtHR, Andronicou and Constantinou/Cyprus, 9 Oct. 1997, No. 25052/94

This second "leading case" in the ECtHR's jurisprudence on Article 2 ECHR involved the alleged unlawful killing of a young couple by officers of a special police unit (MMAD) in the course of a rescue operation.[27] The concrete planning and control of the rescue operation was challenged by the Court. The problem at hand was to establish whether in these circumstances authorities had taken appropriate care in the planning and control of the rescue operation, including the decision to deploy MMAD officers to minimize any risk to the lives of the couple, and an appropriate assessment of alternative ways of handling the situation with the benefit of hindsight.[28]

The authorities conducted prolonged negotiations with the knowledge that they were dealing with a young couple (only a "lovers quarrel" but not terrorists). The

[23] Irish Republican Army.

[24] ECtHR, McCann v. United Kingdom (Fn. 1), § 12.

[25] *Ibid*, § 25.

[26] *Ibid*, § 191; Greer (2006), p. 243.

[27] ECtHR, Andronicou and Constantinou v. Cyprus, judgment of 9 October 1997, No. 25052/94, § 55; *Mowbray*, Cases and Materials on the ECHR (Fn. 6), pp. 101–103, para. 5.

[28] *Ibid*, § 230.

negotiations were carried out in a reasonable manner in view of the circumstances. However, as the situation became increasingly fraught with danger, the authorities could reasonably conclude that decisive action needed to be taken to bring an end to the incident. This was justified by the fear that the young man—known to be armed—would kill his fiancée and commit suicide. The decision to send in MMAD officers was only taken after a careful reflection and a high level consultation.

The officers had been given clear instructions to open fire only if the life of the young woman or their own lives were in danger and to only use proportionate force. The decision to use the MMAD officers was considered the *last resort*.[29] The applicants were not able to show that the rescue operation had not been planned and organized in a way that minimized the risk of the couples' lives to the *greatest extent* possible. The use of lethal force in the circumstances did not exceed what was *absolutely necessary* for the purpose of defending the life of the young woman and the lives of the officers (no violation of Article 2 ECHR).[30]

4.4.3 ECtHR (GC), Makaratzis/Greece, 20 Dec. 2004, No. 50385/99

In 1995, the police tried to stop the applicant, an unarmed civilian, after he had driven through a red traffic light in the center of Athens; he did not stop but accelerated. Pursued by several police officers, his car collided with several other vehicles; two drivers were injured. After he had broken through five police road-blocks, the police officers started firing at his car. He stopped his car at a petrol station but locked the doors and refused to get out; the police officers continued firing. *Makaratzis* sustained many injuries; there were 16 gun holes found on his car.[31]

The fact that some of the police officers left the scene without revealing their identity and disclosing all necessary information concerning the weapons used bore problems in this case.[32] The public prosecutor instituted criminal proceedings against seven officers, which ended in their acquittal. Given that not all the officers involved in the incident had been identified, the criminal court was unable to establish beyond reasonable doubt that the seven accused were the ones who had fired at the applicant.[33] *Makaratzis* complained, under Article 2 ECHR, that the police officers had used excessive firepower against him, putting his life at risk.[34]

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[29] *Ibid*, § 183.

[30] *Ibid*, § 193.

[31] ECtHR, Makaratzis v. Greece (Fn. 3), § 11.

[32] *Ibid*, § 13.

[33] *Ibid*, § 15.

[34] *Ibid*, § 33.

With regard to the criminal conduct of *Makaratzis* and the several terrorist actions against foreign interests at that time, the Court accepted that the use of force against him had been based on an honest belief that had been perceived to be valid at the time. However, the Court criticized the chaotic way the firearms had been used by the police. Serious questions arose as to the conduct and the organization of the police operation. The Court concluded that irrespective of whether or not the police had actually intended to kill him, the applicant had been the victim of conduct that, by its very nature, had put his life at risk, even though, in the event, he had survived; Article 2 ECHR was therefore violated.[35]

4.4.4 *ECtHR, Wasilewska and Kalucka/Poland, 23 Feb. 2010, Nos. 28975/04 and 33406/04*

The case concerned the death of a suspect during an antiterrorist operation. The Court found a violation of Article 2 ECHR: the Polish government had failed to submit any comments regarding the proportionality of the level of force used by the police, the organization of the police action, and whether an adequate legislative and administrative framework had been put in place to safeguard people against arbitrariness and abuse of force.[36]

4.4.5 *ECtHR (GC), Giuliani and Gaggio/Italy, 24 March 2011, No. 23458/02*

The case concerned the death of a young man (Carlo Giuliani) who was taking part in an antiglobalization protest during the G8 summit in Genoa in 2001. His family brought an application to the ECtHR alleging that Italy had breached Article 2 ECHR. The ECtHR found no violation of Article 2 ECHR with regard to the use of lethal force.[37] However, 7 of the 17 judges dissented, especially to many aspects of the decision regarding the right to life.[38]

The ECtHR held that there was no violation of Article 2 ECHR with regard to the domestic legislative framework governing the use of lethal force or with regard to the weapons issued to the law-enforcement agencies at the G8 summit in Genoa: it

[35] *Ibid*, § 55; *Mowbray*, Cases and Materials on the ECHR (Fn. 6), p. 114–118.

[36] ECtHR, Wasilewska and Kalucka v. Poland, judgment of 23 February 2011, Nos. 28975/04 and 33406/04, § 32.

[37] ECtHR, Giuliani and Gaggio v. Italy, judgment of the Grand Chamber of 24 March 2011, No. 23458/02, § 8.

[38] *Ibid*, dissenting opinions annexed to the judgment.

had not been excessive or disproportionate to what was *absolutely necessary* in defense of any person from unlawful violence.[39]

The Court found no violation of Article 2 ECHR with regard to the organization and planning of the police operations at the summit: the authorities had a duty to ensure the peaceful conduct and the safety of all citizens during lawful demonstrations, but "they (could not) guarantee this entirely and (had) a wide discretion in the choice of the means to be used."[40]

Notably, however, there were differing views regarding the State's obligations (both substantive and procedural) to protect life, including the use of firearms during police operations, issuing nonlethal weapons, and whether there was a higher level of responsibility where large-scale, high-risk demonstrations are planned.[41]

However, the dissenting opinions of four judges found a lack of organization by the State, which breached the right to life: the criteria for selecting armed forces, i.e. the limited experience and training of the officials, and the lack of support for the officer who ultimately shot *Carlo Giuliani*. The police officer was left in a vehicle that was not adequately protected, with a lethal weapon as his only defense. The lack of an appropriate legislative framework governing the use of firearms, coupled with the shortcomings in the preparation of the police operations and the training of law enforcement personnel, meant that the State's actions were in fact linked to *Carlo*'s death.[42]

4.4.6 ECtHR, Finogenov et al./Russia, 20 Dec. 2011, Nos. 18299/03 and 27311/03

The case concerned the hostage taking in the *Dubrovka* theater in Moscow by Chechen separatists (*Nord-Ost theatre siege*) in October 2002,[43] as well as the decision to overcome the terrorists and liberate the hostages by pumping an unknown narcotic gas into the theater. The applicants alleged that their relatives (terrorists, as well as hostages) had suffered and died as a result of the actions of the Russian security forces. Furthermore, it was claimed that the use of force by the security forces was disproportionate and the assistance provided to the survivors inadequate.[44]

[39] *Ibid*, § 172.

[40] *Ibid*, § 230.

[41] *Ibid*, § 188.

[42] *Ibid*, § 205.

[43] ECtHR, Finogenov et al. v. Russia, judgment of 20 December 2011, Nos. 18299/03 and 27311/03, § 8.

[44] *Ibid* Reason No. 4.

The Court found no violation of Article 2 ECHR concerning the decision to resolve the hostage crisis by ending the negotiations, storming the building, and releasing the narcotic gas. The ECtHR held that "there existed a real, serious and immediate risk of mass human losses and that the authorities had every reason to believe that a forced intervention was the 'lesser evil' in the circumstances," while the use of gas was not in these circumstances a disproportionate measure (proportionality principle).[45]

However, the Court found a violation of Article 2 ECHR concerning the inadequate planning and implementation of the rescue operation, as well as the lack of medical assistance to the hostages. The Court held that the rescue operation was *not sufficiently prepared*.[46] Significantly, even in a counterterrorism operation, the use of lethal force by the State must be no more than what is *absolutely necessary*.[47]

4.4.7 ECtHR, Fanziyeva/Russia, 18 June 2015, No. 41675/80

In 2007, Ms. Eneyeva visited a local market, together with Mr. A; one of the stallholders suspected that Ms. Eneyeva was planning to steal a skirt from a market stall; the police arrived and arrested the applicant's daughter on suspicion of theft; Ms. Eneyeva and Mr. A. were both put into a police vehicle. According to Mr. A., an unknown police officer approached the vehicle, kicked Ms. Eneyeva 15 times on her legs, and left. At the police station, Ms. Eneyeva was taken to the interrogation room situated on the second floor of the police station and was beaten by the police officers until she fainted. It was not clear if Ms. Eneyeva attempted to escape by jumping out of a second floor or if she was thrown out of the window by unspecified police officers.[48] Ms. Eneyeva was taken to the hospital but died of complex internal injuries to her head, body, and extremities.

The ECtHR concluded that the State authorities failed to provide Ms. Eneyeva with sufficient and reasonable protection from a foreseeable danger to her life, as required by Article 2 ECHR, and stressed the authorities' obligation to protect the health and physical well-being of persons under arrest, in detention, or in custody.[49] Despite sufficient evidence to show that the authorities knew or ought to have known that there was risk that Ms. Eneyeva might attempt to escape by jumping out of a second floor window, there were certain basic precautions that police officers

[45] *Ibid*, §§ 210, 236.

[46] *Ibid*, § 266.

[47] *Ibid*, § 210.

[48] ECtHR, Fanziyeva v. Russia, judgment of 18 June 2015, No. 41675/08, § 7. The applicant is the mother of the late Ms Madina Eneyeva who died in 2007.

[49] ECtHR, Fanziyeva v. Russia (Fn. 48), §§ 57–60.

should be expected to take in respect of persons held in detention in order to minimize any potential risk for their right to life (foreseeable danger).

Although the ECtHR could not assess in detail whether the supervision arrangements for Ms. Eneyeva's detention were adequate, the Court criticized that one of the State agents had allowed Ms. Eneyeva, an arrested person, to remain unsupervised in the lavatory equipped with an opening window.

4.5 Use of Electroshock Devices and Electrical Discharge Weapons (Taser)

In recent years, more and more national police units in Europe have been equipped with melee weapons. The central argument brought up for the acquisition of such weapons, e.g. electroshock devices and electrical discharge weapons, is often that police officers unequipped with such weapons, who are being faced with significantly aggressive behavior, are then forced to use their firearm as a ranged weapon in order to prevent an unreasonable self-endangerment.[50] As convincing as this thought may appear at first glance, as unequivocally clear are, however, the requirements set by Article 2 ECHR for the application of such special weapons. For a more detailed explication of how a taser actually works, see (5.1) ECtHR, Fox/United Kingdom, 20 March 2012, No. 61319/09.

According to Amnesty International (AI), studies have shown that taser shocks pose a significant danger of causing adverse effects on people who suffer from a heart condition or whose systems are compromised due to drug intoxication or after a struggle. The probes can only be shot once, so they need to hit; otherwise, the reloading of the taser would most probably take too much time.[51]

The ECtHR, too, and other international supervisory bodies already had to deal with the admissibility of the application of tasers and other electroshock devices—primarily, however, in the context of the prohibition of torture set by Article 3 ECHR and other parallel international provisions.

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[50]The Berlin Senator of the Interior, *Frank Henkel*, argues that a taser opens up possibilities to resolve critical situations and that they could even be lifesaving. There had been an incident at the Alexanderplatz in Berlin in 2013, where a confused man fidgeting with a knife and attacking the police, was killed by a shot from a police officer's firearm. In these kinds of situations a taser could be the adequate measure and close the gap between pepper spray and firearms, see rbb-online, Press release of 31 August 2016, *Henkel* wants to test taser at the Alexanderplatz in Berlin, http://www.rbb-online.de/politik/beitrag/2016/08/taser-bei-berliner-polizei-henkel-kandt-reaktionen-mueller.html.

[51]See http://www.amnestyusa.org/news/press-releases/amnesty-international-urges-stricter-limits-on-police-taser-use-as-us-death-toll-reaches-500; http://www.mopo.de/hamburg/nach-angriffen-auf-wachen-polizisten-fordern-schock-pistolen-4109054; the first source quotes an AI spokesperson as follows: "Even if deaths directly from Taser shocks are relatively rare, adverse effects can happen very quickly, without warning, and be impossible to reverse [. . .] Given this risk, such weapons should always be used with great caution, in situations where lesser alternatives are unavailable."

4.5.1 ECtHR, Fox/United Kingdom, 20 March 2012, No. 61319/09

In this case, the claimant alleged that he had been severely assaulted by police officers by a taser when being arrested. He had been "tasered" at least four times; the taser had been applied directly to the skin rather than from a distance. A psychiatrist compared the treatment to an "extreme electro-convulsive therapy" that caused severe trauma and injuries.[52] A taser is a pistol-like device that shoots two probes from an attached cartridge; wires are attached to the probes. When the trigger is pulled, an electric charge of some 50,000 volts is passed through the wires and, if the probes have become attached to the subject, through his body. The electric pulse lasts for some five seconds, or longer if the trigger is held down.[53]

The Court declared the application inadmissible.[54] However, in similar cases, the use of a taser may amount to an arguable breach of Article 3 ECHR, i.e. to an inhuman and/or degrading treatment.[55]

4.5.2 ECtHR, Anzhelo Georgiev et al./Bulgaria, 30 Sept. 2014, No. 51284/09

The case concerned allegations of excessive use of police force and, notably, the use of electroshock weapons. The applicants alleged that they had been ill-treated by armed, masked police officers during a special police operation carried out at their Internet company's offices in 2008 in order to search and seize illegal software. One of the applicants (*Kosev*) alleged that he had an electroshock gun used against him while handcuffed to a window grill. The applicants sustained

[52]ECtHR, Fox v. United Kingdom, decision of 20 March 2012, No. 61319/09, § 13.

[53]*Ibid*, § 33; see High Court, Morrison v. The Independent Police Complaints Commission, [2009] EWHC 2589 judgment of 26 October 2009, §§ 9–11, where High Court Judge *Nicol* commented on the use of tasers by the police : "The Taser is a pistol-like device which shoots two probes from an attached cartridge. Wires are attached to the probes. When the trigger is pulled an electric charge of some 50,000 volts is passed through the wires and, if the probes have become attached to the subject, through his body. The electric pulse lasts for some 5 s, or longer if the trigger is held down. The Taser can also be operated by holding it against the body of the subject. This is known as the 'drive stun' mode. It is the method which the Claimant alleges was applied to him about three times. The electric charge can cause intense pain. It also (and this is said to be its principal attraction for the police) incapacitates its subject. The electrical stimulus causes an uncontrollable skeletal muscle contraction which will make the individual lose control of his body. This lasts as long as the charge is applied. It stops when the charge stops, although the person concerned may be dazed and confused for a while longer. There may also be small burn marks on the skin nearest to the probese." (quoted after ECtHR, Fox v. United Kingdom, decision of 20 March 2012, No. 61319/09, § 33).

[54]*Ibid*, § 36.

[55]*Ibid*, § 45.

injuries during the intervention, including bruising, abrasions, and burns, shown in reports of medical examinations carried out the next day.[56]

The applicants' injuries were sufficiently serious to reach the minimum level of severity required for a complaint to pass the threshold of Article 3 ECHR.[57] Moreover, the preliminary inquiry had not provided a plausible explanation for the necessity of the force used against the applicants. The Court held it unsatisfactory that the prosecuting authorities assumed the lawfulness of the use of electroshock weapons, known to cause intense pain and temporary paralysis, despite insufficient evidence to show that the suspects had disobeyed the police officers' orders in a way warranting the use of such weapons.[58]

On the international level, taser usage is subject to controversial debate. Tasers lend themselves to misuse by their nature. The European Committee for the Prevention of Torture (CPT) has gathered evidence that such weapons have been exploited to inflict severe ill-treatment to persons deprived of their liberty. The Committee has frequently received allegations that detained persons have been threatened with ill-treatment via the use of a taser or other electronic weapons.[59]

An UNCAT report of 2007 stated that "The Committee was worried that the use of Taser X26 weapons, provoking extreme pain, constituted a form of torture, and that in certain cases it could also cause death, as shown by several reliable studies and by certain cases that had happened after practical use."[60]

Amnesty International (AI) has also raised extensive concerns about the use of other electroshock devices by the American police, as well as in American prisons, as they may be used to inflict cruel pain on individuals.[61]

Before such a large-scale acquisition of these electroshock devices for police units in Germany can be realized, a very meticulous purpose-benefit-related analysis must have taken place. This approach, too, is part of a "preventive governmental protection of life," as the ECtHR infers from Article 2 ECHR. It is self-evident that in case of a theoretical subsequent operation, the nonapplication of a firearm must not come along with an "automatic standard use" of tasers.

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[56]ECtHR, Anzhelo Georgiev et al. v. Bulgaria, judgment of 30 September 2014, No. 51284/09, § 8.

[57]*Ibid*, § 69.

[58]*Ibid*, § 42.

[59]20th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 1 August 2009 – 31 July 2010, p. 35, § 66: Electrical discharge weapons, see further: http://www.cpt.coe.int/en/annual/rep-20.pdf.

[60]Committee against Torture, Thirty-Ninth Session, press release, United Nations Office at Geneva, 23 November 2007.

[61]Amnesty International's statement on Tasers use to the US Justice Department, AI Index: AMR 51/151/2007, October 2007.

4.6 Conclusions

The remarks on the general protection concept of Article 2 ECHR and the presentation of the concrete structuring of this concept by the judicature of the ECtHR showed distinctively that even from a rather apparently abstractive-manner-written human rights guarantee, as the right to life (Article 2 ECHR), concrete requirements for the daily deployment of police officers can be derived. Especially in this sensitive area, covering everything from the application of "police violence" up to the fatal outcome of a police operation, it is necessary that after the completion of the elaboration of respective scenarios at the national level, an international supervisory body for the review of human rights standards can be consulted on top. This way, the ECtHR achieves important preventive work, too. It hereby allows the Contracting States of the Convention a considerable amount of room to maneuver regarding the preparation and execution of police operations. This is appropriate since even the Court in Strasbourg knows that hindsight is easier than foresight. By proclaiming exaggerated due diligence, no police officer operating on the streets was ever reached. It is, however, even more important that the persons concerned (especially their close relatives) is given, already on a national level, an effective possibility to lodge a complaint in order to claim an unlawful interference with the right to life. Germany provides for these case proceedings to force criminal prosecution (*Klageerzwingungsverfahren)*, § 172 of the German Code of Criminal Procedure (StPO). In the last two years, the German Federal Constitutional Court has set up in four much-noticed decisions considerable "effectiveness parameters" regarding the protection of life and other fundamental rights for this procedure.[62]

This kind of judicial control does not please anybody—since there is a lot at stake for everyone involved in a police operation that ends deadly. But the right to life, with its prominent position that it received by the ECHR itself and through the jurisdiction of the ECtHR, does indeed call for such a control—from a preventive perspective, as well as from the point of view of a retrospective evaluation.

In the recent years, the ECtHR has developed for both perspectives "effectiveness aspects" that are way more than just an abstract human-rights skeleton. The Strasbourg standards, including the day-to-day police work, have become ever more concrete recently. This is why keeping an eye on the Court of Strasbourg is worth the while, also in the context of the "protection of life during police operations"—especially for researchers and for practitioners even more so, since it is them who will have to bear the negative consequences of a deficient sensitization in this area.

[62]BVerfG, Decision of 26 June 2014 – 2 BvR 2699/10 (*Tennessee E.*); BVerfG, Decision of 6 October 2014 – 2 BvR 1568/12 (*Gorch Fock*), NJW 2015, 150 = EuGRZ 2014, 719; BVerfG, Decision of 23.3.2015 – 2 BvR 1304/12 (*Münchener Lokalderby*); BVerfG, Decision of 19 May 2015 – 2 BvR 987/11, NJW 2015, 3500 = EuGRZ 2015, 429 = JZ 2015, 890 (Kunduz) Compare Esser/Lubrich, StV 2017, 418–424.

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Chapter 5
Command Responsibility and the Use of Force by the Police

Anja Bienert

Contents

Abstract The police power to use force and firearms is granted to law enforcement officials for the fulfilment of their duties, and its exercise comes with obligations and responsibilities—notably in terms of the respect for and protection of human rights that may be affected by the use of this power.

Drawing from findings and recommendations from the Amnesty International publication, Use of force: Guidelines for implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement officials (2015), this article looks more closely at the role of commanding and superior officers in relation to the use of force. In this regard, three layers of responsibility can be distinguished:

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- Commanding and superior officers can themselves be involved in situations in which force and firearms are used and in such situations are responsible for their own actions and omissions, for the orders they have given or failed to give, as well as for the planning and preparation of policing operations.
- They are responsible for defining an operational framework that ensures that law enforcement officials resort to the use of force and firearms in a lawful and human-rights-compliant manner. This includes notably human-rights-compliant policies, operational procedures and instructions, as well as the provision of appropriate equipment and training.
- They are supposed to effectively supervise and control their subordinates and to ensure that law enforcement officials are held accountable if they have resorted to unlawful use of force and firearms.

When commanding and superior officers fail to assume their responsibility in any of these areas, they themselves must be held accountable.

5.1 Introduction

It is the responsibility of law enforcement officials to maintain law, safety and public order and to prevent and detect crime. In order to fulfil this important task, law enforcement officials are granted a number of powers, including the power to use force and firearms (often referred to as the state's 'monopoly of force'). This power is granted to them for the fulfilment of their duties, and this implies that its exercise comes with obligations and responsibilities—notably in terms of the respect for and protection of human rights that may be affected by the use of this power. When law enforcement officials resort to force and firearms in a way that violates human rights, this puts at risk the legitimacy of and public trust in the law enforcement authorities and the state as whole. It is thus in the interest of all—the state, the law enforcement agency and society as a whole—that human rights are respected when law enforcement officials exercise their powers.

Article 2 UN Code of Conduct for Law Enforcement Officials[1]:

> In the performance of their duty, law enforcement officials *shall respect and protect human dignity and maintain and uphold the human rights of all persons.*

UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles):[2]

Preamble, para. 3: '... law enforcement officials have a *vital role in the protection of the right to life, liberty and security of the person*'.

[1] Adopted by UN General Assembly resolution 34/169 of 17 December 1979.

[2] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

Basic Principle 5b): 'Whenever the lawful use of force and firearms is unavoidable, *law enforcement officials shall: … b) minimize damage and injury, and respect and preserve human life*' *[emphases added]*.

While it is certainly the case that law enforcement officials across the world manage in innumerable situations to comply with these obligations, it is nevertheless still true that too often the resort to the use of force is unnecessary, excessive or in other ways unlawful and therefore in contravention of the obligations listed above—and all too often this results in serious injury or even death.[3] The reasons for such unlawful use of force can be manifold. It can occur intentionally, by negligence or as a result of a generally dysfunctional law enforcement system. It can be the result of a personal decision of the acting law enforcement official or of an order received from a superior officer or any other person empowered (or perceived to be empowered) to give such an order. In any case, and with the exception of absolutely unforeseeable situations, the resort to unlawful use of force occurs because it takes place in an environment that is conducive to such behaviour.

The law enforcement profession has an extremely challenging task, in which officials are confronted with a wide variety of situations, often requiring quick, sometimes even instantaneous, decisions and difficult choices to be made. Highly dangerous or stressful circumstances add to this challenge. It is therefore crucial—and sometimes even a matter of life or death—that law enforcement officials are provided with a legal and operational framework that helps them to take the best possible decisions and appropriate action in such circumstances.

Here the responsibility of state authorities is clearly engaged: in order to respect and protect fundamental human rights, such as the right to life, physical integrity and human dignity, authorities must take all possible measures to ensure that law enforcement officials exercise the power to use force and firearms in a lawful and human-rights-compliant manner. To support state authorities in fulfilling these obligations under international human rights law, the United Nations General Assembly welcomed in 1990 the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[4] It is a groundbreaking document that has received worldwide recognition and acceptance as authoritative guidance.[5] Still, throughout

[3]See for instance Amnesty International documents: 'My children are scared: Burundi's deepening human rights crisis', 22 December 2015, AFR 16/3116/2015 available at: https://www.amnesty.org/en/documents/afr16/3116/2015/en/; Brazil: 'You killed my son: Homicides by military police in the city of Rio de Janeiro', 3 August 2015, AMR 19/2068/2015, available at: https://www.amnesty.org/en/documents/amr19/2068/2015/en; Turkey: 'Kobani protests in Turkey: Human rights failures', 7 July 2015, EUR 44/2017/2015, available at: https://www.amnesty.org/en/documents/eur44/2017/2015/en; 'Deadly force: Police Use of Lethal Force in the United States', 18 June 2015, available at: http://www.amestyusa.org/reasearch/reports/deadly-force-police-use-of-lethal-force-in-the-united-states; Cambodia: 'Taking to the streets: Freedom of peaceful assembly in Cambodia', 4 June 2015, ASA/23/1506/2015, available at: https://www.amnesty.org/en/documents/asa23/1506/2015/en.

[4]UN General Assembly Resolution 45/121 of 14 December 1990.

[5]Report of the Special Rapporteur on extrajudicial executions, UN Doc. A/HRC/26/36 (2014) para. 44.

its more than 25 years of existence, implementation in practice of the Basic Principles is often poor, or even completely lacking.

Yet an analysis carried out by Amnesty International of existing practice around the world clearly revealed that it is indeed possible to achieve full implementation of the Basic Principles.[6] The guiding document (hereafter: AINL Guidelines) that was developed based on this analysis makes it clear not only that the prevention of unlawful use of force depends on the individual law enforcement official but more importantly that it is the command leadership and superior officers in a law enforcement agency who have the power and the obligation to create an operational framework that is conducive to human-rights-compliant policing in general and, in particular, to use of force that respects and protects human rights.

Drawing from the findings and recommendations of the *AINL Guidelines*, this article seeks to look more closely at the role of commanding and superior officers in relation to the use of force. In this regard, three layers of responsibility can be distinguished:

- Commanding and superior officers can themselves be involved in concrete situations in which force and firearms are used, and in such situations they are responsible for their own actions and omissions.
- They are responsible for defining an appropriate and human-rights-compliant operational framework in which their subordinates carry out their duties and that must ensure that law enforcement officials resort to the use of force and firearms in a lawful and human-rights-compliant manner.
- They play an important role when it comes to holding law enforcement officials accountable who may have resorted to unlawful use of force and firearms.

5.2 Command/Superior Responsibility for Own Actions and Omissions

5.2.1 Orders

The most obvious involvement of commanding and superior officers in relation to the use of force and firearms is when they themselves give orders to their subordinates—or if they fail to give an order that they were supposed to give.

[6] Amnesty International, Dutch section (2015), available at: https://www.amnesty.nl/sites/default/files/public/ainl_guidelines_use_of_force_0.pdf (*hereafter: AINL Guidelines*).

Basic Principle 26:
'Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it. *In any case, responsibility also rests on the superiors who gave the unlawful orders' [emphasis added]*.

While law enforcement officials often carry out their work alone or in pairs and are afforded considerable discretion in the choice as to how to respond to a given situation, a law enforcement agency nevertheless remains a hierarchical organisation. This means that when orders are issued by superior officers, these are—depending on their scope—replacing the discretion of the individual officer and are likely to be carried out.

When such orders are manifestly unlawful, law enforcement officials are expected not to follow them—at least if they have a reasonable opportunity to refuse (see above, *Basic Principle 26*). An important point in that regard is that law enforcement officials should not have to face negative consequences if they refuse to carry out a manifestly unlawful order.

Basic Principle 25:
'Government and law enforcement agencies shall ensure that *no criminal or disciplinary sanction is imposed* on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials and these basic principles, refuse to carry out an order to use force and firearms, or who report such use by other officials' *[emphasis added]*.

In any case, independently of the responsibility of the individual law enforcement official resorting to the use of force and firearms, the superior who gave the unlawful order must be held accountable. Obviously, this applies in all situations, when a superior gives a specific—and in the circumstances unlawful—order to an individual officer to use force (e.g., to fire his/her weapon in the course of an arrest when there is no threat of death or serious injury, to launch tear gas against a peaceful assembly, to use physical means to extract a confession, etc.). On a positive note, it can be stated that responsibility and accountability for unlawful orders given are established in many countries around the world.[7]

However, command responsibility must also be engaged at a broader level since the order of a commanding officer about a certain course of action can have serious consequences and must comply with the obligation to respect and protect life. In

[7]See for instance some illustrative country examples in the *AINL Guidelines*, section 3.2.2 and 3.2.3. This is however, much less the case for the following aspects of command responsibility presented in the following parts of this article.

particular, in large-scale operations, it will often be difficult to determine whether the individual officer on the ground resorted to the use of force and firearms unlawfully or whether it was done in the genuine belief that it was self-defence. Still, what must be clear is that commanders are to be held accountable for having issued an order that led to a situation in which injury and death became an inevitable consequence of the order and when this order should not have been issued given the serious consequences to be expected.

The very serious consequences of such unlawful orders can sadly be illustrated by the tragic events that occurred in August 2012 in Marikana, South Africa.

Commanding police officials took the decision to end a strike of mine workers at all costs. They distributed 4000 rounds of live ammunition, provided for four mortuary vans and launched an operation that was almost certain to lead to violence and death. The day the operation started, there were no signs of deterioration of the situation; there was neither ongoing violence nor any signs of emerging violence.

The Marikana Commission of Inquiry, which investigated the event, concluded:[8] '. . .[The Provincial Commissioner] made the decision that the "tactical option" would be implemented the next day, if the strikers did not lay down their arms and leave the . . . [hill] that morning. *That decision was inexplicable, and no real attempt has been made to explain or justify it. It was frankly reckless. [. . .]* on 16 August, she made the decision that it was now time to move to phase 3 (the tactical phase). *This too was a reckless decision. She had been informed of the risks of the operation, but nevertheless proceeded, at a time when there was no reason to do so' [emphases added]*.

Thirty-four people were killed and several dozen injured as a result of this *inexplicable* and *reckless* decision.

The orders to end the strike, and the deployment of lethal means for that purpose, were thus unlawful in these circumstances—a situation in which command responsibility and accountability must be engaged.

5.2.2 *Planning, Preparation and Precaution*

Law enforcement officials will often have to respond to suddenly occurring situations that were not expected and that require an immediate response. However, in particular in major law enforcement operations, such as the policing of assemblies

[8]Report of the Marikana Commission of Inquiry, 25 May 2015, p. 367, available at http://www.sahrc.org.za/home/21/files/marikana-report-1.pdf.

or other major events, or when carrying out high-risk arrests, it is possible and necessary to plan and prepare for such operations. This is a key responsibility of commanding and superior officers, and this planning and preparation needs to be done with the utmost precaution and care for the protection of the lives and safety of all involved.

The planning and preparation requires a number of considerations: obtaining as much information as possible beforehand in order to know what to expect, to anticipate possible scenarios that might unfold with a plan on how to respond to them, to decide on the appropriate place and time for an intervention, etc. This includes also preparing for a margin of error and taking precautionary measures to prevent mistakes that may lead to the loss of life.

McCann and Others v. The United Kingdom (18984/91), European Court of Human Rights (1995)

'211. However, the failure to make provision for a margin of error must also be considered in combination with the training of the soldiers* to continue shooting once they opened fire until the suspect was dead. [. . .] Against this background, the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.

212. [. . .] *This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation*' [*emphasis added*].

[*This was a law enforcement operation carried out by military forces.]

Protection of uninvolved persons is a particularly important element when it comes to the planning and carrying out of any law enforcement operation. In law enforcement, the loss of life of uninvolved persons is not accepted under any circumstances,[9] and all possible measures must be taken to ensure that this does not occur. Therefore, commanders involved in the planning of law enforcement operations in which the use of lethal force must be anticipated have to ensure that uninvolved persons are not at risk of being killed in the course of the operation. This can even mean that an operation may not be carried out at all, or must be carried out at a different time or place, if such loss of life cannot otherwise be prevented. When commanders fail to ensure this and an uninvolved person is killed as a result, this amounts to an arbitrary deprivation of life.

[9]The concept of so-called collateral damage, i.e. an incidental loss of life which is—under certain circumstances—acceptable, is exclusively applicable to the conduct of hostilities in the context of an armed conflict; cf. more on this concept in: Melzer (2008), p. 354ff.

Ergí v. Turkey (66/1997/850/1057), European Court of Human Rights (1998)

‘79. [. . .] In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination [. . .].

Furthermore, under Article 2 of the [European] Convention [of Human Rights], read in conjunction with Article 1, the State may be required to take certain measures in order to “secure” an effective enjoyment of the right to life. In the light of the above considerations, the Court agrees with the Commission that the responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. *It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event minimising, incidental loss of civilian life*.

Thus, even though it has not been established beyond reasonable doubt that the bullet which killed Havva Ergí had been fired by the security forces, the Court must consider whether the security forces’ operation had been planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers, including from the firepower of the PKK members caught in the ambush.

80. [. . .] *In these circumstances, the villagers had been placed at considerable risk of being caught in cross-fire between security forces and any PKK terrorists who had approached from the north or north-east*. Even if it might be assumed that the security forces would have responded with due care for the civilian population in returning fire against terrorists caught in the approaches to the village, it could not be assumed that the terrorists would have responded with such restraint. *There was no information to indicate that any steps or precautions had been taken to protect the villagers from being caught up in the conflict*.

Accordingly, in the absence of evidence from gendarmes involved in the planning and conduct of the operation, the Commission was not satisfied that the ambush operation carried out close to Kesentas village had been implemented with the requisite care for the lives of the civilian population.

[. . .] 86. Having regard to the above considerations, the Court finds that the Turkish authorities failed to protect Havva Ergí’s life on account of the defects in the planning and conduct of the security forces’ operation [. . .]. Accordingly, there has been a violation of Article 2 of the Convention’ [*emphasis added*].

The duty to protect life and, in that regard, the duty to take all possible measures to minimise damage and to prevent loss of life requires law enforcement officials, and in particular those involved in the planning of operations, to ensure that appropriate medical assistance is available for anybody harmed during an operation.

Basic Principle 5:
'Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: [...]

c) ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment. [...]'

Where an operation is planned in which it must be anticipated that persons might get injured, commanding officers must take steps during the planning phase to ensure that appropriate medical assistance will be available, taking into account the scope of the operation, the number of people who will be potentially affected, as well as the type of health hazards that might occur.

Finogenov and Others v. Russia (18299/03 and 27311/03), European Court of Human Rights (2012)
'265. [. . .] The Court is called upon to decide whether the State as a whole complied with its international obligations under the [European] Convention [of Human Rights], namely its obligation to "take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life" [. . .].

266. The Court acknowledges that in such situations some measure of disorder is unavoidable. It also recognises the need to keep certain aspects of security operations secret. However, in the circumstances *the rescue operation of 26 October 2002 was not sufficiently prepared, in particular because of the inadequate information exchange between various services, the belated start of the evacuation, limited on-the-field coordination of various services, lack of appropriate medical treatment and equipment on the spot, and inadequate logistics. The Court concludes that the State breached its positive obligations under Article 2 of the Convention. [i.e. the right to life under Art. 2 ECHR]' [emphasis added]*.

5.3 Responsibility for the Operational Framework

Law enforcement officials have—as already mentioned—a certain degree of discretion in how to carry out their work, a discretion that is inherent to the nature of their work, given the large variety of situations they may face and the rapidly changing circumstances in which they operate. In order to ensure that this discretion is used in the best possible way and in full respect for the law and human rights, the command leadership of a law enforcement agency must create an operational framework that instructs, guides and enables their subordinates to react to a specific situation in an appropriate manner and to make the best possible choices and decisions. This requires the establishment of clear, lawful and human-rights-compliant policies, regulations and procedures; the availability of appropriate equipment; as well as the provision of training that enables law enforcement officials to follow the instructions and use the equipment available in the best possible way.

5.3.1 Regulations and Procedures

Basic Principle 1:
'Governments and *law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials*. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review' *[emphasis added]*.

Policies, regulations and procedures must be established for the different types of situations that law enforcement officials may face and provide for the criteria and considerations that should guide their response. It is the responsibility of the command leadership of a law enforcement agency to clearly establish how they expect their subordinates to carry out their duties and not to leave them in a limbo of uncertainty.

In the first place, regulations and orders must reaffirm the rule of law and respect for human rights. It must be made clear that only lawful and human-rights-compliant policing is *good* policing.[10] Then they need to address the different situations in which law enforcement officials may have to decide whether to use force and, if so, which force to use, e.g. in relation to self-defence or the protection of others, in public assemblies, in the course of an arrest, in detention facilities, etc. [11]

[10] ICRC (2014), p. 329.

[11] See Chapter 4–7 of the *AINL Guidelines* for more details in this regard.

Without being a straitjacket, the regulations and procedures should offer a range of criteria and considerations that should guide this decision. This includes in particular emphasis on the principles of legality, necessity and proportionality that should govern any exercise of police powers. Key human rights principles such as the obligation to use non-violent means first, to use minimum force, to minimise damage, to protect uninvolved persons and not to cause damage that outweighs the benefits of the law enforcement operation must be reflected in the internal regulations and procedures.

In relation to the use of force and firearms, this means, for instance, to clearly require from law enforcement officials the utmost care for the right to life. Policies should not require law enforcement officials to achieve their objective at *all* costs. Law enforcement officials must be required to refrain from any action that would cause disproportionate harm. This is particularly relevant for the use of firearms. Being designed to kill, their use must always be considered as—at least—potentially lethal and therefore only be allowed to avert a threat of death or serious injury.[12]

Basic Principle 9:
'Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.'

Policing regulations must be unequivocal in that regard. Where operational regulations do not clearly reflect this principle or, even worse, are formulated in violation of this principle, any deprivation of life resulting from such regulations must be considered an arbitrary deprivation and therefore a violation of the right to life. The command leadership must be aware of their responsibility to prevent such arbitrary deprivation of life from occurring and must be held accountable if they do not assume this responsibility.

[12]Special Rapporteur on extrajudicial executions, UN Doc. A/HRC/26/36 (2014), para. 70.

5.3.2 Equipment

Basic Principle 2:
'Governments and law enforcement agencies should develop *a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms*. These should include the *development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury* to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.'

Basic Principle 3:
'The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to *minimize the risk of endangering uninvolved persons*, and the use of such weapons should be carefully controlled' *[emphases added]*.

It is the responsibility of the command leadership to ensure that law enforcement officials have the appropriate equipment to carry out their tasks. This refers to the necessary protective equipment, as well as to weapons and other types of equipment.

Protective equipment is indispensable to ensure the safety of the law enforcement officials deployed on the streets. It is part of the obligation of the law enforcement agency to protect the life and safety of its members. And it is also an important element to minimise harm and injury among those affected by police action, given that law enforcement officials who feel sufficiently protected will feel less compelled to use force for the purpose of self-defence. When a person is injured or killed in a law enforcement operation—whether it is the law enforcement official himself/herself because of being insufficiently protected or another person because the law enforcement official felt compelled to defend himself/herself with force due to lack of protection—this engages the immediate responsibility of commanding or superior officers for having failed to protect the life and security of that person.

Law enforcement officials are required to show restraint in the use of force and not to use more force than necessary to achieve their objective. In this regard, it is indispensable that they are provided with a range of means that allow them to adapt the degree of force to the concrete situation, so as to cause minimum harm:

- When law enforcement officials are only provided with a firearm, they are very likely to use it even if a situation does not amount to a threat of death or serious injury.
- The equipment and weapons provided must have been carefully assessed and tested in order to ensure that they do not cause excessive or uncontrollable harm.[13] For instance, equipment that is highly inaccurate or that causes more harm than necessary should not be deployed.

It is thus the duty of the command leadership of a law enforcement agency to make sure that their officials are provided with equipment that meets the requirements of international human rights law. Where failure to do so results in death or injury, this must be considered a violation of the right to life and security of person and engage the responsibility of the command leadership.

Güleç v. Turkey (Application no. 21593/93), European Court of Human Rights (1998)

'71. The Court, like the Commission, accepts that the use of force may be justified in the present case under paragraph 2 (c) of Article 2 [of the European Convention of Human Rights], but it goes without saying that a balance must be struck between the aim pursued and the means employed to achieve it. The gendarmes used a very powerful weapon because they apparently did not have truncheons, riot shields, water cannon, rubber bullets or tear gas. The lack of such equipment is all the more incomprehensible and unacceptable because the province of Şirnak, as the Government pointed out, is in a region in which a state of emergency has been declared, where at the material time disorder could have been expected.

[. . .]

73. In conclusion, the Court considers that in the circumstances of the case the force used to disperse the demonstrators, which caused the death of Ahmet Güleç, was not absolutely necessary within the meaning of Article 2.'

[13]For more details on the development, testing, deployment and evaluation of less-lethal weapons, see: Amnesty International and Omega Research Foundation (2015); as well as *AINL Guidelines*, chapter 6.

5.3.3 Training

Basic Principle 19:
'Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.'

Law enforcement work is a particularly challenging task. It requires highly skilled personnel to ensure appropriate responses to the large variety of often dangerous and stressful situations. It is the responsibility of the command leadership to provide all officials with training that appropriately addresses the difficulties and challenges they will face in their daily work. This includes the following:[14]

- physical training,
- proficiency in the use of the equipment they are provided with,
- communication skills,
- risk assessment and decision-making,
- mental training and stress management,
- first aid training.

Training must be practical based on realistic scenarios of situations that law enforcement officials may face in practice. Classroom teaching or training in the use of weapons and equipment in ideal settings without stress or other challenging circumstances (e.g., simple targeting exercises at the shooting range) is clearly insufficient in that regard. The command leadership must be aware that officials who feel insecure; who are not able to effectively communicate, including with dangerous individuals; or who are not proficient in the use of equipment; can act in a way that worsens a situation rather than solving it. They may thus present a danger to themselves or to those with whom they interact. Commanding and superior officers must take all measures—including through regular refresher trainings and coaching—to prevent such risks from materialising, and failure to do so must engage their responsibility.

For instance, they must be held accountable when deploying highly inexperienced officers to complex and/or dangerous policing operations involving serious risks for the safety of these officers and of anybody else or when providing law enforcement officials with firearms or other weapons likely to cause death or injury without ensuring they are properly trained and certified for the use of that weapon, in particular if that leads to death or serious injury—whether of the law enforcement official or any other person.

[14]For more details on training see: *AINL Guidelines*, section 9.2.

Caracazo v. Venezuela (Series C No. 95), Inter-American Court of Human Rights (2002)
'127. [. . .] The State must adopt all necessary provision [. . .] and specifically those for education and training of all members of its armed forces and its security agencies on principles and provisions of human rights protection and regarding the limits to which the use of weapons by law enforcement officials is subject, even in a state of emergency. The pretext of maintenance of public security cannot be invoked to violate the right to life. The State must, also, adjust operational plans regarding public disturbances to the requirements of respect and protection of those rights, adopting to this end, among other measures, those geared toward control of actions by all members of the security forces in the very field of action to avoid excess.'

5.4 Ensuring Accountability

5.4.1 Supervision, Control and Corrective Measures

Defining an operational framework is not enough. Commanding and superior officers must ensure that this framework is respected and implemented in practice.

It is their responsibility to constantly supervise and check upon their subordinates in order to identify any shortcomings:[15] misconduct warranting disciplinary sanctions or even criminal investigations; regulations or procedures that have proven to be inadequate; problematic equipment that needs to be changed; training that needs to be improved or adapted; or officers requiring coaching or mentoring. This is just a short list of the ongoing issues to be addressed by commanding and superior officers who are (or should be) in the first line of those being able to stop and prevent any inappropriate or unlawful use of force: they should actually know what happens under their command and take corrective action, and not knowing cannot be a defence if they failed to carry out their supervisory role. For that purpose, an effective system of reporting needs to be in place, as well as other forms of supervision and control.

Basic Principle 6:
'Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.'

(continued)

[15]For more details on supervision and control see: *AINL Guidelines*, section 10.3.

Basic Principle 11:
'Rules and regulations on the use of firearms by law enforcement officials should include guidelines that: [. . .]

(f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.'

Basic Principle 22:
'Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11 (f). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.'

Basic Principle 24:
'Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.'

However, reporting is not an end in itself. Reports must be carefully evaluated by superior officers in order to assess the lawfulness and appropriateness of any use of force and to identify possible corrective measures required to be taken as a result. Only when superior officers assume this role thoroughly will they be able to prevent recurrence of unlawful or otherwise inappropriate use of force in the future and the emergence of further serious and systematic patterns of human rights violations committed by their subordinates. The disastrous effects of supervisors failing to fulfil their supervisory duties are clearly illustrated by the findings of the US Department of Justice investigation into the work and functioning of the Ferguson Police Department.

United States Department of Justice, Civil Rights Division, Investigation of the Ferguson Police Department (4 March 2015), p. 38
'FPD's use-of-force review system is particularly ineffectual. Force is frequently not reported. When it is, there is rarely any meaningful review. Supervisors do little to no investigation; either do not understand or choose not to follow FPD's use-of-force policy in analyzing officer conduct; rarely

(continued)

correct officer misconduct when they find it; and do not see the patterns of abuse that are evident when viewing these incidents in the aggregate.'

Page 825:

'Public trust has been further eroded by FPD's lack of any meaningful system for holding officers accountable when they violate law or policy. Through its system for taking, investigating, and responding to misconduct complaints, a police department has the opportunity to demonstrate that officer misconduct is unacceptable and unrepresentative of how the law enforcement agency values and treats its constituents. In this way, a police department's internal affairs process provides an opportunity for the department to restore trust and affirm its legitimacy. Similarly, misconduct investigations allow law enforcement the opportunity to provide community members who have been mistreated a constructive, effective way to voice their complaints. And, of course, effective internal affairs processes can be a critical part of correcting officer behavior, and improving police training and policies.

Ferguson's internal affairs system fails to respond meaningfully to complaints of officer misconduct. It does not serve as a mechanism to restore community members' trust in law enforcement, or correct officer behavior. Instead, it serves to contrast FPD's tolerance for officer misconduct against the Department's aggressive enforcement of even minor municipal infractions, lending credence to a sentiment that we heard often from Ferguson residents: that a "different set of rules" applies to Ferguson's police than to its African-American residents, and that making a complaint about officer misconduct is futile.'

5.4.2 Effective Investigations

Unlawful use of force, in particular where it has led to death or injury, must be properly investigated. Still, all too often, a false understanding of loyalty towards the agency or towards subordinates leads to superior officers backing their subordinates, not allowing or hampering an independent and impartial investigation to be properly conducted and concluded.

On 26 April 2016, a jury in the United Kingdom concluded that 96 people who died at the Hillsborough football stadium in Sheffield in 1989 were unlawfully killed as a result of various failings by police and the ambulance services.

(continued)

The tragedy on its own was already terrible enough. However, what was then even more shocking is that it took 27 years to uncover the truth why 96 lives were lost. This could only happen because for years the police service concerned denied its responsibility and sought to blame allegedly drunken, unruly and violent football supporters for what happened. The jury's ruling clearly confirmed that supporters were not at all to be blamed for the tragedy, which was a result of failures in crowd control by the police.

One day after the ruling, the current chief of the police service was suspended, holding him accountable for having over the years allowed this cover-up to happen. [16]

While not linked to issues of the use of force, this case illustrates tendencies that may prevail within a law enforcement agency not to allow any failures to be identified, as well as the serious consequences that this has in terms of impunity, victims' suffering and loss of public confidence and trust.

A culture of impunity is a major cause of human rights violations being committed. When superiors do not ensure that their subordinates are held accountable for unlawful use of force, this not only contributes to impunity but, worse, sends a message to subordinates that their superiors at least do not care about unlawful conduct or—even worse—tacitly endorse or even expect such behaviour. Only when superiors take firm action to ensure that law enforcement officials who have resorted to unlawful use of force are held accountable for such behaviour can they prevent a climate of impunity in which law enforcement officials will place themselves above the law.

It is precisely for this reason that the UN Human Rights Committee has clearly established that a failure to effectively investigate violations of rights under the International Covenant on Civil and Political Rights amounts in itself to a violation of the right,[17] i.e. the right to life in the case of an unlawful killing. The European Court of Human Rights has made similar rulings, for instance in the following case.

Makaratzis v. Greece (Application no. 50385/99), European Court of Human Rights (2004):

'73. The obligation to protect the right to life under Article 2 of the [European] Convention [of Human Rights], read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires

(continued)

[16]For more details see for instance: https://www.theguardian.com/football/2016/apr/27/south-yorkshire-police-chief-suspended-over-hillsborough-verdict.

[17]Human Rights Committee (2004), General Comment 31, para. 18.

by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.

[. . .]

78. Having regard to the above considerations, the Court concludes that the authorities failed to carry out an effective investigation into the incident. The incomplete and inadequate character of the investigation is highlighted by the fact that, even before the Court, the Government were unable to identify all the officers who were involved in the shooting and wounding of the applicant.

79. There has accordingly been a violation of Article 2 of the Convention in that respect.'

5.5 Conclusions

The key to ensure human-rights-compliant policing in general and a use of force and firearms that is lawful and respectful of the right to life, security of person and human dignity lies in the hands of the commanding and superior officers of a law enforcement agency.

Commanding and superior officers have the responsibility and the duty to

- only give lawful and human rights compliant orders;
- carry out thorough planning and preparation of law enforcement operations with due care for the lives and well-being of *all* persons involved;
- provide for a human-rights-compliant operational framework in terms of policies and procedures, equipment available and thorough training;
- exercise due supervision and control;
- ensure full accountability of any subordinate who may have resorted to unlawful use of force.

On the other hand, direct personal responsibility and accountability of commanding and supervising officers must be engaged and established in domestic laws and regulations for

- any unlawful order given;
- omissions of orders to prevent unlawful use of force;
- insufficient planning, preparation and precautions that lead to injury or loss of life;
- any failure to establish an operational framework that ensures that force and firearms are only used in strict respect for human rights law and standards;
- any failure to exercise sufficient control and supervision;
- any failure to ensure that unlawful use of force and firearms is properly investigated, with corrective measures taken, and officers responsible being held accountable for their behaviour.

Appendix

Amnesty International—Use of Force: Guidelines for implementation of the UN Basic Principles for the Use of Force and Firearms by Law Enforcement Officials—extract on command responsibility[18]

Guideline 3: Domestic legislation must ensure full and transparent accountability of law enforcement officials for the use of force and firearms.

(a) Law enforcement officials must not be exempted from criminal liability for unlawful acts committed in the course of duty.
(b) Law enforcement officials must be entitled to refuse orders that are clearly unlawful and must be held accountable for knowingly executing unlawful orders. Such orders may not serve as an acceptable defence.
(c) Criminal investigations must seek to evaluate the responsibility under criminal law of the acting law enforcement officials for any unlawful behaviour, the responsibility of colleagues who witnessed an unlawful act but did not take steps to prevent it, and the responsibility of commanding and superior officers who may have given an unlawful order or have failed to prevent the unlawful use of force.
(d) Commanding and superior officers must be held accountable not only for unlawful orders they have given, but also for failings and other omissions in their superior and command responsibility which resulted in death or serious injury. In particular, they should be held liable when they knew or ought to have known that the law enforcement officials under their control and command committed unlawful acts and when they have failed to prevent them from doing so. They should also incur liability when they have failed to undertake measures of bringing those law enforcement officials before competent authorities for investigation.

Guideline 4: The command leadership of law enforcement agencies must create an operational framework that contains instructions for various kinds of situations that law enforcement officials may face during their work, including decision making criteria and the conditions for the use of force.

Guideline 5: Law enforcement agencies must provide an operational framework that provides clear instructions on when and how to use a firearm.

Guideline 6: Law enforcement agencies should have a range of less lethal equipment at their disposal that allows for a differentiated use of force in full respect of the principles of necessity and proportionality, and ensures that harm and injury are kept to the minimum.

Guideline 9: Law enforcement agencies must ensure that their personnel are able to meet the high professional standards established in the Basic Principles.

[18]The detailed Guidelines with explanatory text can be accessed at: https://www.amnesty.nl/sites/default/files/public/ainl_guidelines_use_of_force_0.pdf.

Guideline 10: The command leadership and all other senior officers or supervisors must be held accountable for ensuring that the agency and its members fulfil their law enforcement duties and responsibilities in compliance with the law, including human rights law, and in an effective and professional manner.

(a) There must be a functioning and transparent system of command responsibility and command accountability and a pre-established chain of command with clearly assigned responsibilities. All decisions taken should be traceable and those who have taken them must be held accountable for them.
(b) A pre-established supervision and reporting system within the law enforcement agency must allow for the assessment of the compliance of law enforcement officials with the law and internal regulations, as well as of their professional skills, competency and effectiveness. Superiors are responsible for correctly and appropriately supervising their subordinates.
(c) Internal supervision and investigation should serve to assess the need for corrective measures (revision of procedures, equipment, training), the situation of the acting law enforcement officials (need for coaching, training, psychological support etc.), any failures in command responsibility and the need for disciplinary actions in case of any use of force that was in disrespect of the operational framework.
(d) A detailed reporting system that allows for the evaluation of the lawfulness and appropriateness of the use of force needs to be in place, and should include reports by colleagues who may have witnessed the use of force. Obligatory reporting should be established not only for situations in which a firearm was discharged or in which death or serious injury occurred, but for *all* situations in which law enforcement officials have resorted to the use of force. Law enforcement officials who report on unlawful use of force by colleagues or on an unlawful order by their superiors must be protected against any retribution or other negative consequences.

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Chapter 6
Effective Investigation of Alleged Police Human Rights Abuse: Combating Impunity

Graham Smith

Contents

Abstract Human rights have a procedural side. If there is a complaint, or suspicion, that the police have abused their powers, human rights require such cases to be investigated effectively. This requirement has been developed by international human rights bodies during the last decades, in particular in the case law of the European Court of Human Rights on the right to life and the prohibition of torture. This chapter describes the conditions of an 'effective' investigation, including the role of independent police complaint bodies in avoiding impunity for human rights violations.

6.1 Introduction

Impunity is not a modern phenomenon. It is axiomatic of autocratic rule and in recent years has been targeted as an obstacle to democracy, the rule of law and human rights. As well as a high risk of impunity for human rights abuse in

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transitional states, it is an ever-present risk in stable democratic societies, particularly the impunity of law enforcement officers whose membership of agencies that control the criminal process places them in the privileged position of being able to escape having to account for their conduct—solely at their own design or with the collusion of other public officials. Consider recent developments in the United States of America, for example. Firstly, international concern has been expressed with the inaction of officialdom after acknowledgement by the Senate Select Committee on Intelligence[1] that the Central Intelligence Agency's secret detentions and interrogation programme involved unlawful acts that were in breach of the United States of America's treaty obligations.[2] Secondly, there has been civil society opposition to the culture of impunity associated with fatal shootings of unarmed African American citizens by police.[3]

Across Europe, the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR), which sits in Strasbourg, France, set out the obligations of the 47 member states of the Council of Europe to protect the human rights of individuals for which they have jurisdiction. The right to life and prohibition of torture and inhuman or degrading treatment or punishment are protected under Articles 2 and 3 of the ECHR. In the course of the last quarter century or so, the positive obligation to investigate and punish serious human rights violations, which requires that states meet their procedural duty to protect substantive human rights, has become firmly established. Starting with the landmark judgment of *Velásquez Rodriguez* v *Honduras,*[4] international human rights courts, the Inter-American Court of Human Rights and ECtHR have laid down effective investigation requirements: variously referred to as 'standards', 'parameters', 'principles' and 'criteria'.

Protection of human rights presumes the existence of a regulatory framework, including legislation, regulations and institutional capacity, which puts into practical effect the principles established in the jurisprudence of the international courts. A raft of international instruments,[5] monitoring bodies[6] and state-funded and

[1]Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (2014) Findings and Conclusions and Executive Summary. Senate Select Committee on Intelligence, https://web.archive.org/web/20141209165504/http:/www.intelligence.senate.gov/study2014/sscistudy1.pdf.

[2]See Amnesty International (2015).

[3]See Harris (2015), Armstrong (2016).

[4]*Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

[5]For example, Council of Europe ETS No. 126, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf/C (2002) 1 [EN]; UN General Assembly, Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 9 January 2003, A/RES/57/199; UN Office of the High Commissioner for Human Rights (OHCHR), Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Istanbul Protocol'), 2004, HR/P/PT/8/Rev.1.

[6]For example, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), www.cpt.coe.int; Subcommittee on Prevention of Torture and

voluntary agencies[7] have issued guidance on how standards should be complied with. Cross-cutting developments in law and policy of this type have contributed to a burgeoning international discourse on impunity for human rights abuse, a discourse that prioritises the importance of investigation and criminal prosecution as a means of bringing offenders to justice[8] and points to the central part played by police officers as 'human rights protectors'.[9]

The role of the police in combating impunity is pivotal because the coercive powers available to the police to enforce the law render officers prone to violate human rights and because their duty to investigate crime, either on their own authority or at the direction of a prosecutor or magistrate, serves to protect human rights. Fundamentally, impunity is a law enforcement problem, and the police are vulnerable to allegations that they have negatively violated human rights, on the one hand, or failed to positively protect human rights, on the other. Under these circumstances, police investigation of police inevitably leaves the police open to the accusation that a culture of impunity protects officers from the rule of law.

Since the mid-twentieth century, an international reform trend has been observable in the expansion of non-police bodies with responsibilities for investigating police complaints and misconduct. In this chapter, emphasis is given to the necessity of independent investigation of police officers, and the potential contribution of independent police complaints bodies (IPCBs), to combating impunity. An IPCB is understood to mean an organisation that is structurally separate from the police, in respect of operations and governance, which has statutory authority and powers in regard to the investigation of complaints, including allegations of human rights abuse, made against law enforcement officers and agencies.

Separated into three parts, and focussing on developments in Europe, the chapter commences with a brief introduction to the duty to investigate human rights abuse and, especially, the requirement that investigations must be independent and impartial. Attention focuses on two judgments by the Grand Chamber of the ECtHR: *Ramsahai* v *The Netherlands*[10] and *Tunç* v *Turkey*.[11] This is followed by an overview of the impunity discourse and guidance on effective investigation

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other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Brief.aspx.

[7]For example, the Organisation for Security and Cooperation in Europe (OSCE), www.osce.org, and Amnesty International, www.amnesty.org, respectively.

[8]See, for example, Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (UN Doc. E/CN.4/2005/102/Add.1): https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement; Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies: https://wcd.coe.int/ViewDoc.jsp?id=1769177.

[9]See Murdoch and Roach (2013).

[10](Application no. 52391), Judgment 15 May 2007.

[11](Application no. 24014/05), Judgment 14 April 2015. See also Kukavika and Fikfak's (2015) case comment.

requirements issued by three Council of Europe institutions—the Committee for the Prevention of Torture (CPT), Commissioner for Human Rights and the Committee of Ministers. Finally, operational and policy imperatives are identified in the effective investigation requirements and the importance that attaches to independent investigation of police.

6.2 A Short Introduction to the Duty to Investigate Allegations of Human Rights Abuse

In requiring that 'some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State',[12] the ECtHR's jurisprudence on the duty to investigate alleged violations of the right to life rapidly developed at the turn of the millennium.[13] Relying on the right to an effective remedy under Article 13 of the ECHR, the obligation to investigate was applied to the prohibition of torture the following year.[14]

In two judgments against Turkey on consecutive days in 1998,[15] the developing ECtHR jurisprudence was evident in the way in which compliance with the procedural obligation to investigate under Article 2 was associated with standards of effectiveness, independence, adequacy, thoroughness, public scrutiny and participation of the complainant in proceedings. The Court clarified that the obligation to investigate also applied to allegations against non-state perpetrators and was not dependent on a complaint being made by a member of the public; mere knowledge on the part of the authorities was sufficient to trigger the duty.[16]

A framework for effective investigation was set out in four joined Article 2 cases involving United Kingdom security forces in Northern Ireland in 2001, and a range of procedural shortcomings were identified in separate judgments.[17] Drawing on

[12] *McCann* v *the United Kingdom* (Application no. 18984/91), Judgment 27 September 1995, para. 161.

[13] See Smith (2015a).

[14] *Aksoy* v *Turkey* (Application no. 21987/93), Judgment 18 December 1996: Article 2 jurisprudence on effective investigation was applied to Article 3 in *Assenov* v *Bulgaria* (Application no. 24760/94), Judgment 28 October 1998.

[15] *Ergi* v *Turkey* (Application no. 23818/94), Judgment 28 July 1998; *Güleç* v *Turkey* (Application no. 1593/93), Judgment 27 July 1998.

[16] *Ergi* v *Turkey* (Application no. 23818/94), Judgment 28 July 1998. The obligation to investigate allegations against non-state actors was applied to Article 3 in *Assenov* v *Bulgaria* (Application no. 24760/94), Judgment 28 October 1998.

[17] *Jordan* v *The United Kingdom* (Application no. 24746/94); *McKerr v. the United Kingdom* (Application no. 28883/95); *Kelly and Others v. the United Kingdom, (Application* no. 30054/96); and *Shanaghan v. the United Kingdom* (Application no. 37715/97): all judgments 4 May 2001.

the effectiveness standards introduced in cases against Turkey, five requirements were elaborated,[18] and in regard to independence the Court spelled out:

> [I]t may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events... This means not only a lack of hierarchical or institutional connection but also a practical independence.[19]

In the mid-2000s, an additional duty was introduced to thoroughly investigate allegations of discrimination (contrary to Article 14 of the ECHR),[20] before the Grand Chamber further clarified adequacy and independence as standards of effectiveness in the 2007 case of *Ramsahai* v *The Netherlands*.[21] Adequacy was explained in the already established requirement that an investigation must be capable of identifying and punishing those found responsible for a violation, of the right to life in the instant case, which is an obligation of means and not result.[22] Referring to the jurisprudence introduced in the four United Kingdom cases cited above, the Court explained the rationale for the independence standard in terms: 'What is at stake here is nothing less than public confidence in the state's monopoly on the use of force.'[23]

The Court found that there had been a violation of the procedural obligation to effectively investigate a fatal police shooting as the result of failure to meet both the adequacy and independence standards. Adequacy of the investigation was impaired as a result of operational failures, including flawed forensic examinations and arrangements for interviewing police officers.[24] Independence was tainted because the investigation was initially conducted by colleagues of the officers responsible, and it was 15 and a half hours before an independent body took charge.[25] In separating out the adequacy and independence requirements, and finding that there had been a failure to meet both, the Court established independence as a free-standing effective investigation standard.

In the 2015 case of *Tunç v Turkey*,[26] the Grand Chamber rowed back from the Ramsahai decision and determined that independence is to be evaluated in the broader context of effectiveness.[27] The ECtHR granted the request of the

[18] See, for example, *Jordan* v *The United Kingdom* (Application no. 24746/94), Judgment 4 May 2001, paras 102–109.

[19] *Jordan* v *The United Kingdom* (Application no. 24746/94), Judgment 4 May 2001, para. 106.

[20] *Nachova & Others* v *Bulgaria* (Application nos. 43577/98 & 43579/98), Judgment 6 July 2005.

[21] (Application no. 52391), Judgment 15 May 2007.

[22] *Ramsahai v The Netherlands* (Application no. 52391/99), Judgment 15 May 2007, para. 324.

[23] *Ramsahai v The Netherlands* (Application no. 52391/99), Judgment 15 May 2007, para. 325.

[24] *Ramsahai v The Netherlands* (Application no. 52391/99), Judgment 15 May 2007, paras. 326–332: by a majority decision of sixteen votes to one.

[25] *Ramsahai v The Netherlands* (Application no. 52391/99), Judgment 15 May 2007, para. 333–341.

[26] (Application no. 24014/05), Judgment 14 April 2015. See also Kukavika and Fikfak's (2015) case comment.

[27] *Tunç* v *Turkey* (Application no. 24014/05), Judgment 14 April 2015, paras. 223–225: by a majority decision of twelve votes to five.

government of Turkey to refer to the Grand Chamber the decision of the Second Section Chamber that there had been a violation of the procedural limb of Article 2 solely on the ground that the investigation into the death of a conscript soldier lacked independence.[28] The Court determined that a concrete examination of independence rather than an abstract assessment is required, and independence does not have to be absolute. The persons and bodies responsible for the investigation must be sufficiently independent of the persons and structures that may be subject to investigation, and where impartiality and independence are an issue there must be a stricter scrutiny:

> [C]ompliance with the procedural requirement of Article 2 is assessed on the basis of several essential parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation. These elements are inter-related and each of them, taken separately, does not amount to an end in itself . . . They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues, including that of independence, must be assessed.[29]

The Court found that although the parties involved in the investigation into the death of the soldier, and review proceedings, did not enjoy full statutory independence, there was an absence of direct hierarchical, institutional or other ties with the potential suspect, and as the conduct of investigators did not reflect a lack of independence in the handling of the investigation, the investigation was sufficiently independent to meet the procedural requirements of Article 2.[30] Affirming the decision of the Chamber that the investigation met the adequacy, promptness and victim involvement requirements,[31] the Court concluded that there had been no violation of the procedural obligation to protect the right to life.

Whereas in *Ramsahai* the Grand Chamber used the language of standards in establishing independence as a requisite of effectiveness, the language of parameters and criteria adopted in *Tunç* is less prescriptive in allowing for effectiveness to be determined according to assessment of other factors. In sum, the *Tunç* judgment represents a retreat from a requirement that applied for close to eight years. Namely, that an investigation into an alleged violation of Article 2 must be carried out by investigators that are institutionally and hierarchically separate to potential violators, and similarly independent management and direction arrangements must be in place.

The ECHR effective investigation requirements, especially the significance of the *Ramsahai* judgment to policy development, will be referred to further below, as will *Tunç* in the discussion on operational and policy imperatives.

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[28] *Tunç* v *Turkey* (Application no. 24014/05), Judgment 25 June 2013, para. 138.

[29] *Tunç* v *Turkey* (Application no. 24014/05), Judgment 14 April 2015, para. 225.

[30] *Tunç* v *Turkey* (Application no. 24014/05), Judgment 14 April 2015, para. 254.

[31] *Tunç* v *Turkey* (Application no. 24014/05), Judgment 14 April 2015, paras. 209 and 216, respectively.

6.3 Combating Impunity

The early ECHR case law on effective investigation coincided with an emerging international discourse on impunity. In 1991, UN Special Rapporteur Louis Joinet was tasked with studying the impunity of perpetrators of human rights violations by the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights (UNCHR). Reporting in 1997,[32] Joinet observed that the need to combat impunity was recognised by the international community at the culmination of a series of stages of civil society opposition to human rights abuse. In the 1970s, there were amnesty campaigns, focussed particularly on dictatorial regimes in Latin American countries, for political prisoners. These were followed in the 1980s by opposition to the introduction of amnesty laws by unpopular and discredited political leaders in an attempt to ensure impunity for the crimes that they had committed prior to their loss of power. Then, following the end of the cold war, peace agreements and democratisation programmes were characterised by conflict between attempts by members of former regimes to forget the past, on the one hand, and demands raised by victims for justice, on the other. Eventually, the need to combat impunity was realised in the jurisprudence of the Inter-American Court of Human Rights (*Velasquez Rodriguez Case*[33]) and at the 1993 World Conference of Human Rights.[34]

Joinet found that there was a pressing need to combat impunity, and the UNCHR adopted principles he drafted under four headings—the right to know, to justice and to reparations and guarantees of non-recurrence.[35] In reaching his conclusion, Joinet relied on a functional definition that emphasised that impunity serves to protect perpetrators of human rights violations from being held to account:

> 'Impunity' means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[36]

There is more to impunity than exemption from punishment. In the same way that terrorism may not be entirely understood in terms of the harm suffered by an innocent victim of an atrocity, impunity may not be understood solely as the

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[32] *Revised final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political)*, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 1 (2 October 1997). http://www.derechos.org/nizkor/impu/joinet2.html.

[33] Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

[34] *Vienna Declaration and Program of Action*: UN Doc. A/Conf,157/24. Part II. para.91.

[35] *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, annex II).

[36] *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, annex II) p14.

protection from justice of a criminal who violated the human rights of another individual. The specific purpose of impunity may be to protect the perpetrator of a wrong from being brought to account. There are also general purposes, including the signalling to a wider population that they are collectively powerless to challenge the authority and power of the group of which the perpetrator is a member. In their study of impunity in Guatemala in the 1980s, McSherry and Molina Meja[37] distinguished three dimensions: *structural*, relating to the institutionalised and legalised mechanisms of impunity; *strategic*, referring to official measures adopted in response to demands for truth and justice and declarations of support for security forces criticised for human rights violations; and *political/psychological*, explaining the use of impunity to terrorise the population from challenging the status quo.

Chilean psychiatrist and co-ordinator of the mental health team of the Committee of the Defence of People's Rights Dr Paz Rojas Baeza recorded the harmful effects of impunity on victims and survivors of the Pinochet regime of 1973 to 1990 and, then, during the early transition to democracy.[38] Baeza writes of impunity as a crime of aggression that conceals crime that is not fully revealed and goes unpunished. For the victim of impunity, there is dual victimisation, caused by the initial crime and, then, its concealment, which is timeless and results in specific harms:

> During the therapy process, we realized from what people told us that the external world is profoundly altered by the existence of impunity. The surrounding world becomes false and alien as well as threatening. The parameters of reality are altered and distorted by concealment and deceit.
>
> Impunity falsifies the 'material' which knowledge assimilates, analyses and synthesises. Consequently, without truth it is impossible to construct a stable inner world. On the contrary, the whole of life is invaded by doubt and distrust. It unleashes disruptive dynamics, traced to the disequilibrium and bewilderment produced by impunity. *The realm of subjectivity disintegrates, human relations become perverted and permeated by fear*.
>
> With impunity, knowing becomes confused, submerged, hidden, and uncertain. Attacks against life remain unexplained for ever. This creates fear, anxiety and guilt, which elicit abnormal responses and behaviour. *Uncertainty enters the psyche* (Emphases in the original.)[39]

The psychological disorders Baeza wrote of were as a consequence of torture, killing and forced disappearance, and they persisted after the fall of the Pinochet regime. In regard to impunity in the transition to democracy, she found that it was 'experienced even more dramatically' when approved and permitted by different

[37]McSherry and Molina Mejia (1992); see also Afflitto (2000), Penrose (1999).

[38]See Rojas Baez (1996, 2000).

[39]Rojas Baez (1996), p. 85.

branches of the state at different degrees of involvement than when it resided in tyrannical power.[40]

Joinet's *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*,[41] updated by Professor Diane Orentlicher in 2005,[42] required states to remedy impunity where it was found to have existed and, in doing so, offer protection against its recurrence. Thus, the victim's right to know is a collective right. It carries with it a duty on the state to make arrangements for understanding what happened in the past, through an extrajudicial inquiry like a truth and reconciliation commission. As part of the process of knowing, there is an additional burden on the state to facilitate remembrance of past excesses by way of publication of commission findings and maintenance of historical archives. The principles relating to the right to justice place the onus on the state to punish perpetrators of human rights abuses and crimes against humanity, including provision for the involvement of victims in proceedings.[43] The right to reparation, as well as requiring states provide individual victims with access to remedies, including restitution, compensation and rehabilitation, also requires state recognition of the collective harm that impunity causes to their communities. There is some overlap between collective reparation and the need to protect against impunity reoccurring, and principles relating to the right to reparation and guarantees of non-recurrence were incorporated under one heading in the updated 2005 Principles.[44] Institutional reform is anticipated under this final head of principles, including, *inter alia*, repeal of laws that interfere with the rule of law, reform of institutions found responsible for impunity and introduction of effective complaint procedures.

The CPT contributed to the developing knowledge of impunity in a practical way when including a 'Combating Impunity' section in their General Report of 2004, by which time the ECtHR effective investigation jurisprudence was firmly established.[45] Along with other substantive issues relevant to the prevention of torture and ill-treatment, the section has been regularly reproduced as part of the *CPT Standards*.[46] Available in 37 languages, the standards serve as a guide to how

[40]On this point, Cherif Bassiouni (2000) ascribed impunity to the conflicting goals of realpolitik and justice, and described it as a consequence of the search for compromise between political settlement and legal accountability.

[41]*Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, annex II).

[42]*Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (UN Doc. E/CN.4/2005/102/Add.1): https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement.

[43]Buttressed by the Rome Statute of the International Criminal Court, and access to justice in the event of failure by a state to meet international humanitarian law duties.

[44]*Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (UN Doc. E/CN.4/2005/102/Add.1).

[45]CPT, 2004, *14th General Report on the CPT's activities covering the period 1 August 2003 to 31 July 2004*: CPT/Inf (2004) 28.

[46]See, for example, CPT/Inf/E (2002) 1 - Rev. 2015.

persons deprived of their liberty should be treated and help national authorities prepare for CPT monitoring visits. With a remit to prevent torture or inhuman or degrading treatment or punishment,[47] the *CPT standards* expressly address the risk of impunity of state officials and the duties of the authorities that have responsibility for bringing state officials to justice. Acknowledging that it is not uncommon for separate agencies to share responsibility for criminal investigation, particularly in states where the prosecutor manages and directs investigations conducted by police officers, the CPT favours completely independent investigation of public officials: 'Ideally, those entrusted with the operational conduct of the investigation should be completely independent from the agency implicated.'[48] For an investigation into possible ill-treatment to be effective, in addition to being independent, the CPT set out that it must be thorough, comprehensive, promptly and expeditiously conducted, subject to public scrutiny, and the victim must be involved.

The year after the *Ramsahai* judgment established independence as a stand-alone effective investigation standard, the Council of Europe Commissioner for Human Rights organised an expert workshop on independent and effective police complaints mechanisms,[49] at which five IPCBs, from the United Kingdom (Northern Ireland and England and Wales), Ireland, Hungary and Belgium, were represented. The principal output of the workshop was the *Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints Against the Police* (Commissioner's *Complaints Opinion*).[50] The Commissioner offered guidance on ECHR effective investigation principles, which were commensurate with the CPT's standards, and promoted the pivotal role of an IPCB with investigation powers as the best means for ensuring compliance. In the following 2 years, the Commissioner's *Complaints Opinion* was favourably cited by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, who recommended the introduction of IPCBs with investigation powers,[51] and the United Nations Office on Drugs and Crime.[52]

[47]European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: CPT/Inf/C (2002) 1 [EN].

[48]*CPT Standards*. CPT/Inf/E (2002) 1 - Rev. 2015, p. 105.

[49]Expert Workshop 'Police complaints mechanisms: ensuring independence and effectiveness' Strasbourg, 26-27 May 2008, Report, Council of Europe CommDH(2008)16.

[50]Council of Europe, CommDH(2009)4, https://wcd.coe.int/ViewDoc.jsp?p=&id=1417857&direct=true, see Smith (2010). In the same year guidelines on effective investigation standards were published as part of a 'Combating ill-treatment and impunity' joint programme of the European Commission and the Council of Europe, which focussed on police and law enforcement activities in five Council of Europe member states – Armenia, Azerbaijan, Georgia, Moldova and Ukraine: see Svanidze (2009).

[51]See Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Addendum Study on police oversight mechanisms: UN A/HRC/14/24/Add.8, published 28 May 2010.

[52]See *Handbook on police oversight, accountability and integrity*, UNODC, Vienna, 2011.

Like the *CPT Standards*, the scope of the Commissioner's *Complaints Opinion* was limited to a specific domain of impunity and stressed the necessity for independent and effective investigation of police officers alleged to have negatively violated the right to life or prohibition of torture.

The scope of the more recent (2011) *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations* (Committee of Ministers' *Impunity Guidelines*)[53] is broader than the *CPT Standards* and the Commissioner's *Complaints Opinion* and includes the duty of the state to take positive action against non-state actors. Particular reference is made to the obligation to make statutory criminal law provisions in connection with protection of the right to life, prohibition of torture, prohibition of forced labour and slavery (Article 4 of the ECHR), aspects of the right to liberty and security (Article 5) and right to respect for private and family life (Article 8). Sections are included that recommend general preventative measures, safeguards to protect persons deprived of their liberty and on the duty to effectively investigate credible allegations of serious human rights violations.

The effective investigation requirements are, once again, set out differently in the Committee of Ministers' *Impunity Guidelines* than in the requirements detailed in the *CPT Standards* and the Commissioner's *Complaints Opinion,* and they are referred to as criteria. *Adequacy* requires that the investigation is capable of identifying and punishing perpetrators. *Thoroughness* relates to the need to comprehensively investigate all of the circumstances, including motivation and systemic failures; secure, examine and analyse all of the evidence; and assess the evidence in a thorough, consistent and objective manner. *Impartiality and independence* establishes that investigators must not be part of the same unit as the officials under investigation. *Promptness* is linked to thoroughness because, for example, delay may result in lost evidence and serves to help maintain public confidence in the rule of law and dispel perceptions of collusion in or tolerance of unlawful conduct. *Public scrutiny*, without endangering the adequacy of the investigation or the rights of interested parties, and similar to promptness, maintains public confidence and protects the integrity of the investigation. *Involvement of the victim* of abuse in the investigation, referred to elsewhere as an effective investigation principle[54] that serves to protect the legitimate interests of the victim, is addressed under a separate heading in the *Impunity Guidelines.*

To recap, informed by the Joinet Principles and international discourse, a co-ordinated Council of Europe strategy has been developed to combat impunity for human rights abuse. The *CPT Standards* introduced several requirements for effective investigation of state officials as developed in the early ECtHR jurisprudence. Shortly after the landmark *Ramsahai* judgment, the Commissioner's

[53]Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies, p. 2: https://wcd.coe.int/ViewDoc.jsp?id=1769177.

[54]The Commissioner's *Complaints Opinion*, for example, see fn. 39 above.

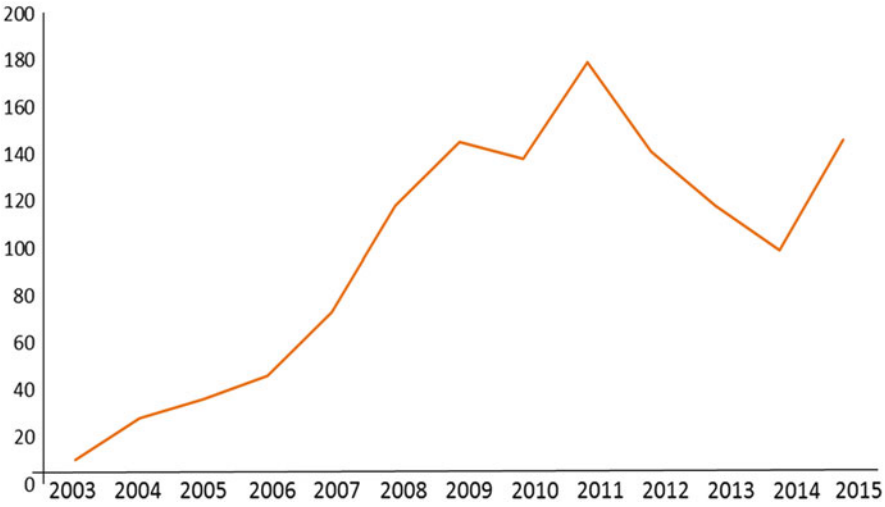

Fig. 6.1 ECHR Articles 2 and 3 lack of effective investigation violations: 2003–2015. Source: ECtHR annual reports

Complaints Opinion presented five principles of effective investigation and paid particular attention to independent investigation of the police. The Committee of Ministers' *Impunity Guidelines* comprehensively address the need to combat serious human rights abuses by state and non-state actors and set out criteria for effective investigation.

Tasked with co-ordinating the Council of Europe strategy, including liaison with the European Union and governmental and non-governmental organisations at the national and international levels, the Directorate General Human Rights and Rule of Law oversees programmes to combat impunity for human rights abuse in member states.[55] The strategy has faced many challenges, and indication of the task ahead may be found in the annual reports of the ECtHR and recent statistics on the lack of effective investigations of alleged violations of the right to life and prohibition of torture, as shown below in Fig. 6.1.

There has been a total of 1277 violations of Articles 2 and 3 for failure to conduct an effective investigation over the course of 13 years: there were 10 violations in 2003 and an increase of just over 300% in the three years between 2007, the year of the *Ramsahai* decision, and 2009, the year the Commissioner's *Complaints Opinion* was published. The peak in violations to date, 179, coincided with the publication of the Committee of Ministers' *Impunity Guidelines*, and it remains to be seen whether the upturn in 2015 is a temporary interruption to the more recent downward trend. Of the total, 80.9% involved violations by four Council of Europe member states: Russia ($n = 437$), Turkey ($n = 356$), Ukraine ($n = 106$) and Romania ($n = 94$).

[55]See Svanidze (2009), Smith (2015a).

The ECtHR statistics do not fully reflect the extent of the challenges ahead.[56] They are limited to violations of Articles 2 and 3 and do not include other human rights abuses that require investigation. Clearly they represent the tip of a very large iceberg in so far that many allegations go unreported, and of those reported very few reach the ECtHR. Further, as intimated by Joinet, as well as the need to tackle impunity *de jure* and impunity *de facto*, more elusive problems associated with cultures of impunity also have to be wrestled with. In her 2004 report on the Joinet Principles, Orentlicher asserted that 'an effective programme for combating impunity requires a comprehensive strategy, comprising mutually reinforcing measures' with civil society playing a central role.[57]

6.4 Operational and Policy Imperatives of Effective Investigation

Whether a state or non-state actor evades accountability for the wrongs they have committed, impunity *de facto* essentially relates to problems associated with ensuring that public officials responsible for the criminal process, and disciplinary proceedings in cases where the evidence points to individual or institutional failures that do not meet the criminal threshold, lawfully perform their duties.[58] Criminal investigation, which relies on the actions of the police, sometimes under the direction of prosecutors and magistrates, represents the frontline in combating impunity.

There is more to it, or less depending on standpoint, where a culture of impunity serves to protect human rights abusers from being brought to justice. This is partly because it may never come to the attention of those responsible for the criminal process and police discipline that a human rights violation may have occurred. Victims may decline to report due to fear of reprisals or in the belief that justice will not be achieved, for example: both of which display a lack of confidence on the part of victims in the procedures for protecting human rights.[59] Understanding on the

[56]Further evidence on the difficulties faced is to be found in the annual reports of the Department for the Execution of Judgments of the European Court of Human Rights (http://www.coe.int/en/web/execution/home).

[57]Orentlicher reported favourably on the effectiveness of the Joinet Principles and recommended their updating: *Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to perform all aspects of impunity, by Professor Diane Orentlicher*: UN Doc. E/CN.4/2004/88: p. 2. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/113/55/PDF/G0411355.pdf?OpenElement. Orentlicher later pointed out the importance of understanding the cultural context of impunity, see Impunity Watch (2007).

[58]Providing that there is not impunity *de jure*, in which case remedies for human rights abuse are a matter for the legislature in the first instance; see, for example, *Cestaro* v *Italy* (Application no. 68841/11), Judgment of 7 April 2015.

[59]See Smith (2009).

part of an abuser that their victim is unlikely to complain is highly constitutive of a culture of impunity.

An independent and effective police complaints system in which the public have trust and confidence is fundamental to the protection of human rights and combating impunity. The system must have the capacity to investigate both an allegation that the conduct of a police officer was i) negatively in violation of the right to life or prohibition of torture or ii) failed to positively protect human rights. This includes procedures by which an alleged failure of a police officer to record or effectively investigate a violation will be scrutinised, regardless of whether the perpetrator of the offence was a police officer, any other state official or a non-state actor. It follows that police complaints investigation represents the frontline in combating cultures of impunity.

Returning, now, to the obligation to conduct an effective investigation, six cross-cutting requirements have been identified in the ECtHR jurisprudence and guidance issued by the CPT, Commissioner for Human Rights and the Committee of Ministers—adequacy, thoroughness, independence and impartiality, promptness, public scrutiny and victim involvement. Plainly, there is much overlap, and regarding them as discrete standards should be guarded against. Take the need to objectively analyse evidence for example. In the Committee of Ministers' *Impunity Guidelines*, objectivity is included under the criterion of thoroughness and referred to in the *Tunç* judgment as contributing to the adequacy[60] and thoroughness[61] of an investigation. Yet objectivity is essential to the exercise of independent and impartial judgment[62] and is relevant to the determination of whether or not an investigation has been handled in an independent and impartial manner, one of the two limbs of independence considered in *Tunç*.[63]

Operational and policy imperatives are evident in the ECtHR jurisprudence on effective investigation. The imperatives are apparent in the *Ramsahai* decree that confidence in the police is contingent on independent and impartial investigation (see above),[64] and the two limbs as expounded in *Tunç*. The requirement that evidence will be objectively examined is an operational imperative, and the requirement for institutional and hierarchical separateness and practical independence is a policy imperative. In *Tunç*, the Court found that compliance with the operational imperative outweighed the policy deficit and concluded that the investigation was sufficiently independent. The importance attached to the manner in which an investigation is conducted or handled is to be welcomed for reinforcing the requirement for independence and impartiality. It should not be presumed that the exercise of objective, unbiased and impartial judgment is a corollary of institutional and hierarchical separation. Consider, for example, where an investigation

[60] *Tunç* v *Turkey* (Application no. 24014/05), Judgment 14 April 2015, para. 174.

[61] *Tunç* v *Turkey* (Application no. 24014/05), Judgment 14 April 2015, para. 175.

[62] See Smith (2009) and Savage (2013) on meanings of independence.

[63] *Tunç* v *Turkey* (Application no. 24014/05), Judgment 14 April 2015, para. 254.

[64] For an interesting discussion on complaints and police legitimacy see Torrible (2016).

is directed by an independent body of which the investigator is a member but regulatory capture has occurred[65] or there has been collusion at either the institutional or individual level.

As an overarching policy imperative, the adequacy of an investigation is measured by thoroughness, independence and impartiality, and prompt operational imperatives, and independence and impartiality, public scrutiny and victim involvement policy imperatives serve to ensure and safeguard adequacy. Where operational imperatives are not met, in institutional settings or specific cases, investigation deficits have to be addressed. If this need is recognised by the authorities—police, prosecutors, judges, inspectors that report to government ministers—an internal review and reform programme may be undertaken. Where there has been reluctance on the part of the authorities to recognise the need for change, civil society has taken up the cudgel of human rights protection, as observed by Joinet and Orentlicher, often in the support of victims of abuse.

The significance of civil society and the interests of victims, and their importance to the public interest, are protected in the ECtHR jurisprudence in the public scrutiny and victim involvement effective investigation requirements. As policy imperatives, the two requirements serve to monitor effectiveness independently of the authorities that are responsible for investigation.

Effective investigation of human rights abuse is a developing area of law and policy. By separating out operational imperatives, which pertain to the effectiveness of an investigation, and policy imperatives, which are important to institutional capacity, improves understanding of how to combat impunity. In regard to police complaints, failure by the police to adequately investigate has been and continues to be the policy rationale for the transfer of responsibility for investigation to a separate body.

The 'who polices the police?' dilemma—captured in Juvenal's conundrum 'quis custodiet ipsos custodies?'—has tormented those with responsibility for policing for many years and has been a cause of constant tension in police community relations. The crux of the problem is that police insistence on the effectiveness of internal controls has been opposed by civil society calls for non-police involvement. In the second half of the twentieth century, an international reform trend slowly took hold in the face of police resistance and IPCBs were introduced, initially in English-speaking jurisdictions, with responsibilities for managing public complaints against the police.[66] The powers of the early IPCBs were limited to reviewing internal police investigations, and since the late 1980s IPCBs in a number of jurisdictions have been created with statutory investigation powers.

Since the *Ramsahai* judgment, there has been limited progress by Council of Europe member states towards compliance with the effective investigation

[65] See Prenzler (2000), Smith (2013).

[66] See Goldsmith and Lewis (2000), Prenzler and den Heyer (2015).

requirements (see Fig. 6.1 above[67]) and a reluctance to establish IPCBs as proposed in the Commissioner's *Complaints Opinion*.[68] Many factors are responsible for the inertia, and some of the challenges are mentioned here in no order of priority. Lack of will on the part of politicians who may have called on the services of the police in the past, or anticipate having to do so in the future, or do not wish to antagonise powerful police chiefs or representative bodies.[69] Underdeveloped civil society organisations, including insufficiently independent media and non-governmental organisations, which are not taken seriously by government.[70] Limited resources for institutional and capacity building programmes required to improve regulation of law enforcement and, for example, establish new bodies, improve communication between law enforcement departments and protect against collusion.[71]

A counter-argument to calls for the introduction of IPCBs is that the police can, and do, adequately investigate the police in an independent and impartial manner.[72] This practical reality is reflected in the finding in *Tunç* that the investigation was sufficiently independent in spite of the acknowledged lack of statutory independence. Of equal importance, the finding risks diluting the policy imperative of independent investigation and may serve to undermine the effectiveness of programmes to combat impunity for human rights abuse that have been developed by national authorities and the Council of Europe.

On the positive side, the implications of *Tunç* are limited in scope in two ways. Firstly, there was no direct connection between the potential suspect, a fellow conscript soldier who was the last to see the deceased alive and the personnel whose independence was compromised as a result of their membership in an agency that was not unconnected to the parent agency of the potential suspect. This was not the case in *Ramsahai*, where colleagues of the potential suspect were responsible for the first 15 and a half hours of the investigation. Secondly, the judgment seeks to restrict the impact of the ruling on independence to investigations where suspicion does not fall on the security forces as an institution: 'as for instance in the case of deaths arising from clashes involving the use of force in demonstrations, police and military operations or in cases of violent deaths during police custody'.[73] The reasoning put forward in support of this caveat is that the potential suspect was also a conscript soldier and the suspicions against him were not related to his status as a state agent.

[67]Also evidenced in the case files and reports of the Department for the Execution of Judgments of the European Court of Human Rights: http://www.coe.int/en/web/execution/home.

[68]Only two IPCBs with investigation powers have been established in Europe, in Scotland and Denmark, since publication of the Commissioner's *Complaints Opinion*; see Smith (2015b).

[69]See Luna and Walker (2000).

[70]See Goldsmith (2005).

[71]See Prenzler and Ronken (2001).

[72]See Smith (2009).

[73]*Tunç* v *Turkey* (Application no. 24014/05), Judgment 14 April 2015, para. 255.

Although reassuring, the above two points must be weighed against negative policy implications that may place strategies to combat impunity at risk. Despite the Court's cautionary note against internal investigation of an allegation based on suspicion of abuse of power, *Tunç* signals a shift in the Strasbourg jurisprudence. On its face, the judgment arguably provides for internal investigation into acts of conscript soldiers and voluntary law enforcement officers who may enjoy similar status.[74] Further, deliberate failure to record or investigate a serious human rights abuse are also abuses of power, which was not picked up in the judgment. This oversight points to the need for a more developed understanding of how cultures of impunity protect perpetrators of human rights abuse and cause further harm to victims.

Of more general concern is that the *Tunç* judgment has interrupted the gathering international consensus on impunity, the necessity and design of strategies for combating it and the national implementation programmes that have been developed, which have, in turn contributed to a better understanding of impunity.

6.5 Conclusions

Where there is impunity, the work of Baeza and others show that a victim of human rights abuse is also a victim of the criminal justice system and suffers specific harm of a psychological nature that compounds the harm and suffering caused by the initial offence. Where there is a culture of impunity, and if not in existence is an ever-present and permanent risk, communities are victimised into submitting to the unlawful authority and power of the protected group, whether members of a state agency or a criminal gang.

It is argued that an IPCB offers the best protection against impunity. This is due to the unique position in which the police find themselves as public servants that are vulnerable to censure for abusing human rights and failing to protect them. The risk of a culture of impunity is greater where police investigate police. This may be due to the lack of public trust and confidence in the police, as well as ineffective police investigations of police, the infrequency of occasions when police offenders are brought to justice and the unlikelihood that reparation will be made to victims.

Introduction of an IPCB is not a panacea for impunity. Effective investigation of human rights abuse is a developing area of law and policy around the globe, in stable democracies as well as transitional states. IPCBs tend to be short-lived and in the pursuit of effectiveness are replaced by bodies performing additional functions, exercising additional powers and with different governance arrangements. In England and Wales, for example, at the time of writing, legislation is about to be passed by Parliament that will create a fourth IPCB, the Office for Police Conduct.

[74]On this point see the joint dissenting opinion of Judges Speilmann, Karakaş, Ziemele, López Guerra, and de Gaetano; *Tunç* v *Turkey* (Application no. 24014/05), Judgment 14 April 2015.

The first IPCB, the Police Complaints Board, commenced reviewing police investigations in 1977. It was replaced by the Police Complaints Authority in 1985, which could also supervise police investigations and lasted until 2004. After feasibility research, stakeholder consultation and many months of preparation, the Independent Police Complaints Commission was launched with powers to investigate the police in 2004.

Civil society has played an important part at every stage in a reform trajectory, which has seen the incremental development of IPCB powers over the course of 50 years. No less is true today, and civil society activism is probably the single most important factor for improving the effectiveness of investigations into human rights abuse. As understanding of impunity continues to develop, there is the prospect of more inclusive approaches to police accountability, extending beyond police departments to include consultation with community organisations and meaningful engagement with victims. If such an approach, which has the potential to harness the experiences, knowledge and expertise of victims and investigators, can be given full impression, it is suggested that it will provide for better protection against impunity.[75]

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[75]I am grateful to Neville Harris for comments on an earlier draft of this chapter. The usual caveat applies.

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Chapter 7
The Deprivation of Liberty by the Police. International Parameters and the Jurisprudence of the European Court of Human Rights

Francesc Guillén Lasierra

Contents

Abstract The deprivation of one's liberty by the police is quite a sensitive moment for the detainee because he/she loses contact with the outside world and some of his/her fundamental rights may be at risk. International law has been very aware of the need to properly regulate police procedures in order to guarantee all detainees' rights. Both at the United Nations' and at the European level, several international

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conventions were agreed on in order to establish minimum standards to protect human dignity. One of those agreed instruments, the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was approved within the framework of the Council of Europe, has been of paramount importance in this regard. First of all, its Article 5 establishes quite detailed safeguards to protect detainees' rights during the detention. Second, the Convention was accompanied by the creation of the European Court of Humans Rights, whose sentences are binding for the countries that ratified the Convention.

The Court has repeatedly dealt with the different aspects regulated in Article 5. However, the Court has never precisely defined what a detention consists of. Different factors have been taken into consideration in order to ascertain, first, whether a detention has taken place and, second, whether it has been carried out with respect to all safeguards established in the Convention. It is true, however, that the parameters established by the Court in order to determine whether a detention can be defined as fair or not may vary depending on the circumstances of the case. The Court establishes quite insistently that one of the aims of Article 5 is to prevent violations of other rights (namely the ones protected by Articles 2 and 3) and is intended to guarantee that a detention takes place within the framework of rule of law, following legal provisions, and without any sort of arbitrariness.

7.1 Introduction

Being arrested is quite a serious experience for the person experiencing the arrest. He or she goes from being free to losing his or her freedom, one of the highest goods in our liberal democracies. The arrestee loses contact to and the hypothetical support of friends, relatives or acquaintances and is confined to a restricted space where he/she is told what to do by somebody else without external eyes to witness it. Furthermore, he/she may experience some sort of violence (use of force) during the arrest and might be suffering a certain degree of psychological consequences afterwards. Consequently, it is paramount to have preestablished parameters that define how the police should proceed in order to carry out the detention uniquely using force when it is strictly necessary and with it having the minimum impact possible on the arrestee's rights while at any time respecting his/her dignity. Since the European Convention for the Protection of Human Rights and Fundamental Freedoms indistinctly uses the terms "deprivation of liberty," "arrest," and "detention," this article will also use them indistinctly. To the effects of this article, the contents of those three terms should be considered to be synonyms that describe the situation of deprivation of liberty described in Article 5 of the Convention.

International texts on human rights and their relevance to the police have defined the requirements to be respected by the police in order to keep their intervention within the limits of legitimacy and fairness. The main text of reference in Europe is Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Committee for the Prevention of Torture (from now on CPT) and the Organization for Security and Cooperation in Europe (from now

on OSCE) recommendations and reports deal, quite frequently, directly or indirectly, with the topic and have applied and further developed the contents of the European Convention. The European Code of Police Ethics (from now on ECPE), which was approved by the Council of Ministers in September 2001, has also devoted some articles for the establishment of principles that should be guiding police officer's actions when they deprive somebody of his/her freedom (Articles 54 to 58). Other international texts have further established parameters to be taken into account (some from the United Nations), but the most well known in our context are those elaborated within the framework of the Council of Europe. It is, however, true that the United Nations approved quite an exhaustive Body of Principles for the protection of all persons subjected to any form of detention or imprisonment[1] and that there are worldwide covenants, such as the International Covenant on Civil and Political Rights, that establish safeguards to impede arbitrary detention in its Article 9.[2] However, it does not have as much binding force for the countries of Europe as the European Convention has due to the existence of the European Court of Human Rights, whose findings are directly applicable in the country affected by it. Resolutions of the United Nations Human Rights Committee, for instance, do not have such a binding effect.

Most national constitutional frameworks have also endorsed those principles and, by doing so, established similar legal frameworks in Europe (due to, among other aspects, the binding character of the European Convention) concerning the deprivation of liberty by the police.

This paper will try to ascertain which those principles are. In order to do so, first of all, deprivation of liberty will be defined according to international parameters, and its subsidiary character will be analyzed. Furthermore, this article will focus on the grounds for legitimate police detention to end with the conditions required for it to take place (or, to word it differently, citizens' rights that need to be respected during detention). The main text of reference will be the European Convention, with references to the European Code of Police Ethics and some texts of the United Nations.

It is important to stress that, although the deprivation of liberty is basically regulated in Article 5 of the European Convention of Human Rights and Fundamental Freedoms, during police detention different rights recognized or declared in other Convention's articles could become relevant, which is why it is impossible to focus the discussion of police detention exclusively on Article 5. The European Court of Human Rights (from now on the "Court") takes a very straightforward approach: "Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of an individual[3] and as such its importance is paramount. Its key purpose is to prevent arbitrary

[1]Vid. General Assembly resolution 43/173 of 9 December 1988.

[2]However, the United Nations Code of conduct for Law Enforcement Officers makes no direct reference to detention.

[3]Vid., for example, its link to Articles 2 and 3 in disappearance cases such as Kurt v. Turkey, (25 May 1998, § 123), Reports of Judgments and Decisions 1998-III. Furthermore, article 34 of the

or unjustified deprivations of liberty."[4] In a similar context, the Court declares that judicial control over detentions is necessary as demanded in Article 5.4. It "serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this initial stage of a perhaps continuing deprivation of liberty following the bringing of a criminal charge."[5] Therefore, safeguards in Article 5 are thought to prevent the violation of rights declared in other articles of the Convention.

7.2 What Is Deprivation of Liberty?

There is no definition of deprivation of liberty in the text of the European Convention. The Court has not given any clear definition in its findings either but has defined the factors that can help to determine whether a deprivation of liberty has taken place. First of all, not any restriction of freedom is considered like that. On equal grounds, not any restriction to freedom of movement according to Protocol 4 of the Human Rights Convention should be considered a police detention, as the Court has established consistently. Hence, it is crucial that the restriction of liberty has particular characteristics to be considered as a detention. Some special circumstances should be present to qualify a situation as a deprivation of liberty in terms of Article 5 of the Convention.

The Court states that, although the duration of the measure is a factor to be taken into account, the fact that control is imposed for a significant period of time is not in itself sufficient to justify a deprivation of liberty, as was clear from the cases on night curfews.[6] The type, duration, effects, and manner of implementation of the measure in question are relevant: "Article 5 § 1 is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4." In order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5 § 1, the starting point must be his concrete situation and account must be taken of a whole range of criteria, such as the type, duration, effects, and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is one of degree or intensity and not of nature or substance.[7] Article 5 contemplates individual liberty in its classic sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary form. It does not concern mere restrictions upon liberty of movement (Article 2 of Protocol No. 4). This is clear

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United Nations' Body of Principles established the duty of opening an enquiry when a detainee disappears or dies while in custody.

[4]Vid. McKay v. UK, (2006, § 30).

[5]Vid. Magee and Others v. the U.K. (2015, § 76).

[6]Vid. Raimondo v. Italy, (1994), and Trijonis v. Lithuania, (2005) (quoted in Austin and Others v. U.K:, 2011, § 41).

[7]Vid. Austin and others v. United Kingdom, (2011, § 57).

from the use of the terms "deprived of his liberty," "arrest," and "detention," which also appear in paragraphs 2 to 5, and from a comparison between Article 5 and the other normative provisions of the Convention and its protocols.[8]

Controls in order to identify people are not considered to be detentions. Identification implies a restriction of freedom in the sense that the person subjected to it is stopped and should show documents that certify who he/she is. In case the addressee does not provide proper evidence about his/her identity, he/she could be required to go to the police station to try additional means of identification. Normally, this only lasts for quite a short period of time (some countries have even established clear temporal limits for identification that require a visit to the police station, up to 6 h in the case of Spain[9]) and does not necessarily imply the loss of contact with the outside world since, in most cases, such controls can be carried out on the street. In Spain, the Constitutional Court had established in its early times that a person was to be considered as being held in police detention when he/she was impeded from moving freely. Consequently, this position could be understood as implying that stops to identify persons could constitute a detention. However, in a quite famous finding, the Spanish Constitutional Court[10] clarified the concept by adding that not any restriction of liberty meant a detention (actually it had already been mentioned in some previous sentences[11]). Police stops to identify someone are restrictions of liberty, but they seem to be proportionate (Goig, 2006). It is noticeable that the Spanish Constitutional Court used Article 5 ECHR and jurisprudence from the Court to assert that not any deprivation of liberty implies a detention, only those established in Article 5 (although, as we will see later, sometimes the Court accepts that there are situations differing from detention included in Article 5). The discussion was, in that finding, whether the requirement for identification, which could result in bringing somebody to the police station in case he/she could not provide evidence about his/her identity on the street, implied a detention or not and whether the same safeguards prescribed for detention (lecturing of rights, legal assistance) should be observed with people brought into a police station in order to be identified. Since the Court considered that this case was not to be considered a detention, it was assumed not necessary to offer the person affected by the measure the guarantees established for detainees.

This accepting of restrictions of liberty does not seem to violate the European Convention since, in principle, the objective of Article 5 § 1, according to the Court, was to prevent arbitrary and unjustified detention. Consequently, the Convention aims not to impede any restrictions of liberty but to hinder arbitrary and unjustified

[8]Vid. Engel and others v. The Netherlands, (1976, § 58).

[9]Vid. Article 16.2 of the Organic Law 4/2015, of 30th of March, for protection of citizens' security.

[10]Vid. the Spanish Constitutional Court Sentence 341/1993, 18th November, § 4.

[11]Vid. the Spanish Constitutional Court Sentence 107/1985,7th October, § 3, established that a traffic police control so as to carry out a breath test didn't constitute a detention, although it was a restriction of liberty.

ones. This is the reason why type, duration, and manner of implementation provide us with clues about a possible abusive or arbitrary character of a detention. Furthermore, "the purpose for which a measure was imposed was a relevant factor and could weigh against the Court finding a deprivation of liberty, even where there was physical confinement in a specific place for a long period. Measures taken in the context of military discipline[12] or with a humanitarian purpose[13] may make them acceptable to the eyes of the Court.

As the same Court states, "the relevant principles for identifying a deprivation of liberty were established in the early times of jurisdictional control of the application of the European Convention: Engel and Others v. the Netherlands, 8 June 1976, §§ 58–59, Series A no. 22, followed by Guzzardi v. Italy, 6 November 1980, §§ 92–93, Series A no. 39 and numerous subsequent cases. This case-law made it clear that the question whether there was a deprivation of liberty had to be determined with reference to the specific facts."[14]

Consequently, different factors should be taken into account: whether there was a certain restriction of liberty with some persistence at the time, the grounds on which it took place, the finality pursued with the measure,[15] the overall context (were the persons locked in a particular space or not? Handcuffed?), and whether it was carried out following a procedure legally established. Hence, there should always be a particular and concrete consideration regarding the circumstances of every case before qualifying a particular action or fact as detention. Furthermore, any restriction of liberty, whether it does or does not reach the category of detention, should have legitimate grounds, be subsidiary, and be carried out proportionally. Furthermore, courts should considerer cases that claim violation of Article 5 from a presumption of liberty, which implies that a clear and solid justification of the deprivation of it is needed.[16]

[12]Vid. Engel and Others, (cited above, § 59).

[13]Vid.Nielsen v. Denmark (28 November 1988, Series A no. 144) and H.M. v. Switzerland (no. 39187/98), ECHR 2002-II (quoted in Austin and Others v. U.K., 2011, §37).

[14]Vid. Austin and others v. U.K., (2011, § 41).

[15]Vid. X v Federal Republic of Germany, Commission decision of 19 March 1981. Here a relevant question not to qualify the facts as a deprivation of liberty was that the police had brought the girl to the police station not to deprive her from his liberty, but to obtain information from her (as Murdoch and Roche 2013, 48- describe).

[16]Vid. Macovei (2003, 8–9).

7.3 Detention as Last Resort, as Subsidiary Remedy, as Is the Use of Force

The police should not resort to detention as a first remedy for a particular situation. The European Code of Police Ethics (ECPE) establishes that "Deprivation of liberty of persons shall be as limited as possible" (Article 54). It confirms the principle established by the Court in the sense that detention should be necessary.[17] Necessity should be understood in the sense that there is no other way to achieve the same goal with a different and less restrictive measure.[18] Consequently, it is required not only that the detention be lawful within the country where it takes place but that it should also be necessary under the circumstances of the case.[19]

The same ECPE article mentions the respect for an arrestee's dignity as a requirement for any detention. Dignity is linked with different issues, but mainly with the use of force, as the Court has established. In a recent and controversial case,[20] the Court based its ruling on the fact that there had indeed been a degrading treatment according to the definition of Article 3 on the use of unnecessary force during detention. As a rule, use of force should always be proportionate to the legitimate aim to be achieved through the police measure. No physical force should be used at all unless it is strictly necessary. The use of force should be progressive: nonviolent means should be attempted first; force should only be used when less intrusive methods have not been able to achieve the targeted aim. Nevertheless, not any aim is acceptable. Therefore, in their relations with arrested people, law enforcement officials should not use force unless it is strictly necessary for the maintenance of security and order within the institution or their personal safety is at stake.[21] As a paramount example, the Court emphasizes that a slap inflicted by a law enforcement officer on an individual who is entirely under his control constitutes a serious attack on the individual's dignity when there was no threat to anybody's personal safety.[22] European jurisprudence is extremely strict in this regard and does not accept, for instance, the need to prevent a detainee from escaping as a justification for the use of firearms as it does in some of the United Nations' normative.[23]

At the moment of detention and during the time it lasts, Article 8 (privacy) should also be considered as a factor related to dignity. An unnecessary arrest of somebody in front of his/her children's school when he/she could have been easily

[17] Vid. Casadevall (2007).

[18] Vid. Witold Litwa v. Poland, (2000, § 72–80) (quoted by Murdoch and Roche 2013, p. 52).

[19] Vid. Hilda Hafsteinsdottir v. Island, (2004, § 51).

[20] Vid. Bouyid v. Belgium (2015, §88, 100,101, 106–108).

[21] Vid. El-Masri v. FYROM, (2012, § 205–211), Bouyid v. Belgium, (2015, § 88).

[22] Vid. Bouyid v. Belgium, (2015, § 88).

[23] Vid. Article 9 of Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27th August to 7th September 1990.

arrested somewhere else could affect his/her family life and his/her privacy. The Court considers Article 8 as a sort of complement of Article 3. When violations do not have the level of severity required by Article 3, they could be included in the framework of Article 8.[24]

As required in all police operations, this measure must always be lawful. This means, it must be according to law, respecting not only national law but also international law (the European Convention).[25] Arbitrary detention should be prevented, whether it has been carried out within the framework of national legislation that allows for that or not. A detention may be carried out respecting domestic law but be considered arbitrary by the Court.[26] Therefore, legality should be assessed according to international parameters much more than to national ones.[27]

7.4 Legitimate Grounds for Detention

The Convention establishes a closed list of legitimate grounds for detention. The list is exhaustive. That is to say, the grounds mentioned in this list are to be considered the only ones that legitimize a detention.[28] Furthermore, police interventions should only be carried out within the framework of a procedure prescribed by law. The grounds are as follows:

To bring a convicted felon into jail—there is no apparent doubt about this ground. There should be a judiciary sentence that establishes culpability and condemns him/her to prison and that has not been appealed.

To secure the fulfillment of an order from a court or the law—it seems that police interventions that constitute a light restriction of liberty should be included here, as is the case of the requirement for identification. That is to say, taking somebody to the police station in order to certify his/her identity would not constitute a detention but should be done in a lawful and not arbitrary way in order to respect this article.[29] The Court's considerations seem to provide grounds to consider that a light restriction of liberty carried out without a legal basis or in an arbitrary way could imply a violation of Article 5 of the Convention, although it does not constitute, in a strict sense, a detention. It should also be subsidiary. The person may only be taken into the police station when doing so is the only way to identify him/her properly.

[24] Vid.Raninen v. Finland, (1997, § 60–64).

[25] Vid. Macovei (2003, 12).

[26] Vid. Witold and Litwa v. Poland, (2000, § 72–80).

[27] Vid. Gusinsky v. Russia, (2004, § 62).

[28] Vid. Casadevall, 2007.

[29] Vid. Novotka v. Slovakia, (2003, §2).

To bring somebody before a judge or a court who presumably has committed a crime or to prevent somebody from committing an offense—this could be the most usual ground for detention. The main requirement is that the police should have reasonable grounds that the concerned person has committed or is going to commit an offense that, according to law, allows for his/her detention (Article 47 connected with Article 54 of the ECPE). In this case, the main point is that the purpose of detention should be to ascertain the criminal responsibility of the detainee, after having objective grounds to think that he/she has committed an offense. "It has long been established that the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time."[30] If, afterwards, the detainee is not convicted or even charged with a crime, it does not necessarily mean that the detention was unfair. Article 5 does not require that the police have all necessary evidence to get a conviction in the moment they arrest somebody.[31] However, the fact initially attributed to the detainee should constitute a crime and must have happened, and there should be some connection between the fact and the detainee.[32] This link could be reduced to confidential information in case of terrorism[33] or statements of a cooperating criminal.[34]

To bring a minor before the competent authority for educational reasons[35]—it may cover the fulfillment of compulsory education and the cases in which minors commit crimes and should be sent to special centers. Very recently, CPT highlighted the particular vulnerability of juveniles in the context of detention (24th General Report of the CPT, 2013–2014, January 2015, juveniles deprived of their liberty under criminal legislation, paragraphs 3, 98, and 99). In these cases, safeguards should be higher so as to protect minors from unwilling consequences that may condition the formation of their personality and their entire life.[36]

Prevention of spreading infectious diseases, protect and control people with mental problems, drug addiction, alcoholism or vagrants—In all the aforementioned cases, those people should constitute a serious risk, a threat to third persons or themselves, and there may not exist another less intrusive way to take them under control.[37] For instance, an alcoholic who is not drunk at the moment or is

[30]Vid. Lawless v. Ireland (no. 3), 1 July 1961, §§ 13 and 14, Series A no. 3; Ireland v. the United Kingdom (cited above, § 196); Guzzardi v. Italy (6 November 1980, § 102), Series A no. 39; and Jėčius v. Lithuania (no. 34578/97, § 47–52), ECHR 2000-IX.

[31]Vid.Ahmet Ozcan and others v. Turkey, (2004, § 367).

[32]Vid. Casadevall, 2007.

[33]Vid. Murray v. U.K., (1994, § 58).

[34]Vid. Labita v. Italy, (2000, § 156–158).

[35]Vid. Macovei (2003, 45–46).

[36]Vid. Bouyid v. Belgium, (2015, §109).

[37]Vid. Enhorn v. Sweden, (2005, § 46–49).

drunk but quiet and conscious might be an example where detention is not justified since he/she does not pose an immediate threat to anyone. The fact that the person is an alcoholic itself is not a reason to arrest somebody.[38] The same principle is applicable to the cases of people with mental problems or to vagrants. Whether somebody suffers from mental perturbations, takes drugs, or is a vagrant, detention would only be acceptable in cases where he/she poses a danger to third persons or to himself/herself.

It should be understood that this case also includes situations in which people under shock refuse to leave buildings or spaces where their lives are at risk (in case of fire, flooding, explosions, etc.) or do not want to leave their premises when it is dangerous for them to stay inside (for instance, gas escape outdoors). This could be extended to any emergency situation. In the aforementioned cases, there must be a true danger for the persons affected by the measure in case they are left on their own. It is also possible to file this situation as one attributed to the second ground (fulfillment of a court order or the law) since normally the law allows for police officers of members of the fire brigade to make decisions in such circumstances. Be that as it may, those situations in emergency cases allow for restrictions of liberty imposed by the police (fire brigade or any other body in charge of the situation) without constituting a violation of Article 5 of the Convention.

To prevent an illegal entry of the country or to enforce an expulsion of somebody who stays illegally or has an order of extradition or deportation—CPT has drafted relevant guidelines about detentions of migrants and asylum seekers (General Reports of 1997 and 2009). In any case, there are only two situations that allow for detention in the article:

- The affected person stays illegally in the country.
- An order of deportation or extradition has been legally issued.

Any different ground would not allow for a detention of immigrants and should not be acceptable within the framework of the Convention (except, obviously, the cases foreseen in the previous paragraphs, that is to say if they commit a crime, are in danger, the fulfillment of an order of Court or a law. . .).[39]

The grounds are important because, as was mentioned before, quoting the Court, they have effects on, for instance, the duration of the detention. Moreover, without legitimate ground, there is no possible detention in the eyes of the Convention.

[38]Vid. Witold Litwa v. Poland, (2000, § 72–80).

[39]Vid. Hilda Hafsteinsdóttir v Iceland, (2004, § 51–56) (quoted by Murdoch and Roche 2013, p. 58).

7.5 Detainee's Rights

Article 10 of the Covenant on Civil and Political Rights 1966 provides that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." It is indubitable that this means that people under arrest should have their rights respected. To word it differently, arrestees also have rights. The same conclusion can be drawn from Article 54 of ECPE, which states that deprivation of liberty of persons should be conducted "with regard to the dignity, vulnerability and personal needs of each detainee," which, without discussion, also includes arrestees' rights. Among them, we should mention the following ones.

7.5.1 Information

Everyone who is arrested must be informed promptly (without delay) about the reasons that justify his/her arrest in a language that he/she can understand (Article 5.2).[40] The ECPE (Article 55) adds the need to inform the detainee about the procedure applicable to the case. There is no collision with or repetition of Article 6.3a) because the former is pointing out the possibility to check the legality of an arrest, whereas the latter is thought to allow an adequate defense before the judge or court. The first one protects the arrestee from illegal detention, and the second one facilitates the right to defense in trial.

The explanation should be given in a language that the arrestee can easily understand, not in technical language (some parallelism with the famous USA Supreme Court's sentence known as *Miranda Amendment*[41]). In case the detainee does not understand the language, a translator should be provided. "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

Information provided to the detainee should also contain all his/her rights: to remain silent, to not confess culpability, to be assisted by an interpreter in case of not understanding the language, to be assisted by a lawyer, to notify his/her detention to a third party, to be examined by a doctor.

"Persons deprived of their liberty by the police shall have the right to have the deprivation of their liberty notified to a third party of their choice" (Article 57 ECPE). Normally, all national legislation recognizes this right. In case of foreigners, it is quite common that the detainee can contact two people: some relative or friend and his/her country's consulate or embassy, normally with the

[40] In a similar sense, Article 10 of the United Nations' Body of Principles establishes something similar: Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him".

[41] Vid. Miranda v. Arizona, 384 U.S. 436 (1966).

presence of a police officer. It should be understood that in cases of minors, parents or the authority in charge of the minors' protection should be informed. International standards demand for it (Vid., for instance, principle 16 of the United Nations' Body of Principles and OSCE, 2005).

7.5.2 Legal Assistance

Any person deprived of his/her liberty by the police shall have the right to have access to legal assistance (Article 57 ECPE) even in the case of internment in a psychiatric institution.[42] The moment in which the arrestee can request such legal assistance may vary from country to country. In some countries, the detainee cannot be questioned without a lawyer (theoretical situation nowadays in Spain), but in other countries, he/she can be without any lawyer up to some hours or until he/she is formally charged. The lawyer should be present during interrogation.

The right of access to a lawyer must include the right to contact and to be visited by a lawyer. The detainee should be allowed to talk to the lawyer in private.[43]

CPT stresses that, in its experience, the period immediately following the deprivation of liberty is when the risk of intimidation and physical ill-treatment is the greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility (to ask for a lawyer) is thought to have a dissuasive effect upon those minded to ill-treat detained persons; furthermore, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.[44] Therefore, the lawyer should have access to the file with the information about the accusation against the detainee; otherwise, there would be violation of the right to legal assistance.[45]

However, CPT recognizes that in order to protect the interests of justice, in some cases it may be necessary to delay a detained person's access to a particular lawyer chosen by him/her for a certain period of time for exceptional reasons. However, this should not result in the right of access to a lawyer being completely denied during the period in question. In such cases, access to another independent lawyer who can be trusted not to jeopardize the legitimate interests of the police investigation should be arranged for.[46]

[42]Vid. Megyeri v. Germany (1992, § 23). However it is necessary that the ground for the internment is the commission of criminal acts.

[43]Vid. CPT/INF (92) 3, § 38.

[44]Vid. 6th General Report [CPT/Inf (96) 21, § 15.

[45]Vid. Lamy v. Belgium (1989, § 27–29).

[46]Vid. 12th General Report [CPT/Inf (2002) 15 § 41.

On similar grounds, although this right includes having the lawyer present during any questioning conducted by the police and the fact that the lawyer should be able to intervene in the course of questioning, the arrestee could be questioned before the lawyer arrived in urgent cases.[47] However, this possibility should be interpreted very restrictively; only exceptional circumstances could justify such measures.

7.5.3 Access to Medical Examination

Arrestees should have the right to access to a doctor and to be examined by him/her (Article 57 ECPE). That is to say, when the detainee asks for a doctor, the doctor should be called without delay and be able to examine him/her out of hearing and sight of the police officers (unless the detainee or the doctor asks for police officers to be present). Once released from police custody, the arrestee should have the right to request a medical examination (although he/she may not be eventually brought before a judge).[48] In the mentioned recent case *Bouyid v. Belgium*, the doctor certificates served to accredit the likeliness of the aggression having been suffered as the applicants were under police custody, although in both cases they were freed after a short period of time and in one of the cases no criminal charge was brought against the arrestee. Whenever possible, the doctor should be the one chosen by the arrestee.

7.5.4 The Detainee Should Promptly Be Brought Before a Judge[49] and a Decision on the Continuity of the Detention or the Release Pending Trial Should Be Made

The Court clarifies that this guarantee includes two different moments: first, the possibility that a judge or a court can supervise the legality of the detention and, second, the necessary judicial decision on whether the detainee should be released or not while the trial is still pending:

> Article 5 § 3 as part of this framework of guarantees is structurally concerned with two separate matters: the early stages following an arrest when an individual is taken into the power of the authorities, and the period pending eventual trial before a criminal court during which the suspect may be detained or released with or without conditions. These two

[47] Vid. CPT/Inf (2011) 28, § 24.

[48] Vid. 12th General Report [CPT/Inf (2002) 15 § 42.

[49] A similar mandate is found in Article 11 of the United Nations' Body of Principles.

limbs confer distinct rights and are not logically or temporally linked (see T.W. v. Malta, (GC), no. 25644/94, § 49, 29 April 1999).[50]

The same judge or court can carry out these two actions, but this is not a necessity. To clarify, if two different judges make those decisions, there is no violation of the safeguards established by the Convention. However, it seems that both decisions should be made in a short period of time, but with some differences. According to the Court in Mckay's case, the "promptness" is only referred to the first step, when the judge should decide whether the detention was lawful, whether there were objective grounds to believe that the detainee has committed a crime, or whether there has been an illegal deprivation of liberty. A second step is to decide whether the detention should continue or the person in police custody should be released. In order to maintain the detention, there should still be reasonable suspicion that the detainee has committed a crime (that is a condition *sine qua non* to accept the continuation of detention) and to confirm that there are other grounds that justify the ongoing deprivation of liberty (interrogation of the detainee, collecting of other evidence, preservation of relevant evidence, or a pending result of an examination or analysis[51]). However, the decision on this last question does not necessarily have to be made promptly. Article 5.3 only refers to promptness in the first step (monitoring the legality of the detention); for the second one, it is true that there should not be any undue delay and that it should be made as soon as possible, but only with due expedition, "within a reasonable time," as the Article states. A reasonable time means that it cannot be extended without justification but does not require the same speed as *promptness*.

Although there are legal provisions in every country about the length of a detention without judiciary intervention, it should be as short as necessary. The true limit is arbitrariness. In Spain, the new criminal procedure law (2015) already establishes 24 h as a regular deadline, although it may be extended to 72 h. The Spanish Constitution, however, establishes as the fundamental criterion the necessary time to carry out the inquiries to clarify the facts, without allowing it in any case to exceed 72 h (with exceptions in cases of terrorism, in which it can be extended 2 days more).[52] Murdoch and Roche[53] mention the limit of 4 days (even for terrorism investigations) as the one used by the Court to assess whether the length of detention was acceptable in terms of Article 5 of the Convention.[54] This judiciary revision of detention should be automatic without waiting for a petition of the arrestee. It should be remembered that detention might affect mentally ill people who cannot properly understand reality or self-govern. Therefore, it is important

[50]Vid. Mckay v. U.K., (2006, §31).

[51]As established in paragraph 23 of the British 2000 Terrorist Act (and quoted by the Court in Sher and Others v. U.K., 2015, § 98).

[52]Vid. Article 55.2 of the Spanish Constitution.

[53]Vid. Murdoch and Roche (2013, p. 62).

[54]Vid. McKay v. the U.K. (2006, § 47, in fine), quoting Brogan and Others v. the United Kingdom, 1988, § 6 Series A no.145B.

that the revision takes place independently of whether the detainee applies for it since, in some cases, they are not in the proper psychological condition to ask for it.

In some cases, there might be a conflict with national legislation. For instance, in the United Kingdom, the provisions for cases under the Terrorist Act establish a noticeably longer period of police custody without judicial intervention. However, very recently, the Court has stated that the fact that the police (or the prosecution service) should apply to a district judge to extend the detention to up to 14 days, and to a high court judge to extend it to up to 28 days, and that the detainee should be informed about those applications, and can make oral or written allegations (although with some exceptions), provides enough safeguards to monitor whether the detention and its extension have solid and legitimate grounds.[55] Nevertheless, it should be considered what the limit for this prolongation of deprivation of liberty should be and when the moment in which the independent control of a detention cannot justify its extension any longer occurs. Lately, the Protection of Freedoms Act of 2012 amended the Terrorist Act and established the maximum length of precharge detention to 14 days. However, this period still is noticeably longer than the 4 days established by the Court.

The exceptional legislation that came into force in France after the November 2015 attacks could also be arguable in terms of the extension of police detention. We will see what the Court says, should somebody argue in the future that those measures violate Article 5 of the Convention. As we have just seen very recently,[56] the Court stated that the simple petition to a judge for the extension of detention already satisfies the requirements of Article 5.3 because, theoretically, with every petition, the judge can check the legality of the detention. The Court insists that the article's aim is to give a judge the chance to check whether the detention is legal and that this is guaranteed by the communication asking for the prolongation of detention. In contrast to that, the Spanish Constitutional Court, in its early stages, declared the nullity of a law that accepted an extension of detention for seven extra days, with communication to the judge, who had to take a grounded position within 24 h. Magistrates thought that it infringed Article 9.3 of the International Covenant on Civil and Political Rights and Article 5.3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, both ratified by Spain.[57]

The Court plays down the deadline in the opposite direction too. There could be cases in which promptness is not exactly bound to a particular period of time. The case circumstances will determine whether the detainee was brought promptly before the judge or not, and the aforementioned 4 days do not constitute the only criterion. In a case where two minors were brought before the judge 3 days and 9 h after their detention, after having been in custody for 2 days without being interrogated under antiterrorism legislation, the Court considered that a violation of the mandate to bring detainees promptly before the judge.[58] Although the time frame

[55]Vid. Sher and others v. the U.K. (2015, § 100), and Magee and others v. the U.K., (2015 § 41).

[56]Vid. Magee v. U.K., (2015, § 48–51).

[57]Vid. Spanish Constitutional Court Sentence 199/1987, of 16th December, § 8.

[58]Vid. Ipek and Others v. Turkey (2009, § 34).

did not exceed the 4 days established in Mckay's case, it could not be considered to be promptness in the eyes of the Court due to the fact that the detainees were minors and the police should have had shortened the detention as much as possible in order to minimize its negative effects on them, instead of having them detained 2 days without even interrogating them. A similar criteria was followed in *Kandzhov v. Bulgaria* (2008), where, although the detention had lasted only 3 days and 23 h, the Court considered that the presentation before the judge was not prompt because the applicant had committed a minor and nonviolent offense and 24 h had passed after the detention until the police proposed to the prosecutor in charge of the case to bring him before a judge.

7.5.5 To Be Entitled to Trial in a Reasonable Time

Being entitled to a trial in reasonable time does not depend on the police unless the police do not carry out the actuations that are in their hands in order to ascertain the guilt of the detainee. However, as established by the Court, the trial itself is a different incident than the presentation before the judge to allow him to monitor the fairness of detention. The trial is more part of the sphere of Article 6. In Article 5, the mandate should be restricted to the two moments previously mentioned: supervision of detention and the decision on continuing it or on freedom with conditions or without them.

7.5.6 To Have the Right to Present a Habeas Corpus

Arrestees should be given the possibility to bring their case before a judge, who can check the lawfulness of their detention (by themselves or by relatives or friends). Police should facilitate the interposition of it.[59]

7.5.7 Cells and Detention Conditions

An arrestee's time in custody by the police is (or should be), in principle, of relatively short duration. Consequently, cells and detention conditions at police stations do not have the same importance as they have in prisons. Nevertheless, detention conditions in police cells must meet certain basic requirements.

The Commission for the Prevention of Torture has dealt with the issue with a lot of clarity: "All police cells should be of a reasonable size for the number of persons

[59]In the same sense, principle 32 of the United Nations' Body Principles.

they are used to accommodate, and have adequate lighting (i.e. sufficient to read by, sleeping periods excluded) and ventilation; preferably, cells should enjoy natural light. Further, cells should be equipped with a means of rest (e.g. a fixed chair or bench), and persons obliged to stay in custody overnight should be provided with a clean mattress and blankets. Persons in custody should be allowed to comply with the needs of nature, when necessary, in clean and decent conditions, and be offered adequate washing facilities. They should be given food at appropriate times, including at least one full meal (i.e. something more substantial than a sandwich) every day. The CPT also advocates that persons kept in police custody for 24 hours or more should, as far as possible, be offered outdoor exercise every day."[60]

> The issue of what is a reasonable size for a police cell (or any other type of detainee/prisoner accommodation) is a difficult question. Many factors have to be taken into account when making such an assessment. However, CPT delegations felt the need for a rough guideline in this area. The following criteria (seen as a desirable level rather than a minimum standard) are currently being used when assessing police cells intended for single occupancy for stays in excess of a few hours: in the order of 7 square meters, 2 meters or more between walls, 2.5 meters between floor and ceiling.[61]

The police shall provide for the safety, health, hygiene, and appropriate nourishment of persons in the course of their custody. Police cells shall be of a reasonable size, have adequate lighting and ventilation, and be equipped with suitable means of rest (Article 56 ECPE). A complex question is what the police should do in case the detainee refuses to eat (hunger strike) no matter what reason brings him/her to that decision (unfairness of detention, religious beliefs, complaining against the political system, or whatever). The dilemma is whether the detainee has the right not to eat when the police are responsible for his/her health or not.[62] In the case of detention, it would be imaginable that if the life of the detainee is not at risk, the police should accept the will of the detainee. If we take into account, as we have just seen, that the duration of police detention is temporally limited (4 days in the Court's general rule), a hunger strike may not threaten a detainee's life unless he/she is ill. In case of imprisonment, the problem may worsen since the period that inmates stay there are longer and the likelihood of having their lives at risk, in case of a hunger strike, is much higher. It is very

[60] Vid. CPT/Inf (2002) 15.

[61] Vid. CPT/Inf (92) 3.

[62] A similar case was judged by the Spanish Constitutional Court. Some GRAPO (Spanish terrorist group in the second half of the past century) inmates decided to carry out a hunger strike in prison. When their health weakened, the penitentiary authorities decided their compulsory feeding to prevent them from dying. They appealed the decision and the Constitutional Court decided that, once they lost the consciousness, the authorities were responsible for their health and should do whatever was possible in order to keep them alive (Spanish Constitutional Court Sentence120/1990, of 27th of June, § 10–11).

difficult to die after 2 days without eating, but it is quite likely to happen after 2 months, for instance.

The police shall, to the possible extent, separate persons deprived of their liberty under suspicion of having committed a criminal offense from those deprived of their liberty for other reasons[63] (a usual case is detaining persons for violations of legislation on conditions of entry and residence in the country). There shall normally be a separation between men and women, as well as between adults and juveniles deprived of their liberty (Article 58 ECPE).[64]

Out of respect for the dignity and integrity of individuals and their needs, the police should avoid, whenever possible, keeping criminal suspects together with other categories of persons deprived of their liberty (e.g., detainees for illegal immigration). Other grounds for separation are gender and age. However, separation on these grounds must also take into account personal needs and decency.[65]

It is true that the conditions of cells are more related to Article 3 than to Article 5 since it is linked to the prevention of inhuman or degrading treatment, but, as aforementioned, it is very difficult to focus only on a single article of the Convention when dealing with detention. Clear evidence of this is the fact that the institution that establishes the parameters to check whether the cells are in proper conditions is the Commission for the Prevention of the Torture, which deals mainly with Article 3.

7.5.8 A Single Report as a Guarantee

It is extremely important in order to guarantee fairness of the whole process of detention that all actuations (including interrogatories) should be recorded and that this be done in a single report in order to avoid loss of information or uncertainties about who did what, which would render accountability impossible. The obligation to record everything is a good mechanism of control. First of all, not having the record has to be somebody's responsibility, and possible evidence tampering requires the participation of more officers, which multiplies the responsibilities. At the same time, on the opposite side, the need to have everything recorded could help police officers to cope with malicious claims on degrading treatment during detention because they can prove much easier that everything was under control. Consequently, the European Code of Police Ethics is extremely clear regarding this

[63]Principle 8 of United Nations' Body Principles also establishes the need to separate presumed criminals from convicted criminals.

[64]In the same sense, Article 5.2 of the United Nations' Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states "Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory."

[65]Commentary to the article 58 of ECPE.

issue: "A custody record should be kept systematically for each detainee" (Article 54).

The Commission for the Prevention of Torture explains this with quite a lot of details: "The CPT considers that the fundamental safeguards granted to persons in police custody would be reinforced (and the work of police officers quite possibly facilitated) if a single and comprehensive custody record were to exist for each person detained, on which would be recorded all aspects of his custody and action taken regarding them (when deprived of liberty and reasons for that measure; when told of rights; signs of injury or mental illness; when next of kin/consulate and lawyer were contacted and when the detainee was visited by them; when he/she was offered food; when interrogated; when transferred or released, etc.). For various matters (for example, items in the person's possession, to document being told of one's rights and of invoking or waiving them), the signature of the detainee should be obtained and, if necessary, the absence of a signature explained. Furthermore, the detainee's lawyer should have access to such a custody record."[66]

The United Nations' Body of Principles for the Protection of All Persons under any form of detention or imprisonment also describes in quite a detailed way what the contents of such a report consist of (principle 12).

In *El-Masri v. FYROM* (2012), it was discussed whether a detainee has the right to know the truth about his/her case when he/she is wrongly detained. In this case, the detainee was arrested for longer than 4 months, in a USA Central Intelligence Agency and Macedonian Police joint operation, being freed later without any explanation. He asked for the right to know on which grounds he had been detained, and the Court refused to take that claim into consideration. Actually, the Court refused it because the applicant alleged that not being told the truth of his case violated Article 10 of the Convention (freedom of expression and information), and in view of the Court there is nothing in that article that gives a detainee the right to know which were the grounds that caused his detention.

7.6 Conclusions

International human rights law pays special attention to deprivation of liberty by police officers since detention is quite a sensitive moment for the rights of the person affected by it. Most ill-treatment takes place during detention. The circumstances under which a police officer can arrest anyone are quite thoroughly established, and the requirements of fairness in the execution of the measure are also detailed. Thus, the framework is well described. However, the level of obligation and control of state agents is different, depending on the legal framework in different territories. So far, the international text that has shown to be the most influential in police actions is the European Convention for the Protection of

[66]Vid. CPT/Inf (92) 3.

Human Rights and Fundamental Freedoms. This is mainly due to the action of the European Court of Human Rights and the fact that its sentences must be executed by the states that are members of the Convention.

The Court's jurisprudence is extremely useful (or, at least, it should be) to define the contents and scope of the different rights included in the Convention. However, concerning deprivation of liberty, the Court has not clearly defined what, materially speaking, a detention is. There are some criteria, grounds for the detention, length and intensity of the deprivation of liberty, the finality pursued by the public agent, etc., that should be taken into account, but there is not a clear definition of what constitutes a detention. This implies that we should always consider the circumstances of the case in order to see whether the Court may consider it as detention and, afterward, whether it is considered fair (legal) or not. For instance, we have seen how the Court considers, as a rule, that the longest acceptable duration of police detention is 4 days, but in some cases it accepts longer periods and in others considers detentions that lasted shorter than 4 days a violation of the Convention. This variability may imply a certain legal insecurity and sets the ground to allow the Court to take different decisions depending on the circumstances and political context. More concretization would be advisable in order to get a higher respect of rule of law principles.

Nevertheless, the Court considers, with continuity and coherence in this field, that Article 5 has the main aim to prevent arbitrariness. The main criterion for the Court is whether the deprivation of liberty has followed objective criteria (legally established). Provided that some fundamental rules are observed (respect for human dignity, proportionality, legal prevision), the main objective is detecting and excluding arbitrariness. Two quite recent cases allow us to understand the situation: *El-Masri v. FYROM* (2012) and *Magee v. the United Kingdom* (2015). In both, there is an extension of the limit of police detention, but in the first case there is no procedure, no rule, just the will of the participants. There are no limits to what they decide to do, regardless of whether it affects the detainee's dignity or causes him pain. Rule of law is absent in the whole story. However, in Magee, everything is under control, although he is kept under police detention longer than 4 days. There is legislation that allows for it; there are rules, respect for dignity, certain judicial control; no unnecessary pain is inflicted. In El-Masri, he was not, at any moment, brought before a judge, although he was deprived of his liberty for almost 5 months, he received no information about what was happening and was seriously beaten (including being sodomized with an object). That is to say, unlimited power was used against him; no rules were in place, just the will of the agents that arrested him at the airport and those who later kidnapped him.

In conclusion, the Court gives relevance to a lot of circumstances in order to determine whether there has been a violation of a right included in the Convention, and this can pave the way to very political and diplomatic sentences (in *Ireland v. the UK*, 1978, it seemed quite obvious). However, we should recognize that the Court plays quite an effective role in preventing and removing arbitrariness from the context of police detention. Sentences should be clearer and coherent, with not so many exceptions to the general principles, but that does not mean that the Court

does not play its protective role in the field of arbitrary detention. Its role is still important to enforce the Conventions' mandates in states where internal guarantees are not available or are inefficient.

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Chapter 8
Police Powers and Criminal Investigations

Jim Murdoch

Contents

Abstract One of the main tasks of the police is to bring criminal suspects to justice so that they may be subjected to a criminal trial. Police action may influence in various ways the fairness of criminal proceedings. This chapter outlines those aspects of the guarantees laid down in the European Convention on Human Rights that have an impact upon the discharge of policing, with a focus on the requirements of fair criminal investigations and trials.

8.1 Introduction: The Police and Human Rights

The preventive nature of policing—'to guard, patrol and watch'—so as to protect individuals (and their property) from the criminal acts of others has lain at the heart of contemporary notions of policing in democratic society. Policing is human rights on duty. Police officers are in a real sense the first line of defence of the human rights of individuals. The problem has been, is and will remain that of determining how best to reconcile the exercise of police powers with individual liberty. There must be constant vigilance: vigilance by the police in discharging these

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responsibilities and constant vigilance by the courts and by the duly-elected representatives of the population. While society entrusts the police with extraordinary powers of intervention into private life, with personal freedom of liberty of the person and ultimately with deprivation of life when 'absolutely necessary', the never-ending challenge to the exercise of existing powers (played out daily in the criminal courts) and to executive demands for legislative authorisation for extensions of these powers (when the latest terrorist outrage challenges liberal democratic principles) involves at its most fundamental attempts to ensure that the *Rechtstaat* concept of law and order prevails rather than a drift towards a *Polizeistaat*. The issue is as old as the hills (or at least of justice itself): *quis custodiet ipsos custodies?*

Human rights law plays a fundamental part in helping each society address this conundrum. Human rights directly concern the interface between citizen and citizen in police uniform. Nevertheless, in international human rights law, there is strangely very little specific direct reference to the police: rather, there is a need to extract implications from these international human rights standards. The drafters of various human rights treaties appear to have largely ignored the police officer, but the police officer was very much at the forefront of their minds, for the power of the state is at its most naked and direct as far as most citizens are concerned in the presence of the police officer, charged with extraordinary and ultimately largely discretionary legal authority.

This chapter seeks to outline and to assess the main aspects of human rights guarantees under the European Convention on Human Rights insofar as they have an impact upon the discharge of policing. Across Europe, criminal justice systems vary considerably in relation to domestic arrangements. There are, however, a number of common principles of universal applicability found in the case law of the European Court of Human Rights. This jurisprudence has helped consolidate expectations that assist in ensuring that policing is anchored in respect for human dignity and, more broadly, in the rule of law. The discussion that follows seeks to examine police functions in relation to the responsibilities that a police service has to the community in terms of five areas:

- the duty to intervene and to investigate;
- the duty to investigate only with lawful authority;
- the duty to act with proportionality; and
- the duty to act fairly when investigating.

This is of necessity a simplification of the role of an officer but helps provide a focus for discussion of the case law of the European Court of Human Rights. The duty to combat impunity of police officers who use ill-treatment is covered elsewhere in this volume.

8.2 The Duty to Intervene and to Investigate

Policing functions are traditionally seen as having two aspects: preventive and investigative. Both may be seen as two sides of the same coin: to address criminal wrongdoing. Proactively preventing crime, however, can give rise to the question as to how far a society is prepared to pay in terms of interferences with human rights to allow its police 'to guard, patrol and watch'. Surveillance of those suspected of involvement in serious crime is clearly desirable and necessary, but the need for adequate controls on discretionary powers is also self-evident. This is one such issue in modern policing, and one that is considered below.

The duty upon police officers to investigate and to intervene to protect those at risk of serious harm may arise under the European Convention on Human Rights under a number of articles of the Convention. Most obviously, the duty upon a state under Article 2(1) to ensure that the right to life is 'protected by law' may require police officers to take preventive action to address situations where there is an identifiable and real threat to life, and delay or negligence in the taking of steps that could reasonably be expected to address a known risk of danger or threat to life may constitute a violation of Article 2. Preventive operational measures to address the threat of death posed by another private party will be required where it can be established that the authorities know or ought to know that there existed a real and immediate risk to life from the criminal acts of another. Yet this responsibility is tempered by realisation of the realities of modern policing and the problems of resource allocation. Article 2 thus does not impose any general duty upon the state to provide indefinite police protection to individuals against threats of violence; rather, the duty will only arise where the threat is identifiable and can be addressed by the use of reasonable measures. In other words, the positive obligation to take appropriate steps 'must be interpreted in such a way which does not impose an impossible or disproportionate burden on the authorities'.[1] This principle was first established in *Osman v United Kingdom*. In this case, the applicant alleged that the police had taken insufficient measures to provide protection in the face of threats of violence from an unstable teacher who had developed an unhealthy attraction for a pupil. On the particular facts of the case (which involved the shooting of the boy and his father by the teacher, the father being killed as a result), the European Court of Human Rights eventually considered that the police could not be assumed to have known of any real and immediate risk to the life of the deceased. In these circumstances, no violation of Article 2 was established. However, the Court also acknowledged that there are limits to the taking of preventive steps. Here, it could

[1] *Osman v United Kingdom* 1998-VIII, at para 116. Cf 6040/73, X v Ireland (1973) YB 16, 338 at 392 (withdrawal after three years of police protection against a terrorist organisation which had attempted to kill the applicant: Art 2 'cannot be interpreted as imposing a duty on a state to give protection of this nature, at least not for an indefinite period of time. . . .'); and 9348/81, W v United Kingdom (1983) DR 32, 190, at para 12 (claim that the state had not provided adequate and effective security for the population of Northern Ireland rejected on account of level of presence of security forces: Art 2 could not require 'positive obligation to exclude any possible violence').

not reasonably have been assumed that any action taken by the police would have neutralised any such risk of harm. Short of depriving the teacher of his liberty, prevention would have been difficult. Yet deprivation of liberty in this case would have given rise to a violation of Article 5 of the ECHR, for there was no reasonable suspicion that harm would be the likeliest outcome of the situation. Consequently, no violation was established in the circumstances. Nevertheless, the Court confirmed that Article 2 imposed a positive obligation on states to respond effectively in situations where authorities knew (or ought to have known at the time) of 'the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party' where it can be established 'that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'.[2]

The judgment has required greater sensitivity towards the rights of potential victims. Police forces in the United Kingdom now give what are generally referred to as 'Osman warnings' to potential victims and also (in certain parts of the country) to those suspected of posing a risk: the former seek to warn individuals that they should take some responsibility for their own well-being but that the police are aware of the risk; the latter effectively advise potential perpetrators of violence that they are being watched. However, *Osman*'s importance lies in more mundane and regretfully more commonplace violence. In the subsequent case law, the Strasbourg Court emphasised that there is a particular responsibility upon the authorities to address domestic violence and to protect individuals known to be at risk from a violent member of the household. What in many systems of policing was seen as 'civil' is now firmly in the responsibility of police officers: no longer can police turn a blind eye or fob off complainers with advice to seek a divorce or judicial separation. The Court indeed has gone further: where the violence is gender based, Article 14 may also be of relevance. In *Opuz v Turkey*, for example, the Court ruled that there had been a violation of Article 2 since a lethal attack had been foreseeable in light of the history of violent behaviour against the deceased and her daughter. Article 14 had also been engaged as the Turkish judicial system's general passivity in cases of domestic violence mainly affected women, and this in turn had amounted to a form of discrimination.[3]

[2] *Osman v United Kingdom* 1998-VIII, at paras 119–121. For more recent application, see *RR and Others v Hungary* (4 December 2012), paras 26–32 (withdrawal of membership of a witness protection scheme potentially exposing individuals to life-threatening vengeance: violation, the Court considering the risk emanated from 'criminal circles').

[3] *Opuz v Turkey* 2009, paras 192–198 (and at paras 132 and 149: 'the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse . . . is a general problem which concerns all member states and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected; here, the conclusion was that 'the national authorities cannot be considered to have displayed due diligence' and thus had failed 'in their positive obligation to protect the right to life of the applicant's mother'). The judgment reflects the opinion of the UN Committee on the Convention on the Elimination of All Forms of Discrimination against Women in its General Recommendation no 19 that 'gender-based violence is a form of discrimination that seriously

Outside *Osman* cases, the responsibility to protect life also has a particular relevance for persons who are deprived of their liberty. An individual is at his or her most vulnerable at the point of loss of liberty (and hence the emphasis upon procedural rights to protect a suspect from physical or psychological harm during interrogation), but this vulnerability extends to other risks to health, and several cases have established serious shortcomings on the part of police officers.[4] Thus, effective screening procedures should be adopted with the aim of identifying vulnerable prisoners or detainees who may pose a significant risk to others.[5] The substantive obligation to protect life also extends to a duty to take steps to prevent self-harm, including the placement of prisoners on suicide watch.

Short of loss of life, the risk of harm posed by another identifiable individual is likely to be physical or psychological harm. Failure to take measures within the scope of authorities' powers that, judged reasonably, might have been expected to avoid a real and immediate risk of ill-treatment by an identified individual from the criminal acts of a third party in circumstances where the authorities had knowledge of the risk (or ought to have had such knowledge) may similarly give rise to a violation of Article 3 or, in less serious cases, of Article 8. This has particular relevance for aspects of policing that traditionally has been seen as of less

inhibits women's ability to enjoy rights and freedoms on a basis of equality with men' and is thus prohibited under CEDAW, Art 1, and its reiteration in its combined fourth and fifth periodic report on Turkey that violence against women, including domestic violence, is a form of discrimination (CEDAW/C/TUR/4–5 and Corr.1, 15 February 2005, para 28). The judgment also reflects the CEDAW Committee's decisions in Communications 2/2003, *AT v Hungary* (decision of 26 January 2005) and 6/2005, *Fatma Yŷldyŕyŷm v Austria* (decision of 1 October 2007).

[4]Eg *Anguelova v Bulgaria* 2002-IV, paras 125–131 (delay of the provision of medical assistance by police officers contributed decisively to the death of the detainee, and the case-file contained no trace of criticism of the procedure adopted in the case: violation); *Taïs v France* (1 June 2006), paras 82–104 (death in sobering-up cell in police station of inebriated prisoner suffering from Aids: gross shortcomings and negligence in care and supervision by police); and *Jasinskis v Latvia* 2010, paras 58–68 (deficiencies in health care of an individual who was deaf and mute and who had fallen down a flight of stairs after drinking with friends). Cf *Scavuzzo-Hager and Others v Switzerland* (7 February 2006), paras 80–86 (physical restraint used by police in arresting a violent drug addict who had lost consciousness and died three days later: no violation of the positive obligation under Art 2 to protect life as paramedics had been summoned immediately).

[5]*Paul and Audrey Edwards v United Kingdom* 2002-II, paras 57–64 at para 62 (killing of applicants' son in a police cell by another detainee who suffered from paranoid schizophrenia: violation, as information had been available which should have meant that the authorities knew or ought to have known that the other prisoner posed an extreme danger on account of mental illness, but there had been shortcomings in the transmission of this information combined with the brief and cursory nature of the examination carried out by the screening health worker, and it was 'self-evident that the screening process of the new arrivals in a prison should serve to identify effectively those prisoners who require for their own welfare or the welfare of other prisoners to be placed under medical supervision'; the Court also found a violation of the procedural aspect of Art 2 as the authorities were under a duty to initiate and carry out an investigation, and while there had been a comprehensive inquiry, the lack of power to compel witnesses and the private character of the proceedings from which the applicants were excluded except when giving evidence thus rendered the proceedings inadequate for the purposes of the provision).

significance in terms of prioritisation. Domestic violence can be a blind spot. In *Đorđević v Croatia*, the failure to address serious and persistent harassment of a disabled person by children was found to have constituted a violation of Article 3 in respect of the disabled person and of Article 8 in respect of his mother with whom he lived. However, here, too, compliance with this obligation must be assessed by taking into account the need to ensure 'that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice'.[6] Of course, in such cases, other agencies may be involved. The key point, here, is that coordination is effective, particularly in relation to addressing the risk of domestic violence, including the ill-treatment of children. In *Z and Others v United Kingdom*, the applicants were four siblings in a family that had been monitored by the social services because of concerns about their well-being. Support had been given to the family over a period of four-and-a-half years, but no steps had been taken to place the children in care, despite police and social services reports that had highlighted significant neglect and emotional abuse. Only when their mother had threatened to hit them had the children finally been placed in emergency foster care. Before the Court, the UK Government conceded that the neglect and abuse suffered by the four children had reached the threshold of inhuman and degrading treatment and further that it had failed in its positive obligation to provide the applicants with adequate protection. The Court reiterated that Article 3 imposes a positive duty upon states to provide protection against inhuman or degrading treatment inflicted by others and involving the taking of reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge. While the Court acknowledged that social services often faced difficult and sensitive decisions in attempting to respect and thus preserve family life, the circumstances of the case were such as to leave no doubt as to the failure of the authorities to protect the applicants from serious and long-term neglect and abuse.[7]

The positive obligation to take action to protect an individual against threats of violence is closely related to the need to ensure that any criminal investigation is conducted effectively. Here, and again, a case concerning domestic violence is of some interest. In *MC v Bulgaria*, for example, the Court found that there had been significant shortcomings in the investigation of an allegation of rape and in the determination of whether to prosecute in that officials had failed to assess the

[6] *Đorđević v Croatia* (24 July 2012), at para 139. Cf PF and EF v United Kingdom (dec) 2010 (premeditated sectarian protest lasting two months and designed to intimidate young schoolchildren and their parents: minimum level of severity required to fall within the scope of Art 3 reached, triggering the positive obligation on the part of the police to take preventive action; but in determining whether reasonable steps had been taken, a degree of discretion had to be accorded: here, mindful of the difficulties facing the police in a highly charged community dispute in Northern Ireland, the applicants had not shown the police had failed to do all that could be reasonably expected of them: inadmissible).

[7] *Z and Others v United Kingdom* [GC] 2001-V, paras 73–75.

credibility of conflicting evidence in a context-sensitive manner and in a manner that sought to verify the facts while proceeding on the basis of the lack of any direct proof of rape in the form of violence.[8]

A final aspect of police responsibilities involves that of facilitating the exercise of civil liberties or democratic freedoms. This is an aspect of the positive duty to protect individuals from the risk of harm posed by others, but it has a special dimension insofar as it seeks to uphold democratic values even if at the cost of additional police resources. Protest should be facilitated, not closed down. Positive obligations can arise in a variety of circumstances and can take a variety of forms, both of a substantive and of a procedural nature. Thus, Article 11 can require positive action on the part of the state. This has implications in particular for police officers. In *Plattform 'Ärzte für das Leben' v Austria*, an association of doctors campaigning against abortion legislation had their protest disrupted by groups opposed to their views and complained that the police had given them insufficient protection. In holding that Article 11 imposed a duty upon public authorities to take such reasonable measures as were appropriate in order to allow a lawful demonstration to take place peacefully, the European Court of Human Rights nevertheless confirmed that national authorities enjoyed a wide discretion in their choice of methods and that there could not be an absolute guarantee of protection for participants against those opposed to the expression of such views. For the Court, 'genuine, effective freedom of peaceful assembly' cannot be secured simply by a duty upon the state itself not to interfere but must entail positive state assistance to those seeking to meet and to protest through protection against those opposed to the expression of the particular opinion since 'in a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate'.[9] In *Frumkin v Russia*, the Court indeed extended that these responsibilities include open and prompt and constructive engagement by police officers with the organisers of a protest to help ensure its peaceful conduct.[10] Under Article 10, certain positive obligations to protect freedom of expression may also arise. The key principle is that the right to expression should be facilitated to help secure plurality of opinion. The police may also be obliged to take steps to safeguard the right of freedom of expression by providing protection against unlawful acts by others designed to restrict or inhibit free speech.[11] In all of this, however, there is some

[8] *MC v Bulgaria* 2003-XII, paras 167–187.

[9] Plattform 'Ärzte für das Leben' v Austria (1988) A 139, paras 32 and 34 (no violation established in the circumstances).

[10] *Frumkin v Russia* 2016, paras 102–130 (repeated police failures to provide a reliable channel of communication with the organisers of a large-scale protest in advance of the assembly, and thereafter to respond in a constructive manner to developments as the assembly was taking place; and paras 131–142: additional violation of Art 11 established in the absence of any pressing social need for arrest and detention).

[11] *Özgür Gündem v Turkey* 2000-III, paras 41–46 (deliberate and concerted attacks upon journalists, distributors etc associated with the newspaper; no action taken by the state despite requests by the newspaper: the Court reiterated key importance of free expression and held the state had failed

recognition of the challenges in policing modern societies and the choices that must be made in terms of priorities and resources.[12] The Court has made clear that any such positive obligations upon the police must be interpreted in such a way as not to impose an impossible or disproportionate burden on the authorities.

8.3 The Duty to Act Only with Lawful Authority

Police officers uphold the law. The *Rechtstaat* concerns itself with the quality of that law. From the perspective of the citizen, the key is that the law is not applied in an arbitrary manner. Legal certainty might be defined, in broad terms, as the ability to act within a settled framework without fear of arbitrary or unforeseeable state interference, but domestic law must be itself 'compatible with the rule of law, a concept inherent in all the articles of the Convention'.[13] In relation to policing, the quality of the law that authorises police powers is important, particularly in relation to interference with the right of liberty. This is governed by Article 5 of the Convention, and some discussion of the case law helps clarify the central importance of this principle of 'lawfulness'. Put simply, the overarching purpose of Article 5 is to prevent arbitrary deprivation of liberty. As the Grand Chamber put it in *McKay v United Kingdom*:

> Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of an individual and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty. Three strands in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions; the repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls.[14]

These first two 'strands' are reflected in the textual formulation of Article 5(1). This provides that any detention must be 'in accordance with a procedure prescribed by law', while each of the six sub-headings in paragraph 1 outlining the justifiable grounds for deprivation of liberty further provides that any arrest or detention must be 'lawful'. The paragraph itself identifies 15 distinct grounds for

to comply with its positive duty to protect the newspaper). Cf the related cases of Yaşa v Turkey 1998-VI, paras 118–120 (attacks on newsagents considered under Arts 2 and 13); Tekin v Turkey 1998-IV, paras 57–61 (detention and ill-treatment of journalists etc: not established that loss of liberty was because of the applicant's occupation, and consequently no violation of Art 10); and Dink v Turkey 2010, paras 66–75 and 102–139 (failure to protect life of journalist who had commented on identity of Turkish citizens of Armenian extraction: violation of Arts 2 and 10).

[12] *Austin and Others v United Kingdom* [GC] 2012, para 55.

[13] *Amuur v France* 1996-III, at para 50.

[14] *McKay v United Kingdom* [GC] 2006-X, at para 30 [references omitted].

deprivation of liberty, although it is possible for a particular deprivation of liberty to fall within two or more of the categories or for the nature and classification of the detention subsequently to change. A deprivation of liberty that does not fall within at least one of the sub-paragraphs will be deemed to have been arbitrary. The implications for daily policing are obvious. A state must be able to establish through documentary or other means that an apprehension and a subsequent detention were in accordance with domestic procedures,[15] and thus police officers must record accurately the key features of detention. Further, and more specifically, it must be shown that the particular deprivation of liberty was necessary in the circumstances and thus not imposed arbitrarily. Lawfulness, first, presupposes that there is a substantive legal basis for the deprivation of liberty. Thus, a failure to adhere to domestic law placing an absolute limit upon the length of detention will involve a violation of Article 5.[16] Second, the detention must be necessary in the circumstances, not merely permitted by domestic law. Discretionary powers must be applied in an appropriate manner and in a case-by-case basis. In *James, Wells and Lee v United Kingdom*, a non-exhaustive statement of principles was given by the Court: firstly, there must be no element of bad faith or deception on the part of the authorities; secondly, 'the order to detain and the execution of the detention [must] genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5(1)'; thirdly, there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention; and fourthly, there must be 'a relationship of proportionality between the ground of detention relied upon and the detention in question'.[17] This case did not concern specifically police detention, but it did provide an overview of the concerns that also affect detention effected by the police. The judgment reflected key principles found in the Court's earliest jurisprudence. For example, in *Bozano v France*, the actions of the French police in placing an individual in a police car and removing him to the Swiss border was labelled a disguised form of extradition that thereby failed to be 'lawful',[18] while in *Čonka v Belgium*, the requirement that individuals attend at a police station purportedly for

[15]Cf *Elci and Others v Turkey* (13 November 2003), paras 680–682 (while the detention of a suspect required the authority of a prosecutor, none of the witnesses who had appeared before the Commission delegates had accepted direct personal responsibility for the decision to detain the applicants and no clear picture emerged as to the steps taken to obtain prior authorisation for their detention; there was further a complete absence of any documentary evidence showing that a request had been made to the prosecutor).

[16]*K-F v Germany* 1997-VII, paras 71–73 (delay of some 45 min in releasing an individual detained to allow police the opportunity of checking identity after the maximum period of 12 hours' detention had expired rendered the detention unlawful.) See also *Jendrowiak v Germany* (14 April 2011), paras 32–39 (continuation of preventive detention beyond maximum period authorised at time of placement: violation).

[17]*James, Wells and Lee v United Kingdom* (18 September 2012), paras 191–195.

[18]*Bozano v France* (1986) A 111, para 60.

the completion of asylum applications was similarly in bad faith as immediately upon arrival, the individuals had been detained and then deported.[19]

Such cases require a certain amount of detailed planning and subterfuge. Perhaps more typical are cases where an individual is detained as part of a criminal investigation or to protect the individual from harm posed by his own health. Judgments seek to illustrate the means whereby 'good faith' or good cause is established. Thus, detention purportedly effected under Article 5(1) (c) on the basis of suspicion of the commission of a criminal offence requires the provision of facts or information adequate to satisfy an objective observer that the detainee may indeed have committed an offence.[20] This provides one aspect of 'lawfulness': but the more challenging consideration is of its necessity, for deprivation of liberty may be lawful but not required in all instances. In other words, deprivation of liberty is 'only justified where other, less severe measures, have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained'; the authorities must also be able to show that the loss of liberty was necessary in the particular circumstances. In short, it is not enough in itself that the deprivation of liberty is permitted by domestic law: the particular loss of liberty must be considered necessary in the particular case to avoid the appearance of arbitrariness in the application of the law. Thus, in *Witold Litwa v Poland*, while it was accepted that the detention of the applicant in a 'sobering up' centre had been in accordance with domestic procedures, the Court nevertheless found a violation of Article 5 because of considerable doubts that the applicant had been posing a danger to himself or to others and, further, since no consideration had been given to other available alternatives. Detention was the most extreme of the measures available under domestic law to deal with an intoxicated person, and the police could have taken the applicant either to a public care establishment or even back to his home. In these circumstances, a violation of Article 5 was established.[21] The final aspect of the protection for 'lawful' deprivation of liberty is the associated duty to bring an individual 'promptly' before a judge to allow the judicial scrutiny of the 'lawfulness' of the loss of liberty. However, to ensure that deprivation of liberty is not arbitrary, the detention should cease as soon as the suspicion ceases to be 'reasonable'. In other words, the fact that a person detained 'on reasonable suspicion' is not ultimately brought before a judge or is proceeded against on criminal charges does not bring

[19] *Čonka v Belgium* 2002-I, paras 35–46.

[20] *O'Hara v United Kingdom* 2001-X, paras 34–35. See also *Lukanov v Bulgaria* 1997-II, paras 40–46 (detention of former communist prime minister of Bulgaria was in reality a form of political reprisal not justified under Art 5(1)) and *Khodorkovskiy v Russia* (31 May 2011), para 142 ('outer purpose' of deprivation of liberty differed from its real one since the applicant was apprehended formally as a witness but real intent was to charge him as a defendant).

[21] *Witold Litwa v Poland* 2000-III, paras 72–80.

the detention outwith the scope of the sub-paragraph as long as the relevant level of suspicion existed at the outset of detention.[22]

'Lawfulness' also has a crucial importance for proactive policing, that aspect that seeks to 'guard, patrol and watch'. Here, the concern is to ensure that surveillance measures constituting an interference with Article 8 rights are (in the wording of that provision) 'in accordance with the law'. Most obviously, an unauthorised interception, which takes place without legal basis, will constitute a violation of Article 8.[23] More usually, the test of lawfulness will turn on whether domestic law provides sufficient safeguards against arbitrary interference by satisfying the tests of accessibility and foreseeability. Powers that confer too much latitude will fail this test, but obviously 'foreseeability' in this context 'cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly'. Thus, 'foreseeability' involves an assessment of whether the law is 'sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures', the risk being that powers to carry out surveillance in secret may be open to the risk of abuse by executive agents. The Grand Chamber has recently considered this issue in *Roman Zakharov v Russia*: 'Review and supervision of secret surveillance measures may come into play at three stages: when the surveillance is first ordered, while it is being carried out or after it has been terminated. As regards the first two stages, the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual's knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his or her own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding his or her rights. In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8(2), are not to be exceeded. In a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge, judicial control offering the best guarantees of independence, impartiality and a proper procedure. As regards the third stage, after the surveillance has been terminated, the question of subsequent notification of surveillance measures is

[22] *Stögmüller v Austria* (1969) A 9, Law, para 4; cf *De Jong, Baljet and Van den Brink v Netherlands* (1984) A 77, at para 44: 'whether the mere persistence of suspicion suffices to warrant the prolongation of a lawfully ordered detention on remand is covered, not by [this sub paragraph] as such, but by Article 5(3), which forms a whole with Article 5(1)(c) . . . to require provisional release once detention ceases to be reasonable . . .'.

[23] *A v France* (1993) A 277-B, paras 38–39 (unauthorised interception). See also MM v Netherlands (8 April 2003), paras 44–46 (recording of telephone conversation by one party with the assistance of the police but in the absence of preliminary judicial investigation and an order by an investigating judge as required by legislation: violation).

inextricably linked to the effectiveness of remedies before the courts and hence to the existence of effective safeguards against the abuse of monitoring powers. There is in principle little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken without his or her knowledge and thus able to challenge their legality retrospectively or, in the alternative, unless any person who suspects that his or her communications are being or have been intercepted can apply to courts, so that the courts' jurisdiction does not depend on notification to the interception subject that there has been an interception of his communications'. Thus, scrutiny of the effectiveness of safeguards prohibiting misuse permits checking as to whether police officers have addressed the existence of a pressing social need and also the relevancy and sufficiency of the reasons for the interception or monitoring or seizure of data.[24]

Less technological interferences can simply involve stop and search power. Similar principles apply: the quality of domestic law must meet Strasbourg expectations. In *Gillan and Quinton v United Kingdom*, two individuals attempting to attend a protest against an arms fair had been searched by police. The statute permitted senior police officers if they considered it 'expedient for the prevention of acts of terrorism' to authorise uniformed police officers to stop and search people and vehicles, even in the absence of any reasonable suspicion of wrongdoing. The Court readily found that the use of coercive powers to require an individual to submit to a detailed search amounted to a clear interference with the right to respect for private life, the Court considering that the element of humiliation and embarrassment involved in the public nature of a search has in certain cases the potential to compound the seriousness of the interference. While application of the stop and search powers had a basis in statute combined with the relevant Code of Practice, the quality of the provisions was found not to have offered adequate protection against arbitrary interference and was defective on two counts. Firstly, the authorisation of the power to stop and search if police officers considered it 'expedient' as opposed to 'necessary' to prevent acts of terrorism meant that there was no requirement for any assessment of the proportionality of the authority, and various devices designed to control or review authorisations were either inadequate or never exercised in practice. Secondly, the powers of individual police officers were of very broad scope and did not require any showing of reasonable suspicion and employed merely on a 'hunch' or 'professional intuition', the sole proviso being that the purpose of the search was to look for articles that could be used in connection with terrorism, a category of considerable breadth that could cover many articles commonly carried in the streets. The conclusion was thus that such widely framed powers could be misused, not only against demonstrators and protestors but also against (as suggested by statistics) ethnic minorities. They were thus

[24] *Roman Zakharov v Russia* [GC] 2015, at paras 228–231 (thus 'detailed rules on interception of telephone conversations [are necessary], especially as the technology available for use is continually becoming more sophisticated'.

insufficiently circumscribed and not subject to adequate legal safeguards against abuse to meet the test of 'in accordance with the law'.[25]

8.4 The Duty to Act in a Proportionate Manner

Other aspects of surveillance may also concern the discharge of policing. Here, though, there may be another concern: that there are relevant and sufficient reasons for any interference with an individual's rights to meet the test of 'necessity'. This concerns the proportionality of police action rather than its lawfulness, but the distinction can become blurred. Discussion above has indeed raised the issue in respect of protection against the arbitrary application of the law when effecting the deprivation of liberty of an individual. The concept of 'necessity' is involved (expressly or implicitly) in several articles of the ECHR, but it has subtly different connotations in different contexts. A broad distinction can be drawn between those articles that guarantee rights principally of a civil and political nature, that are subject to widely expressed qualifications, and those articles that guarantee rights (primarily those concerning physical integrity and human dignity) that are either subject to no express qualification or subject only to stringent qualifications. Rights of the former kind are found in Articles 8–11. Paragraph 1 of each of these articles guarantees, in turn, respect for private and family life, home and correspondence; freedom of thought, conscience and religion; freedom of expression; and freedom of assembly and association. Paragraph 2 of each of these articles, however, goes on to identify particular interests or 'legitimate aims' that may justify interference with the protected rights, always provided that any such interference is 'in accordance with the law' (or 'prescribed by law') and 'necessary in a democratic society'. In most cases, the real difficulty lies in the fifth question, i.e. in deciding whether interference is 'necessary in a democratic society'. In considering this phrase, it is important to bear in mind both the word 'necessary' and the words 'in a democratic society'. The Strasbourg Court has said that 'whilst the adjective "necessary", within the meaning of art 10(2), is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need"'.[26] The Court has also identified certain characteristics of a 'democratic society', for example describing pluralism, tolerance and broadmindedness as the hallmarks of such a society and describing freedom of expression as one of the essential foundations of a democratic society.[27] All of this has significant implications for policing, not only at a planning or operational basis but also 'on the beat' in

[25] *Gillan and Quinton v United Kingdom* 2010, paras 76–87.

[26] For early examples, see *Sunday Times v United Kingdom* (no 1) (1979) A 30, para 59; Handyside v United Kingdom (1976) A 24, para 48.

[27] *Handyside v United Kingdom* (1976) A 24, para 49.

deciding what action to be taken in certain circumstances. Police training needs to prepare police officers accordingly. Sensitising officers to human rights considerations that will arise following an interference with an individual's rights will help ensure that policing responses remain proportionate. 'Relevant' reasons for police actions are normally self-evident. However, 'sufficient' reasons must also be shown. 'Sufficiency' requires not only that there be a rational connection between the means employed and the aim sought to be achieved but also that a fair balance be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

This can be illustrated by certain cases relating to private life under Article 8. In *Peck v United Kingdom*, a violation of Article 8 was established. Here, the applicant had been unaware that he was being filmed by a closed circuit television as he had attempted to commit suicide in a deserted public street, but the filming had allowed the police to render medical assistance. Subsequently, the local authority had released still photographs and video footage of the immediate aftermath of the incident authority in an attempt to portray the advantages of CCTV. This material had appeared in newspapers and on television and had allowed the applicant to be identified. The domestic courts had ruled that a local authority had the lawful authority to distribute the video footage. For the Strasbourg Court, however, while the monitoring by means of photographic equipment of the actions of an individual in a public place would not in itself amount to an interference with private life, the recording of data in a systematic or permanent manner could well do so. Here, the incident had been seen to an extent that far exceeded any exposure to a passer-by or to security observation and had been to a degree surpassing what the applicant could reasonably have foreseen. The disclosure thus involved a serious interference with the right to respect for his private life and in the circumstances had also constituted a violation of Article 8 as there had not been relevant and sufficient reasons to justify the direct disclosure of material without obtaining the applicant's consent or masking his identity.[28]

Other interferences with private life may involve the taking and retention of fingerprints and DNA samples without consent. Both contain unique information about the individual, and their retention cannot be considered as neutral or insignificant. The quality of domestic law is also important. As with surveillance in cases

[28] *Peck v United Kingdom* 2003-I, paras 76–87. See further Edwards (2005), pp. 91–114. Cf Case 1 S 377/02, [2004] NJW 1473, [2004] EuroCLY 1332 [Germany] (legislation permitting CCTV installation had to be clear and unambiguous, and the authorities had to show the necessity of installation and the absence of alternative means of surveillance); *Anklagemyndigheden v T* [2005] UfR 2979V, [2005] EuroCLY 1709 [Denmark] (prohibition of publication on the internet of private CCTV images allowing identification of individuals upheld); and Case 2765/2005), [2006] EuroCLY 1705 [Greece] (continued use of CCTV in public places initially installed for security purposes could no longer be considered justified and hindered social and political activities). Cf *Uzun v Germany* 2010, paras 49–53, 64–74, and 77–81 (GPS surveillance ordered only after less intrusive methods of investigation had proved insufficient, had been in place only for a relatively short period, and the investigation had concerned very serious crimes: no violation).

such as *Peck v United Kingdom*, the question may ultimately end up being in a particular case not the quality of domestic law (one more for legislative drafters) but for the actual police officers involved in a particular situation when assessing the proportionality of the interference. In *S and Marper v United Kingdom*, the Grand Chamber was called upon to consider the taking of fingerprints and DNA samples from two applicants who were suspected, but never convicted, of crimes. The data was to be retained without limit of time. One of the applicants had been an 11-year-old minor when the data had been taken. It was readily accepted that the retention of the data pursued the legitimate aim of the prevention of crime by assisting in the identification of future offenders (and that the extension of the database had indeed contributed to the detection and prevention of crime). The Court avoided determining the question whether the interferences had been 'in accordance with the law', but the Court did at least doubt whether the statutory provision was adequately precise in respect of the conditions and arrangements for the storing and use of the information, noting that clear and detailed rules on the scope and application of such measures and minimum safeguards in such cases were essential. The principal failing was in respect of the proportionality of the measures. It could not be concluded in the case of the two applicants who had merely been suspected but never convicted of certain criminal offences that the retention of their fingerprints, cellular samples and DNA profiles could be justified. The consensus in other European law and practice (as in Scotland) required retention of data to be proportionate in relation to the purpose of collection and also limited in time. What was so striking about English law was the blanket and indiscriminate nature of the power of retention, irrespective of the nature or gravity of the offence or of the age of the suspect. Further, there was only limited opportunity for a person acquitted to have his data removed or the material destroyed. There was a real risk of stigmatisation, for persons who had not been convicted of any offence (and who were in any event entitled to the presumption of innocence) were treated in the same way as those convicted of crimes. Indeed, in respect of young persons, the retention of such data could be particularly harmful in view of the importance of their future development and integration into society.[29]

The method of carrying out a search must also be proportionate for the purposes of Article 8. In *McLeod v United Kingdom*, police officers had secured entry to a house to assist the applicant's former husband and his solicitor to remove certain items of property following a court order requiring the applicant to hand over the property. The former husband honestly but mistakenly believed that agreement to collect the items had been reached, but the police officers had failed to check the terms of the court order when advising the applicant's mother (the applicant herself not being present initially) that their action was based upon a judicial instruction. The domestic courts had accepted that the police officers had behaved properly since they had believed that there was a real and imminent risk of a breach of the peace. While accepting that the power of the police to enter private premises

[29] *S and Marper v United Kingdom* [GC] 2008, paras 68–86.

without a warrant to deal with or prevent a breach of the peace was defined with sufficient precision and was clearly for the legitimate aim of preventing disorder or crime, the European Court of Human Rights found that that the means employed by the police officers had been disproportionate. Scrutiny of the court order would have shown that the property was to be handed over rather than collected and, further, that the applicant still had some days left in which to do so. In any event, the appellant's absence when the police arrived should have suggested that there was then minimal risk of disorder.[30] Similarly, in *Keegan v United Kingdom*, the Court determined that there had been a violation of Article 8 on account of the failure by the police to carry out adequate verification of the current occupants of a house several months previously vacated by a relative of a person suspected of involvement in armed crimes. Although the Court was willing to accept that there had been relevant reasons for the search, it could not accept that the reasons had in this instance been sufficient, given the failure to take proper precautions prior to carrying out the search. Nor was it relevant that the police had not acted out of malice in light of the importance of protecting individuals against abuse of power.[31]

It is also expected that police officers will plan operations in such a manner as to avoid occasioning treatment potentially falling within the scope of Article 3. In *Gutsanovi v Bulgaria*, police officers had forced entry to a leading politician's house early in the morning with a view to arresting him and searching his home for evidence of misappropriation of public funds as part of an investigation that had been opened some 5 months beforehand. No judicial authorisation or review of the planning had taken place. There was no suggestion of the commission of violent criminal acts or that the suspect would pose any threat to the physical well-being of the officers themselves even though he was the lawful owner of a firearm. The operation was mounted by armed and masked special operation officers who at one point entered a bedroom where the politician and his wife and two young children were gathered and pointed their weapons at the family, much to the obvious distress of the daughters before pinning the politician against the wall and then taking him downstairs where he had been forced to kneel and was handcuffed. The Court was not satisfied that the use of physical force had been proportionate and absolutely necessary in this case. There had been a failure to take into account the possible presence of family members with the result that no alternative means of carrying out the operation had been contemplated (for example, by staging the operation later in the day or by deploying other types of police officer), a failure that had meant that there had been no consideration of the legitimate interests of his wife, who was not in any way suspected of involvement, or of his daughters, who had been psychologically vulnerable on account of being so young. In this case, there was clear and uncontested evidence that his wife and daughters had been very severely affected by the events, while the politician asserted that he had suffered intense humiliation and anxiety during the heavy-handed operation that had

[30] *McLeod v United Kingdom* 1998-VII, paras 38–58.

[31] *Keegan v United Kingdom* 2006-X, paras 29–36.

occurred in the full view of his family. The Court's conclusion was that the failure to plan and to execute the police operation in such a way as to ensure that the means employed were strictly necessary in order to attain the operation's ultimate objectives had resulted in a psychological ordeal such as to amount to degrading treatment in the case of all four applicants.[32]

A final example of proportionality is found in Article 2. This requires the state to refrain from taking of life unless this has occurred in one of four narrowly prescribed circumstances recognised by paragraph (2). The use of force by state agents such as police officers that results in the intentional loss of life or where death has occurred as an unintended outcome or where there has been recklessness during the deployment of potentially lethal force even when death has not resulted will thus give rise to considerations arising under paragraph (2) as to whether the use of force has been for a prescribed purpose and can be said to have been 'absolutely necessary'.[33] This calls for careful scrutiny. As the Court put it in *McCann and Others v United Kingdom*:

> . . . the use of the term 'absolutely necessary' in Article 2 para 2 indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether state action is 'necessary in a democratic society' under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2.[34]

However, while this obligation is essentially negative in character, it is itself prescribed by a wide range of obligations upon state authorities, including the provision of adequate administrative regulation of the use of potentially lethal force and appropriate personnel training, and the careful planning and operational control of operations.[35] The four sets of circumstances outlined in paragraph (2) involve situations in which the state may use force that results in the deprivation

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[32] *Gutsanovi v Bulgaria* 2013, paras 125–137.

[33] State liability may be engaged even where state officials are acting *ultra vires* or contrary to explicit instructions as a state is strictly liable for the conduct of its agents: cf *Ireland v United Kingdom* (1978) A 25, para 159; and see *Sašo Gorgiev v 'The Former Yugoslav Republic of Macedonia'* (19 April 2012), paras 48–54 (non-fatal shooting by police officer in a bar while on unauthorised leave engaged state responsibility). See also *Celniku v Greece* (5 July 2007), paras 51–59 (fatal shot not triggered by deliberate act of a police officer, and the use of lethal force was not attributable to the state; but violation of Art 2 in respect of inadequate planning and firearms regulation); and Gorovenky and Bugara v Ukraine (12 January 2012), paras 31–40 (fatal shootings by off-duty police officer during a private trip unconnected with any policing operation: while such private acts do not in principle engage state responsibility, in this case the authorities had issued the officer with a weapon in breach of domestic regulations and without assessing his personality).

[34] *McCann and Others v United Kingdom* (1995) A 324, at para 149.

[35] *Trévalec v Belgium* (14 June 2011), paras 75–87 (non-fatal shooting of journalist permitted to attend incident: violation on account of lack of vigilance in protecting journalist even although the journalist had probably not acted with all the requisite caution); and Haász and Szabó v Hungary (13 October 2015), paras 43–48 (use of firearm in circumstances that could have been potentially lethal engages Art 2).

of life: to protect against violence, to effect an arrest, to prevent escape of a prisoner or to quell rioting or insurrection. At first glance, these categories appear potentially wide, but a more careful reading of the text and jurisprudence shows that state authority to take life is narrowly prescribed. The provision 'does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life'.[36] There are two further qualifications. First, each of the recognised categories justifying the use of lethal or potentially lethal force has a particular 'lawful' test to be met (for only action 'lawfully taken' to quell a riot or force used against 'unlawful' violence in defence of oneself or another or to effect a 'lawful' arrest or to prevent the escape of one 'lawfully detained' may be justified). Second, the force used must be able to be shown to have been no more than that which was 'absolutely necessary'. This principle is of general applicability, and even 'anti-terrorist operations should be planned and controlled by the authorities so as to minimise to the greatest extent possible recourse to lethal force'.[37] Thus, in order to ascertain whether the lethal (or potentially lethal) force used was strictly proportionate, consideration is required not only of the immediate circumstances surrounding the moment when loss of life occurred but also of the planning and operational control of the police or security service operation, the prior training of officers and the regulatory framework surrounding the use of force or firearms.[38] However, in any evaluation of the actual force used, consideration of actions of state officials facing split-second decision-making as to whether to use potentially lethal force is not without difficulty. A state official such as a police officer also enjoys the right to respect for life and to use self-defence to protect himself. For example, in *Andronicou and Constantinou v Cyprus*, where it had been considered that the planning and control of a police operation against a gunman involved in a domestic dispute had been carried out in such a manner as to minimise as far as possible any risk of death, a majority of the Court also accepted that the police officers who had opened fire on the gunman had honestly believed that there was a real and immediate danger to the life of another individual and to themselves, even though this belief proved to have been mistaken.[39] In contrast, in *Gül v Turkey*, the Court was satisfied that the lethal force employed could not be considered as 'absolutely necessary'. Police officers had sought entry to a flat in order to carry out a search, but as the occupier was unlocking the door, the officers had opened fire and thereby fatally injured the occupier. The Court considered that there had been insufficient evidence to

[36] *McCann and Others v United Kingdom* (1995) A 324, at para 148.

[37] *McCann and Others v United Kingdom* (1995) A 324, at para 149. The central issue is thus whether the facts indicate that force has been shown to have been no more than 'absolutely necessary', rather than the legal standard of justification for the use of force: paras 154–155.

[38] In principle, this assessment is a matter for the domestic courts, and the European Court of Human Rights will only depart from the findings of national tribunals where 'cogent' reasons suggesting domestic proceedings have been defective in examining such matters.

[39] *Andronicou and Constantinou v Cyprus* 1997-VI, at paras 181–186, and 191–194.

establish that the officers had been under instructions to use lethal force, but in any event the firing of shots at the door could not have been justified by any reasonable belief on the part of the officers that their lives were at risk from the occupants of the flat, let alone that that this had been required to secure entry to the flat. In short, their reaction in opening fire with automatic weapons on an unseen target in a residential block inhabited by innocent civilians could only be considered as a grossly disproportionate response.[40]

In contrast, the prohibition against ill-treatment is absolute, and in general, no 'proportionality' test is thus applicable. However, there is one particular area where proportionality of police measures may be of relevance: police officers have responsibilities to protect individuals who are in police custody, and disproportionate measures of security may attract condemnation as much as the deliberate infliction of ill-treatment or poor material conditions of detention. Recourse to physical force by state officials that has not been rendered strictly necessary by a detainee's own conduct is likely to constitute a violation of Article 3.[41] It will be for the state authorities to demonstrate convincingly that the use of force was not excessive, particularly if injuries are significant. It will be easier for the authorities to justify the need to adopt physical means of restraint where an individual has resisted the imposition of detention, but the onus is still upon the authorities to establish why impugned treatment such as the use of batons[42] or tear gas[43] or strip-searching[6] was necessary, although the use of handcuffs at the time of loss of liberty does not normally give rise to an Article 3 issue 'if handcuffing has been imposed in connection with a lawful detention and does not entail use of force, or public exposure, exceeding what is reasonably considered necessary', bearing in mind the risk that the prisoner may abscond or cause injury or damage.[44]

[40] *Gül v Turkey* (14 December 2000), paras 81–83. See also Oður v Turkey [GC] 1999-III, at para 83 (even if the death had been caused by the firing of a gun as a warning, 'the firing of that shot was badly executed, to the point of constituting gross negligence, whether the victim was running away or not'); and Şimeşk and Others v Turkey (26 July 2005), paras 107–113 (while demonstrations had not been peaceful, police officers had shot directly at the demonstrators without first having recourse to less life-threatening methods); and Makbule Kaymaz and Others v Turkey (25 February 2014), paras 101–132 (use of lethal force by police seeking to carry out a lawful arrest following an anonymous tip-off but after surveillance suggesting no suspicious activity: violation as it had not been shown that there had been requisite vigilance to ensure that any risk to life was reduced to a minimum).

[41] *Bouyid v Belgium* [GC] 2015, paras 100–113 (administration of slaps during police interview constituted degrading treatment: the Chamber judgment had considered the alleged behaviour as unacceptable professional behaviour but did not involve the minimum degree of humiliation or debasement to meet the Art 3 threshold as these were isolated incidents inflicted unthinkingly as a result of provocative behaviour rather than to extract confessions).

[42] *Eg Dembele v Switzerland* (24 September 2013), paras 43–49 (use of batons during identity check resulting in fracture constituted a disproportionate use of force).

[43] *Ali Güneş v Turkey* (10 April 2012), paras 34–44 (spraying of the applicant's face with tear gas after arrest: violation).

[44] *Mathew v Netherlands* 2005-IX, at para 180Cf Erdoðan Yaðiz v Turkey (6 March 2007), paras 39–48 (handcuffing of individual with no criminal record in public and at place of work: violation).

8.5 The Duty to Act Fairly

Procedural propriety and the prohibition of the retroactive imposition of criminal liability lie at the heart of any legal system grounded in the rule of law. The central importance of Article 6 is reflected in the volume and scope of challenges to the application of criminal, civil and administrative justice in European states. Much of the case law on what constitutes a fair hearing has a particular relevance for the police as it is based upon case law involving the police in relation to the investigation of crime. Police officers investigate crime. Their success in achieving a high 'clear-up rate' may be a key performance indicator for an officer's chances of promotion. The risks are obvious: inducements, threats or actual infliction of physical or psychological pressure to confess may result in practices that are ethically dubious and—from the perspective of fair hearing guarantees under Article 6—highly suspect. This forms the basis of a not insubstantial amount of case law.

Article 6 may come into play at a very early stage in police investigations. The concept of a 'charge' is not dependent upon domestic law. In *Deweer v Belgium*, the Court considered a criminal charge to involve 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', approving the test of whether the situation of the suspect has been 'substantially affected'. This notification can take whatever form provided for by domestic law and may be constituted by arrest, by issue of an arrest or a search warrant or by other official measures carrying the implication of such an allegation and that similarly 'substantially affect the situation of the suspect'.[45] Initial proceedings at the outset of a criminal process may therefore fall within the scope of Article 6. Nor will any decision to label certain offences as 'disciplinary' or 'administrative' rather than as 'criminal' necessarily exclude the application of guarantees in terms of Article 6. In *Engel and Others v Netherlands*, the Court considered disciplinary sanctions imposed upon military service personnel by reference to three criteria to assess whether the proceedings fell within the scope of Article 6. Firstly, the nature of the classification of the offence in domestic law was of relevance in any assessment: if 'criminal', this will be sufficient to bring the issue within the scope of Article 6, but if 'disciplinary' this will not be conclusive and will only provide a starting point for further evaluation of the substance rather than form of the procedure. Secondly, the nature of the offence itself had to be assessed: a prohibition directed against a specific group such as service personnel may in principle rightly be considered as disciplinary, but it is also appropriate to take into account comparative practices applying in other European states. Thirdly, the severity of the penalty that could be imposed upon a determination of guilt was of importance: the more 'appreciably detrimental' the potential sanction is, the greater is the likelihood that the offence will be considered as criminal, especially if

[45] *Deweer v Belgium* (1980) A 35, at para 46; see too *Eckle v Germany* (1982) A 51, para 73; *Foti and Others v Italy* (1982) A 56, para 52.

the penalty could involve not inconsiderable loss of liberty.[46] Thus, a wide range of interventions by way of investigative measure taken by the police will fall within the scope of fair hearing guarantees under Article 6. Police officers will accordingly be required to act in a manner that does not fundamentally undermine the fairness of any subsequent hearing.

The actual interference with fair hearing guarantees may arise when a prosecutor or court seeks to rely upon evidence that appears in some way tainted. Police officers may be responsible for the particular situation, but in terms of Article 6, the issue arises when the State seeks to rely upon it to help secure a conviction. The outcome may not always be straightforward, and the essential question 'was it fair?' need not be answered by the response to an alternative question, 'was it lawful?' For example, in assessing whether the use of evidence obtained in violation of Article 8 has rendered the trial unfair in terms of Article 6, the Court will examine 'all the circumstances of the case, including, respect for the applicant's defence rights and the quality and importance of the evidence in question'.[47] Three cases illustrate this well. In *Schenk v Switzerland*, the applicant had been convicted of incitement to murder his wife partly on the basis of a recording of a conversation made with him but taped without his knowledge or consent. He complained that the use of unlawfully obtained evidence had rendered his trial unfair. The Court did not 'exclude as a matter of principle and in the abstract that unlawfully obtained evidence … may be admissible', but its task centred upon an assessment of the fairness of the trial. In this case, the rights of the defence had not been disregarded: the applicant had sought unsuccessfully to challenge the authenticity of the recording and also its use in evidence; further, the conviction had not been solely based upon the recordings. In the circumstances, the Court considered that the trial had not been unfair.[48] In *Khan v United Kingdom*, the applicant had been one of a number of visitors to the house of an individual who was being investigated for drug trafficking and in which the police had installed a listening device. At one point in a conversation that was being recorded, the applicant had admitted dealing in drugs. During his trial, the applicant sought to challenge the admissibility of the evidence obtained through the surveillance, but after the judge considered the question of

[46] *Engel and Others v Netherlands* (1976) A 22, paras 80–85.

[47] *Gäfgen v Germany* [GC] 2010, at para 165.

[48] *Schenk v Switzerland* (1988) A 140, paras 46–47 at para 46. Cf *Lüdi v Switzerland* (1992) A 238, paras 38–40 (in terms of Art 8, telephone intercept deemed necessary in a democratic society, and use of an undercover agent did not involve 'private life'). See also *Bykov v Russia* [GC] (10 March 2009), paras 94–105 (assessment of admissibility and reliability of irregularly obtained intercept evidence by the domestic courts and availability of other corroborating evidence: no violation). See also *Niculescu v Romania* (25 June 2013), paras 122–127; *Valentino Acatrinei v Romania* (25 June 2013), paras 73–77; and *Dragojević v Croatia* (15 January 2015), paras 131–135 (defence had ability to question the validity of the evidence obtained in violation of Art 8, and while such evidence also played a limited role in securing the conviction, no violation of Art 6(1)). When the evidence is very strong, and there appears no reason to doubt its reliability, the need for supporting evidence is correspondingly weaker: *Bykov v Russia* [GC] (10 March 2009), para 90; and *Dragojević v Croatia* (15 January 2015), para 129.

admissibility and declined to exercise his powers to exclude this, the applicant pled guilty to an alternative charge. Although the Court accepted that there had been a violation of the applicant's Article 8 rights, it did not find that there had been an unfair trial within the meaning of Article 6. On this point, the Court attached considerable weight to the fact that were the admission of evidence to have given rise to substantive unfairness, the national courts would have had discretion to exclude it.[49] In *Allan v United Kingdom*, the applicant complained that he had been convicted on the basis of evidence obtained from both audio and video bugging devices that had been placed in a police cell and in the visiting area of a police station and also upon the basis of the testimony of a police informant who had been placed in his cell for the sole purpose of eliciting information about the alleged crime. Relying on the principles set out in Khan, the Court held that the use of the evidence obtained by video and audio recordings did not conflict with the requirements of fairness guaranteed by Article 6: the statements made by the applicant could not be said to have been involuntary, and the applicant had been accorded at each stage of the proceedings the opportunity to challenge the reliability of the evidence. On the other hand, the use of the evidence obtained from the informant who had been placed in the prison cell 'for the specific purpose of eliciting from the applicant information implicating him in the offences of which he was suspected' was not compatible with the right to a fair trial. Unlike in Khan, the admissions allegedly made to the informant had not been 'spontaneous and unprompted statements volunteered by the applicant, but were induced by persistent questioning' of the informant.[50] In short, the actual facts are important, but there is every good chance that the Court will conclude that evidence unlawfully obtained in terms of surveillance or interception will not in itself render the trial unfair.

This approach is, however, in stark contrast to other forms of unlawfully obtained evidence, for the Court has taken a more resolute stance with regard to evidence obtained under ill-treatment, indicating that evidence obtained in breach of Article 3 will generally violate the right to a fair trial. Crucially, it has eschewed any reference to a 'sole and decisive-type' test, holding instead that an issue may arise under Article 6 in respect of evidence obtained in violation of Article 3, even if the admission of the evidence was not decisive in securing the applicant's conviction.[51] In short, the use of evidence secured as a result of a violation of one of the

[49] *Khan v United Kingdom* 2000-V, paras 36–40; in the *Schenk* case (1988) A 140, para 53, the Court had considered it unnecessary to rule on this matter.

[50] *Allan v United Kingdom* 2002-IX, paras 46–48 and 52–53.

[51] Eg *Harutyunyan v Armenia* 2007-VIII, paras 58–67 (reliance on statements by the accused and witnesses who had been tortured); *Zamferesko v Ukraine* (15 November 2012), para 70; *Kaçiu and Kotorri v Albania* (25 June 2013), para 117; *Ryabtsev v Russia* (14 November 2013), para 91; and *Cēsnieks v Latvia* (11 February 2014), para 66. Cf *Latimer v United Kingdom* (dec) (31 May 2005) (allegations that self-incriminating statements had been made while held in an environment designed to be coercive: inadmissible). See further *Harutyunyan v Armenia* 2007-VIII, paras *Zamferesko v Ukraine* (15 November 2012), para 70; *Kaçiu and Kotorri v Albania* (25 June 2013), para 117.

core and absolute rights guaranteed by the Convention always raises serious issues as to the fairness of the proceedings. The importance of Article 3 as 'one of the most fundamental values of democratic societies' is such that 'even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct'.[52] In *Harutyunyan v Armenia*, for example, the applicant and two witnesses had been forced to make statements as a result of torture and intimidation. In finding that there had been a violation of Article 6, the Court observed that 'incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to "afford brutality the cloak of law".'[53]

The other side of the coin is the right not to answer questions. The rationale for the right to silence and the right not to incriminate oneself includes protection of an accused against improper compulsion with a view to minimising the risk of a miscarriage of justice. However, assessment of whether such a risk has arisen is not without difficulty. In *Gäfgen v Germany*, police had obtained evidence from the applicant by methods of interrogation, which amounted to ill-treatment within the meaning of Article 3. The ill-treatment had been deemed necessary by the police in order to attempt to save the life of a child who, unknown to the police, had already been murdered by the applicant. The applicant had thereafter confessed to the police and had taken officers to the spot where he had hidden the victim's body. Subsequently, the trial court decided that all confessions made by the applicant so far could not be used as evidence. Nevertheless, the applicant then repeated his confession in open court. Before the Strasbourg Court, he sought to argue that the impugned real evidence had been decisive in (rather than merely accessory to) securing his conviction as the self-incriminating evidence obtained as a result of his extracted confession had been wholly necessary for the conviction for murder. The Court disagreed. In general, two matters called for scrutiny: first, consideration of the extent to which the applicant had enjoyed an opportunity to challenge the authenticity and the use of the evidence was necessary, and, second, the Court required to assess the quality of the evidence and the circumstances in which the evidence was obtained to evaluate its reliability or accuracy, for 'while no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk

[52] *Jalloh v Germany* [GC] 2006-IX, para 99 (the administration of emetics to retrieve evidence, which could have been retrieved using less intrusive methods, subjected the applicant to a grave interference with his physical and mental integrity against his will and thereby violated both Art 3 and Art 6).

[53] *Harutyunyan v Armenia* 2007-VIII, para 63: the quotation stems from the US Supreme Court judgment in *Rochin v California* (342 US 165 (1952)).

of its being unreliable, the need for supporting evidence is correspondingly weaker'. As regards specifically real evidence obtained in violation of Article 3, the Court would exclude such evidence always in torture cases, whereas in instances of inhuman or degrading treatment it states that 'a breach Article 3 may (. . .) also require, as a rule, the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3, even though that evidence is more remote from the breach of Article 3 than evidence extracted immediately as a consequence of a violation of that Article. Otherwise, the trial as a whole is rendered unfair. However, the Court considers that both a criminal trial's fairness and the effective protection of the absolute prohibition under Article 3 in that context are only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence.'

In this instance, the Grand Chamber held that, in light of the second confession, the failure of the domestic courts to exclude the evidence obtained following the ill-treatment had not had a bearing on the overall fairness of the trial.[54]

It is self-evident that knowledge of the rights of a suspect may well determine whether the rights are exercised. The most obvious means of accessing rights is through legal representation. Restrictions on the right of access to legal assistance to particular aspects of the proceedings will not in themselves be deemed incompatible with the guarantee if these can be reconciled with the interests of justice. On the other hand, access to a legal adviser during detention by the police is now generally required at the time of interrogation, as the case of *Salduz v Turkey* indicates. The principle in this line of cases is that the possibility of 'irretrievable prejudice' to an accused through failure to accord access to legal representation must be avoided. The avoidance of 'irretrievable prejudice' to an accused's rights is most likely to require access to legal representation during the period when a suspect is questioned. The possibility of such prejudice is obvious where inferences may be drawn from an individual's silence or refusal to answer questions. In *Averill v United Kingdom*, for example, the Court held that the denial of access to a solicitor during the first 24 hours of detention failed to comply with the requirements of the sub-paragraph when taken in conjunction with paragraph (1). The applicant had been held and interrogated under caution on suspicion of involvement in terrorist-related murders in Northern Ireland. Failure to allow access to legal assistance during this period had compromised his rights on account of the 'fundamental dilemma' facing such a detainee in such circumstances: a decision to remain silent could allow inferences to be drawn against him at a trial, but answering questions could also have prejudiced his defence without the risk of such inferences being removed in all instances. As a matter of fairness, the possibility of irretrievable prejudice to the rights of an accused through the existence of this dilemma meant that the applicant should have been guaranteed access to his solicitor before

[54] *Gäfgen v Germany* [GC] 2010, paras 162–188 at para 164, 178.

his interrogation began.[55] This has been taken further to an insistence that access to legal representation should be available more generally at the outset of any interviewing of a suspect. In *Salduz v Turkey*, the conviction of a minor for aiding and abetting an illegal organisation had been largely based upon a statement given during police questioning without having had access to a lawyer. The Grand Chamber considered that in order to ensure that fair hearing rights were 'practical and effective', Article 6(1) requires that 'as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right'. Further, 'even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused'. While it is possible for an individual to waive his rights under Article 6 either expressly or tacitly, provided waiver is 'established in an unequivocal manner and [. . .] attended by minimum safeguards commensurate to its importance', the making of incriminating statements during police interrogation but without access to a lawyer, which are subsequently used to secure a conviction, will 'in principle' irretrievably prejudice the rights of the defence. In this case, the applicant had been affected by the restrictions on access to a lawyer in that his statement to the police had formed the basis for the conviction. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could have remedied the situation in the opinion of the Court.[56] This area of case law is still being worked out. In contrast, in *Aleksandr Zaichenko v Russia*, the absence of legal representation at the time the applicant made self-incriminating statements following a roadside check of his vehicle had disclosed 'no significant curtailment of the applicant's freedom of action, which could be sufficient for activating a requirement for legal assistance already at this stage of the proceedings'. He had neither been formally arrested nor interrogated while in police custody, but he had made the statements at the time of the inspection of the vehicle and in public before two witnesses.[57]

Other aspects of fairness have concerned the obligation to respect the presumption of innocence. In *Allenet de Ribemont v France*, two senior police officers during a press conference had referred to the applicant who had just been arrested as one of the instigators of a murder. While acknowledging that Article 6(2) cannot prevent the public being informed of the progress of criminal investigations, the Court confirmed that it does require the relevant authorities to act 'with all the discretion and circumspection necessary if the presumption of innocence is to be respected'. The statement in this case had been a clear declaration that the applicant was guilty. This had encouraged public belief in the applicant's guilt and also tainted the objective assessment of the relevant facts and thus resulted in a finding

[55] *Averill v United Kingdom* 2000-VI, paras 55–61 at para 59.

[56] *Salduz v Turkey* [GC] 2008, paras 50–63, at paras 55 and 59.

[57] *Aleksandr Zaichenko v Russia* (18 February 2010), paras 46–51 at para 47.

of violation of paragraph (2).[58] Statements to the media by public officials must thus not undermine the presumption of innocence or render a trial unfair.

A final aspect of 'fairness' and policing has involved the use of evidence obtained as a result of police incitement. This occurs 'where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution'.[59] In *Teixeira de Castro v Portugal*, two plain-clothes police officers acting as undercover agents approached the applicant during a drug-trafficking operation and asked him to supply heroin. The applicant's name had been supplied to the officers. He had been arrested when he handed over sachets of the drug. Relying on Article 6, he complained that he had not had a fair trial in that he had been incited to commit an offence by plain-clothes police officers who had acted on their own initiative as agents provocateurs and without judicial supervision. For the Court, the behaviour of the officers had gone beyond what was acceptable of undercover agents 'because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed' and so 'right from the outset, the applicant was definitively deprived of a fair trial'. Although recognising that the rise in organised crime called for appropriate measures, the fair administration of justice could not be 'sacrificed for the sake of expedience' since the public interest could not be used to justify the admission of evidence obtained through police incitement.[60] The use of undercover agents must thus be restricted and accompanied by appropriate safeguards. In *Ramanauskas v Lithuania*, a prosecutor had been convicted of bribery for agreeing to ensure the acquittal of a third party in return for money after having been approached several times by an individual who it later transpired had been an officer from a special anti-corruption police unit. The Grand Chamber considered that there had been a violation of the right to a fair trial since there had been no indication that the offence would have been committed without such an intervention, noting also that the domestic courts had taken no steps to carry out a proper examination of the applicant's allegations of incitement.[61] In contrast, in *Milinienë v Lithuania*, no violation was established. Here, a judge had been convicted of corruption following a conversation between her and a private individual who had secretly recorded the discussion. The individual then approached the police. While noting that the police had 'influenced' events (through approval to offer financial inducements and by supplying technical

[58] *Allenet de Ribemont v France* (1995) A 308, paras 35–41 at para 38.

[59] *Ramanauskas v Lithuania* [GC] 2008-1, at paras 54–55.

[60] *Teixeira de Castro v Portugal* 1998-IV, paras 34–39 at paras 36 and 39.

[61] *Ramanauskas v Lithuania* [GC] 2008-1, paras 62–74 (and at para 50, noting that the Council of Europe's Criminal Law Convention on Corruption (ETS 173(1999)), Art 23 requires states to adopt measures permitting the use of special investigative techniques).

equipment to record conversations), the role of the police was deemed not 'to have been abusive, given their obligation to verify criminal complaints and the importance of thwarting the corrosive effect of judicial corruption on the rule of law in a democratic society'. Further, the determinative factor had been the conduct of the individual and the judge, and on balance, 'the police may be said to have "joined" the criminal activity rather than to have initiated it'.[62]

8.6 Conclusions

Policing modern societies is of considerable complexity. Police officers enjoy extraordinary powers to intervene in the lives of individuals. Much of that legal authority involves discretionary authority. How a police officer behaves in a given situation is entirely dependent upon a range of factors that highlight the amount of discretionary authority that an officer enjoys: to intervene or not? To exercise lawfully prescribed powers or not? And what precise lawful powers to exercise? To deprive an individual of their liberty or not? To employ ancillary powers such as search or not? and so on. These decisions may be as dependent upon the dominant organisational culture as upon an individual's sense of ethical awareness, professionalism and empathy with the individuals with whom the officer is in contact. The role of human rights law is to attempt to bring some sense of order to this range of imponderables, to impose a framework of concerns to 'guide, patrol and watch' the actions or inactions of those seeking to protect society. Human rights law does so by utilising a series of legal concepts—of necessity, proportionality, legal certainty, absence of arbitrariness. Human rights treaties may rarely refer to police officers specifically, but police officers and the exercise of their powers are very much the central concern of drafters and those charged with interpreting these standards in judicial cases. This jurisprudence helps shape the discharge of policing. It should not be seen as a threat to effective policing, for it helps underline the sense that police officers serve to uphold human rights. The contribution of human rights is obvious: it helps ensure that society retains the essential features of a *Rechtstaat* despite the ever-present tendency for legislatures and executives to seek to respond to new forms of perennial challenges to the well-being of the community posed by terrorist, organised crime and technological advances by increasing the opportunities to interfere with citizens' rights.

[62] *Milinienë v Lithuania* (24 June 2008), paras 35–41 at para 38 (and also distinguishing Ramanauskas v Lithuania [GC] 2008 on the ground that the applicant had enjoyed a full opportunity to challenge the authenticity and accuracy of the evidence against her). In a similar vein, see Veselov and Others v Russia (2 October 2012), at para 90 (authorities 'should be in possession of concrete and objective evidence showing that initial steps have been taken to commit the acts constituting the offence for which the applicant is subsequently prosecuted').

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Chapter 9
Surveillance Powers of the Police and the Protection of Personal Data

Dieter Kugelmann and Christina Kosin

Contents

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Abstract In the fight against serious crimes such as terrorism, law enforcement officials and intelligence services employ secret surveillance measures to gather personal data to prevent, detect and investigate these offences. Moreover, personal data is exchanged between public authorities, international actors, as well as private entities in order to safeguard national security. These activities inevitably interfere with fundamental rights. Although national security is a legitimate objective to achieve, fundamental human rights ought not to be disregarded in democratic States, which follow the rule of law. In this paper, the right to privacy and the protection of personal data on the international level are elucidated, the international and national (Germany) collection and transfer of personal data are elaborated upon and case law of the European Court of Human Rights, the Court of Justice of the European Union and the German Constitutional Court is presented. The essential question in this paper is under which conditions interferences with the right to privacy and the right to the protection of personal data may be legally permitted. The core argument is that based on the jurisprudence of the courts, general criteria can be identified that guide lawful and proportional measures of surveillance.

9.1 Surveillance and Privacy

The right to privacy in the digital age becomes more and more one of the most central and important fundamental rights. The United Nations (UN) has reacted to this development by creating the position of a UN Special Rapporteur on Privacy. In July 2015, the UN Human Rights Council (HRC) appointed Prof. Joseph Cannataci from Malta by Resolution A/HRC728/L.27 as the first Special Rapporteur on Privacy. His mandate encompasses the gathering of information on (inter) national practices and trends relating to the right to privacy, the identification of obstacles, awareness raising, the integration of a gender perspective throughout the work and the reporting on violations of the right to privacy as set out in international treaties such as Art. 12 of the Universal Declaration of Human Rights (UDHR) and Art. 17 of the International Covenant on Civil and Political Rights (ICCPR).

The Special Rapporteur on Privacy submits annual reports to the HRC, as well as the UN General Assembly (UNGA). Pursuant to HRC Resolution 28/16, Prof. Joseph Cannataci submitted his first report to the HRC during its 31st session on

8 March 2016.[1] The annual report outlines Mr Cannataci's vision for the mandate, his working methods, the state of privacy in 2016, as well as a work plan for the first three years of the mandate. The Rapporteur's annual report for the UNGA was published on 30 August 2016.[2]

9.1.1 Police and Security Services

In 2013, Edward Snowden disclosed documents from the National Security Agency (NSA), which revealed that the NSA had been using secret surveillance measures to spy worldwide. This information sparked yet another debate on mass surveillance by security services on the one hand and the right to privacy on the other hand. Surveillance measures constitute one central part of police work, as well as the work of security services such as the NSA in the USA, the Government Communications Headquarters (GCHQ) in the United Kingdom and the Federal Intelligence Service (BND) in Germany. However, surveillance measures have to be restricted to what is absolutely necessary. Otherwise, the right to privacy risks to be infringed in an unjustified manner. This means that surveillance activities have to have a legal basis and pursue a legitimate aim. These minimum requirements ought to guarantee that surveillance measures are not arbitrarily used. Any cooperation between security services, the police and other stakeholders should occur in a legal framework, which pays respect to the right to privacy and the principle of proportionality.

One challenging aspect in the context of global cooperation between different international security actors constitutes the legal concept of privacy. For example, pursuant to the US perception of the legal term privacy, persons who have unrestricted access to data own the rights to these data.[3] From the European point of view, it is the other way around. The legal term privacy is understood as empowering persons to whom the data relate with rights to these data. While data protection is a general principle in the US, it constitutes a fundamental right in Europe. Within Europe, the right to privacy and the protection of personal data are two different yet intrinsically interlinked fundamental rights.

The different perceptions of the legal concept of privacy and data protection make cooperation between international actors (at least with regard to the US and Europe) more difficult. This is because the different perceptions result in different standards of protection of personal data. In order to be able to cooperate in the exchange of personal data, States have to agree on common standards of data protection. At the same time, countries have to manage to not disproportionally exceed or undermine the standard of data protection 'at home'.

[1] Report of the Special Rapporteur on the right to privacy from 8 March 2016, UN Doc. A/HRC/31/64.
[2] Report of the Special Rapporteur on the right to privacy from 30 August 2016, UN Doc. A/71/368.
[3] Boehm (2015), p. 51.

9.1.2 The Right to Privacy

The right to privacy is a fundamental right that is recognised in international, European and national laws. For example, the right to privacy is protected in Art. 12 UDHR, Art. 8 of the European Convention on Human Rights (ECHR) and Art. 7 of the Charter of Fundamental Rights of the European Union (CFREU). Measures of surveillance can constitute interferences with fundamental rights such as the right to privacy, especially if such measures are of a secret nature. However, not every interference constitutes a violation of the right to privacy. This is because national legislation, European and international legislation stipulate reasons for justification. On the national level, for example, police law includes reasons of justification for interferences with the right to privacy. On the international sphere, the ECHR contains justifications for such interferences.

9.2 The Council of Europe

9.2.1 The European Court of Human Rights and Surveillance

Article 8 (1) ECHR stipulates that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'. This right encompasses three central legal interests, which are protected: family, home and correspondence. The European Court of Human Rights (ECtHR) has elaborated on the concept of correspondence in its case law. According to the ECtHR in *Copland v. the UK*,[4] correspondence pursuant to Art. 8 (1) ECHR includes mail, telephone, e-mail, as well as personal information.[5] Hence, the concept of correspondence in this article is fit for the digital age as it covers e-mails next to more traditional forms of communication such as mail and telephone. Furthermore, the Court subsumed personal information under Art. 8 (1) ECHR, which shows that the content of letters or of personal Internet usage is covered too.

In Art. 8 (2) ECHR, reasons of justification for interferences with Art. 8 (1) ECHR are stipulated. According to this provision, interferences with Art. 8 (1) by a public authority are only allowed if they are in accordance with the law and necessary in a democratic society, for instance, in the interest of national security. In conjunction with the requirement of 'necessary in a democratic society', further vital interests of States are listed such as public safety or the economic well-being of a country, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others.

[4] *Copland v. the UK*, No. 62617/00, 3 April 2007.

[5] Ibid., para 41.

Next to Art. 8 ECHR, Art. 10 EHCR is another fundamental right in the Convention that has to be mentioned in the context of surveillance measures. Article 10 provides the right to freedom of expression. The right to freedom of expression encompasses all means of uttering an opinion, for example, by telephone or the Internet. The right to freedom of expression encompasses the right to receive information and ideas without interferences by public authorities and regardless of frontiers. Since one cannot form fully informed opinions without receiving information, it is necessary that Art. 10 ECHR encompasses the right to receive information too.[6]

Since Art. 10 ECHR is not an absolute right, interferences with this provision can be justified under certain conditions. These conditions are stipulated in Art. 10 (2) ECHR. Public authorities can interfere with Art. 10 (1) ECHR by establishing formalities, conditions, restrictions or penalties, however, only if these actions are prescribed by law and are necessary in a democratic society. In conjunction with the latter, Art. 10 (2) lists vital interests of States such as national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of reputation or rights of others, preventing the disclosure of information received in confidence or maintaining the authority and impartiality of the judiciary.

9.2.1.1 The Zakharov Case

The ECtHR uses its case law in order to elaborate on the rights and freedoms provided in the Convention, including Art. 8 ECHR. In two of the latest cases, *Roman Zakharov v. Russia*[7] and *Szabó and Vissy v. Hungary*,[8] the Court elaborated on the scope of Art. 8 ECHR. In the former case, the applicant, Mr Zakharov, was a Russian national who worked as an editor-in-chief of a publishing company and as a chairperson of an NGO that monitors the state of media freedom in Russia.[9] Mr Zakharov brought judicial proceedings against three Russian mobile network operators, which installed equipment according to Russian law Order No. 70 of the State Committee for Communications and Information Technologies. Russian law Order No. 70 enabled Russian security services to intercept all telephone communications without prior judicial authorisation. Before Russian courts, Mr Zakharov complained that the legislation, whose addendums have never been published, violated his right to privacy of his telephone communications. His claims were dismissed by the Russian courts.[10]

[6]Kugelmann, EuGRZ (2003), p. 16.

[7]*Roman Zakharov v. Russia*, No. 47143/06, 4 December 2015 [GC].

[8]*Szabó and Vissy v. Hungary,* No. 37138/14, 12 January 2016.

[9]*Roman Zakharov v. Russia*, No. 47143/06, 4 December 2015 [GC], para 8.

[10]Ibid., para 13.

Before the ECtHR, Mr Zakharov complained that the mere existence of the legislation amounted to a violation of Art. 8 ECHR.[11] The Court approached the case by applying the *Kennedy* approach to find out whether the applicant had standing before the Strasbourg Court.[12] In the case *Kennedy v. the UK*,[13] the ECtHR had stipulated criteria in order to examine whether an applicant who claims that his or her right to privacy was violated by the mere existence of a piece of legislation has standing.[14] As mentioned in numerous cases, the Court does usually not examine laws of States *in abstracto*.[15] However, to prevent that secret surveillance measures are practically unchallengeable before the ECtHR, the Court has put up conditions that enable individuals to challenge the mere existence of laws before the ECtHR.

In *Zakharov*, the two central criteria from the Kennedy approach were fulfilled. First, the contested legislation allowed surveillance measures against a wide range of individuals. All users of mobile telephone services of Russian providers were affected by the legal provisions. Second, the legislation did not provide for effective remedies.[16] After having established that an interference with Art. 8 ECHR existed, the ECtHR elucidated the reasons of justification in Art. 8 (2) ECHR. The Court explained that the requirement of 'in accordance with the law' constitutes the quality of law requirement and demands that the legislation has a basis in domestic law, is compatible with the rule of law, is accessible to the person concerned and is foreseeable as to its effects. The criterion of 'necessary in a democratic society' means that the legislation offers adequate and effective guarantees against the abuse of the legislation.[17]

Against this background, the Court summarised the contested Russian legislation as inaccessible to the public at large, unclear concerning the circumstances in which individuals' communications may be intercepted, insufficiently clear on the discontinuation of surveillance measures and unclear regarding the circumstances in which data would be destroyed after a trial.[18] Moreover, the ECtHR highlighted that the law provided limited judicial scrutiny as 'sensitive' areas were outside a court's scope of review, allowed secret service personnel and the police to intercept communications without the prior obtaining of judicial authorisation, limited prosecutors' supervision of secret surveillance measures as 'sensitive' areas lay outside their scope of review and that it did not provide effective remedies for individuals

[11]Ibid., para 148.

[12]Ibid., para 171.

[13]*Kennedy v. the UK*, No. 26839/05, 18 May 2010.

[14]Ibid., para 124.

[15]See for example *N.C. v. Italy*, No. 24952/94, 15 December 1998, [GC], para 56; *Krone Verlag GmbH & Co v. Austria (no. 4)*, No. 72331/01, 26 March 2007, para 26; *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania*, No. 48748/08, 14 July 2014, [GC], para 101.

[16]*Roman Zakharov v. Russia*, No. 47143/06, 4 December 2015 [GC], paras 175–176.

[17]Ibid., para 236.

[18]Ibid., paras 242, 248, 251 and 255.

whose communications were intercepted. Individuals were not notified at any point, and there was no possibility to request information on the interception.[19]

When applying the requirements from Art. 8 (2) ECHR to the Russian law, the ECtHR came to the conclusion that the Russian legislation permitted secret surveillance measures. The contested law did not meet the 'quality of law requirement' and was incapable of keeping the interference to 'what is necessary in a democratic society'. The legislation provided neither for adequate and effective guarantees against arbitrariness nor for an effective and continuous control, public scrutiny and practical effectiveness. Therefore, the ECtHR found the contested Russian legislation to be in violation of Art. 8 ECHR.[20]

The *Zakharov* case revealed specific criteria that the ECtHR demands in order for legislation that allows surveillance measures to be in conformity with Art. 8 (2) ECHR. The law allowing secret surveillance measures needs to fulfil the requirements of transparency, legitimacy, scrutiny, necessity, precision and redress. This entails that the legislation needs to be accessible to the wider public. The wider public has to be able to foresee the effects of the measures stipulated in the legislation. Moreover, individuals who are affected have to be notified of the measures in order to be able to request information (transparency).

Further, the measures stipulated in the law must be subjected to prior judicial authorisation, full and continuous scrutiny, and the law itself has to have a legal basis in domestic law (legitimacy and scrutiny). The content of the legislation has to be sufficiently precise with regard to the conditions when surveillance measures can be used. Such measures have to be targeted and not apply to anyone, and they have to be restricted to what is absolutely necessary (necessity). Furthermore, there have to be clear criteria under which circumstances communications may be intercepted or when the interception is discontinued (precision). Lastly, individuals must be able to challenge the usage of surveillance measures against them. This includes that personal data gathered through surveillance measures can be deleted (redress).

9.2.1.2 The Szabó Case

In *Szabó and Vissy v. Hungary*, the two Hungarian applicants worked for the institution 'watchdog'—an NGO that advocates for a more transparent government.[21] Before the ECtHR, the applicants argued that Hungarian law, which stipulated competences for the anti-terrorism special police force (section 7/E (3) surveillance), violated Art. 8 ECHR.[22] Like in *Zakharov*, the applicants challenged general law and not a specific measure that affected them. The contested legislation provided for secret surveillance measures within the framework of

[19] Ibid., paras 261, 268, 281 and 300.

[20] Ibid., paras 302–305.

[21] *Szabó and Vissy v. Hungary,* No. 37138/14, 12 January 2016, para 7.

[22] Ibid., para 26.

intelligence gathering for national security. Police prerogatives on the basis of the law included surveillance activities such as recording, checking and recording contents of electronic or computerised communications and secret house searches. The contested legal provisions did not require the obtaining of prior consent from the person concerned.[23]

The ECtHR agreed with the applicants and ruled that the contested legislation infringed Art. 8 ECHR and could not be justified on the basis of Art. 8 (2) ECHR. Pursuant to the Court, the legislation lacked sufficiently precise, effective and comprehensive safeguards on ordering, execution and potential redress for police measures. Furthermore, the surveillance measures based on the legislation could virtually affect anyone, lacked effective remedies and were exclusively granted by the executive, and the usage of such measures was not subjected to strict necessity.[24] This case reiterated that surveillance measures and/or the law that stipulates these measures have to be transparent, legitimate, necessary and precise. Furthermore, the legislation ought to be fully subjected to scrutiny, and one must be able to receive redress against surveillance activities.

9.2.2 The Cybercrime Convention

The Cybercrime Convention (CETS No. 185), also known as the Budapest Convention, was established by the Council of Europe (CoE) on 23 November 2001 and entered into force on 1 July 2004. The Convention is the first international treaty to address cybercrime and to tackle the specific law enforcement questions related to copyright infringements, fraud, child pornography and network security issues.[25] The Budapest Convention can be seen as a reaction to the changes brought about by digitalisation, convergence and globalisation of computer networks. The central objective of the treaty is to create a common criminal policy by adopting appropriate legislation on the national level und fostering international cooperation in order to protect society against cybercrimes. In total, the Convention is supported by 49 Member States of which nine States are non-CoE Members, including the USA, Canada and Japan. Israel was the latest State to ratify the Convention in September 2016. Some States of the European Union (EU) such as Greece, Ireland and Sweden did not ratify the Convention.[26]

The Budapest Convention is subdivided into four chapters. Chapter I clarifies the use of terms (definition of computer system and others). Chapter II stipulates the measures that Party States are obliged to take at the national level. For instance, Art. 2 of the Convention obliges Member States to adopt legislative or other measures to

[23]Ibid., paras 9, 52 and 55.

[24]Ibid., para 89.

[25]Clough (2014), pp. 699–700.

[26]CoE Treaty Office, chart of signatures and ratifications of Treaty 185, 29 October 2016.

criminalise the intentional access in whole or in part to a computer system without right. Legislative harmonisation is crucial for an effective international cooperation because many countries require dual criminality for mutual assistance.[27] Chapter III includes forms of international cooperation (mutual assistance, extradition, transborder access to stored computer data, etc.). For example, Art. 34 of the Budapest Convention stipulates conditions for the mutual assistance regarding the interception of content data. In the last part, Chapter IV, final provisions (territorial application, effects of the Convention, reservations, etc.) are listed.

The Cybercrime Convention is enforced by the Cybercrime Convention Committee (T-CY), which was established pursuant Art. 46 of the Convention. The T-CY aims to facilitate the effective use and implementation of the Convention, the exchange of information and potential amendments. In contrast to conventional international treaty bodies such as the UN Human Rights Committee, the T-CY consists not of independent experts but of representatives of the State Parties. Since the Convention is built upon legislative and other forms of harmonisation, as well as international cooperation, it is crucial that Party States themselves enforce the Convention in order for it to be effective and successful.

According to Arts. 44–46 of the Budapest Convention, the European Committee on Crime Problems (CDPC) is involved in the enforcement of the Convention in cases of amendments, settlement of disputes and communication with the T-CY. The CDPC was set up in 1958 by the CoE, and its task is to oversee and coordinate the Council's actions of crime prevention and crime control.

In November 2002, the CoE adopted a short (16 articles!) additional protocol on the criminalisation of acts of racist and xenophobic nature committed through computer systems to the Cybercrime Convention (CETS No. 189). The additional protocol came into force in March 2006. In Art. 6 of the protocol, for example, Party States are obliged to penalise the publication of material through a computer system, which denies, grossly minimises, approves or justifies genocide or crimes against humanity. The additional protocol is supported by 24 Member States of the CoE. Some Member States of the CoE neither signed nor ratified the additional protocol such as Turkey, Russia, Bulgaria, Hungary, Ireland and the UK.[28]

9.2.2.1 Issues with the Cybercrime Convention

Although the Budapest Convention can be regarded as a step forward in the fight against cybercrimes, some issues with the Convention have to be critically highlighted. In Germany, two individuals lodged a constitutional complaint against the Cybercrime Convention before the German Constitutional Court (Bundesverfassungsgericht).[29] Pursuant to the complainants, the German law

[27] Clough (2014), p. 701.

[28] CoE Treaty Office, chart of signatures and ratifications of Treaty 189, 29 October 2016.

[29] BVerfG, Beschluss des Zweiten Senats vom 21. Juni 2016 - 2 BvR 637/09 – Rn. (1-31).

implementing the Convention in line with Art. 59 (2) German Basic Law (GG) violates the German Constitution. The complainants alleged that Arts. 25–34 of the Budapest Convention on mutual assistance are in breach of the right to privacy of correspondence, posts and telecommunications (Art. 10 GG), the inviolability of home (Art. 13 GG), as well as other provisions of the GG, including Art. 1 (1), Art. 19 (4), Art. 101, Art. 102 and Art. 104 GG.[30]

The complainants have emphasised that the transferral of personal data to other countries such as the USA, which do not guarantee the same standard of protection of personal data as Germany, violates the GG. The complainants argued that they were personally, directly, as well as presently affected by the contested provisions of the Budapest Convention as they were intensively using telecommunication networks and the Internet and because they were frequently travelling abroad.

In June 2016, the Bundesverfassungsgericht declared the constitutional complaint inadmissible. According to the Court, Arts. 25–31 and Arts. 33–34 Budapest Convention did not directly affect the complainants because these provisions were not directly applicable in Germany. On the basis of Art. 59 (2) GG, the Cybercrime Convention was incorporated in German law; however, this did not automatically trigger the direct application of the Convention in Germany.[31] The Bundesverfassungsgericht differentiated between the incorporation and validity of the Budapest Convention in German law on the one hand and the application of the Convention in domestic law on the other hand.

Pursuant to the Court, the Budapest Convention and the contested provisions were not self-fulfilling in that they did not directly affect the complainants. Rather, the Cybercrime Convention—as an international treaty, which was incorporated in national law—includes duties for State Parties such as Germany.[32] With regard to Art. 32 Cybercrime Convention, the Bundesverfassungsgericht declared the complaint of the authors inadmissible since the complainants did not sufficiently substantiate their arguments.[33]

Although the Bundesverfassungsgericht declared the complaint inadmissible, this case before the German Constitutional Court reveals that the provisions in the Budapest Convention are not uncontroversial. Because the Cybercrime Convention provides a framework for international cooperation with regard to the exchange of personal data, issues relating to the standard of data protection are inevitable. These problems have to be tackled and solved in order to have a working and effective international cooperation.

Similar to the ECtHR, complainants before the Bundesverfassungsgericht have to be directly and personally affected by the contested legislation in order to have standing. As was seen in the cases of *Kennedy*, *Zakharov* and *Szabó*, the ECtHR may, however, declare complaints against legal provisions *in abstracto* admissible.

[30]Ibid., paras 3–4.

[31]Ibid., paras 10–12.

[32]Ibid., para 14.

[33]Ibid., paras 27–29.

In the case before the German Constitutional Court presented above, the Bundesverfassungsgericht rejected the complaint because the legislation, which was based on an international treaty, did not directly affect the authors.

A further issue with the Budapest Convention concerns its global reach. The Convention is not supported by all countries, although it was intended to apply internationally.[34] As mentioned above, Russia, for instance, did not ratify the Convention. The Budapest Convention was mostly drafted by European States. Hence, the question arises whether the Convention's reach is restricted to Europe. Against this, however, it can be argued that the Cybercrime Convention was drafted by almost half of the non-COE Member States to the Convention, namely the USA, Japan, Canada and South Africa.[35]

9.2.3 The Commissioner for Human Rights

9.2.3.1 The Role of the Commissioner for Human Rights

The position of a Commissioner for Human Rights (HR Commissioner) was created under the auspices of the CoE. The Council of Ministers (CoM) of the CoE passed Resolution (99) 50, which established the HR Commissioner in 1999. Article 1 (1) Res. (99) 50 summarises the HR Commissioner's mandate, which includes promoting education and raising awareness of and respect for human rights as embodied in the CoE's human rights instruments. The position of the HR Commissioner is non-judicial pursuant to Art. 1 (1) Res. (99) 50. The work of the HR Commissioner focuses on three main areas. First, the Commissioner visits countries and talks to national authorities, as well as civil society. Second, the HR Commissioner publishes thematic reports and gives advice on human rights systematic implementation. Third, the Commissioner engages in raising awareness of human rights issues. The current HR Commissioner is the Latvian American Nils Muižnieks**,** whose mandate has started in 2012 and will end in 2018.

The detailed tasks of the HR Commissioner are stipulated in Art. 3 (a–i) Res. (99) 50. The Commissioner identifies shortcomings in the law and practice of Member States concerning the compliance with human rights (Art. 3 (e)), presents a report concerning a specific matter to the CoM or to the CoM and the Parliamentary Assembly of the CoE (PA) (Art. 3 (f)), responds to requests by the CoM and PA concerning their tasks in ensuring compliance with human rights (Art. 3 (g)), submits annual reports to the CoM and the PA (Art. 3 (h)) and cooperates with other international institutions for the promotion and protection of human rights (Art. 3 (i)). With regard to the latter, the HR Commissioner is careful to avoid a

[34]CoE Report 'Project on Cybercrime: Final Report', Report No ECD/567(2009)1, 15 June 2009), p. 5.

[35]CoE Report 'Explanatory Report to the Convention on Cybercrime', Report No, 185, 23 November 2001, p. 55.

duplication of activities. According to Art. 1 (2) Res. (99) 50, the Commissioner neither fulfils functions that are already fulfilled by other supervisory bodies of human rights instruments nor examines individual complaints.

The current HR Commissioner Nils Muižnieks has published numerous articles and comprehensive papers on the topic of surveillance and human rights, e.g. 'Europe is spying on you', which was published in the New York Times in 2015; 'Human rights in Europe should not buckle under mass surveillance', which was published in Open Democracy in 2016; as well as 'Democratic and effective oversight of national security services' (CoE 2015) and 'The rule of law on the Internet and in the wider digital world' (CoE 2014). Mr Muižnieks' central statements concerning human rights and mass surveillance are shortly presented in the subsequent subsection.

9.2.3.2 The Commissioner for Human Rights on Surveillance

Pursuant to Nils Muižnieks, the right to privacy is a fundamental right that guarantees living in dignity and security. Legislation should limit surveillance measures and the usage of personal data to respect the right to privacy enshrined in major human rights treaties such as the UDHR and the ICCPR.[36] Furthermore, a security trend has been spreading over Europe in the light of fighting terrorism. However, combatting terrorism at the expense of human rights is an ineffective approach.[37] Mr Muižnieks advocates that States collect, use and store communication information that is crucial for fighting terrorism under exceptional and precise conditions, as the ECtHR reiterated in the *Zakharov* case. Targeted surveillance measures track potential terrorists, while mass surveillance makes everyone a suspect. Moreover, terrorism wants persons to believe that they have to choose between freedom and security, but Europe must take action that is effective and follows human rights and the rule of law.[38]

9.3 The European Union

9.3.1 EU Law

According to Art. 3 (2) of the Treaty on the European Union (TEU), the European Union's aim is to guarantee its citizens an area of freedom, security and justice (AFSJ) without internal frontiers. This goal is stipulation separately and before the aim of creating an internal market (Art. 3 (3) TEU), which highlights the

[36]Muižnieks (2015a).
[37]Muižnieks (2015b).
[38]Ibid.

importance of the AFSJ in the process of integration.[39] An AFSJ requires adequate data protection, especially in the sphere of police and judicial cooperation in criminal matters. Hence, the protection of EU citizens involves the protection of the citizens' personal data.

Primary law of the EU offers a threefold protection of personal data. Article 16 (1) of the Treaty on the Functioning of the European Union (TFEU) stipulates the right to the protection of personal data. Article 8 (1) CFREU is almost identical to Art. 16 (1) TFEU and entails as well the right to the protection of personal data. Article 39 TEU regulates data protection in the context of the Common Foreign and Security Policy of the EU.[40] Until the entry into force of the Lisbon Treaty, the law of the EU did not provide an explicit right to the protection of personal data.[41] It is noteworthy that Art. 7 CFREU stipulates the right to privacy, which encompasses the right to respect for one's private and family life, home and communications. However, in the context of the protection of personal data, Art. 8 CFREU constitutes *lex specialis* to Art. 7 CFREU.

In the Treaty of the European Community (TEC), the predecessor of the TFEU, Art. 286 (1) TEC obliged organs of the EU to adhere to the standard of data protection entailed in the Data Protection Directive 95/46/EC. However, in contrast to Art. 16 (1) TFEU, Art. 286 (1) TEC did not contain the *right* to the protection of personal data. It is striking that the TFEU explicitly stipulates the right to the protection of personal data since other fundamental rights and freedoms are included in the CFREU but not the TFEU or the TEU. This underlines the growing importance of the right to the protection of personal data within the EU. However, Art. 16 TFEU also encompasses the more economic aspect of free flow of data and can be used as a legal basis for secondary law.

According to Art. 16 (2) TFEU, the European Parliament (EP), together with the Council of the EU (Council), lays down rules to protect individuals with regard to the process of personal data and rules regarding the free movement of personal data. The obligated parties, which have to guarantee the protection of personal rights, are EU institutions, bodies, offices and agencies. Member States of the EU have to ensure the protection of personal data too, however, only if they carry out activities within the scope of the EU. Pursuant to Art. 16 (2) TFEU, independent authorities ought to enforce the rules laid down by the EP and the Council. The term independent authorities relates to the European data protection supervisor,[42] Mr Giovanni

[39]Terhechte (2016), Article 3 TEU para 33.

[40]Cf. Kugelmann, in: Streinz (ed.) (2012), Article 39 TEU.

[41]Kingreen (2016), Article 16 TFEU para 3.

[42]Articles 41 et seq. of Regulation (EC) No 45/2001 of the EP and the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, O.J. L 8 (2001).

Buttarelli; data protection officers of the EU institutions and bodies[43]; as well as national data protection officers[44,45].

The EU and its Member States share competences in the AFSJ pursuant to Art. 4 (2) (j) TFEU. However, Art. 72 TFEU stipulates that activities within the AFSJ are without prejudice to EU Member States' responsibility to maintain law and order and to safeguard domestic security within their borders. This means that Member States of the Union remain the sole defenders of their national security despite the fact that they shared competences with the EU in the AFSJ.[46] Hence, national surveillance measures that aim to safeguard the internal security of a country fall within the competences of Member States and not the EU.

Article 276 TFEU complements Art. 72 TFEU in so far as it prescribes that the Court of Justice of the European Union (CJEU) has no jurisdiction over Member States' actions, which aim to maintain the *ordre public*.[47] In the AFSJ, the EU enjoys specific competences in the field of security due to the overlapping notions of 'national security', 'internal security', 'internal security of the EU' and 'international security'.[48] However, human rights may influence those competences.

9.3.2 Collection and Exchange of Data in the EU and Between the EU and Third States

9.3.2.1 The EU PNR Directive

In December 2015, the EP and the Council negotiated Directive 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crimes (EU PNR Directive). According to Art. 1 (a) and (b) of the Directive, air carriers ought to transfer PNR data of passengers who are flying from outside the Union to the EU to EU Member States. The data is then collected, used, retained and exchanged by and between Member States. Member States may apply the PNR Directive to intra-EU flights too according to Art. 2 (1) of the EU PNR Directive. The collected data is depersonalised by masking out after 6 months.[49] The access to full PNR data that

[43]Ibid. Article 24 (1).

[44]Article 28 (1) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. L 281 (1995).

[45]Kingreen (2016), Article 16 TFEU, para 8.

[46]Rossi (2016), Article 72 AEUV, para 1.

[47]Ibid.

[48]EP Report on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs, Doc. No. A7-0139/2014, 21 February 2014, pp. 11–12.

[49]Article 12 (2) EU PNR Directive.

leads to the identification of the individual concerned is only granted under strict and limited conditions.[50] Pursuant to the Directive, Member States have to set up Passenger Information Units (PIUs) in order to manage the collection, storage and process of PNR data.[51]

The Directive was proposed by the Commission in 2011.[52] However, the EP rejected the initial proposal of the Commission because it was in conflict with fundamental rights.[53] Following the attacks in Paris and Copenhagen in 2015, negotiations on an EU PNR Directive started again in the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) of the Parliament in July 2015. On 14 April 2016, the EP approved the Directive by 461 votes in favour, 179 votes against and nine abstentions. The text of the Directive was approved by the Council on 21 April 2016.[54]

The indiscriminate application of the EU PNR Directive to all aircraft passengers risks constituting a disproportionate interference with the right to data protection and the right to privacy.[55] Moreover, it is questionable whether a direct correlation exists between the PNR data that is collected and used and the prevention, detection, investigation and prosecution of terrorist acts and serious crimes because the Directive applies or may apply to all persons from extra- and intra-EU flights.[56]

9.3.2.2 The EU PNR Agreements with the USA and Canada

The EU has concluded PNR agreements with other countries such as the USA and Canada. The PNR agreement with the US was concluded in December 2011 and entered into force in July 2012.[57] In the aftermath of 9/11, the USA required air

[50]Arts. 6, 7 and 13 EU PNR Directive.

[51]Article 4 EU PNR Directive.

[52]European Commission Proposal for a Directive of the EP and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, Doc. No. COM (2011) 32 final, 2 February 2011.

[53]Report of the EP on the proposal for a directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, Doc. No. C7-0039/2011, 29 April 2013.

[54]EP/Legislative Observatory 2011/0023(COD) – 14/04/2016 Text adopted by Parliament, 1st reading/single reading, http://www.europarl.europa.eu/oeil/popups/summary.do?id=1439888&t=d&l=en.

[55]European Data Protection Supervisor, Opinion 5/2015—Second Opinion on the Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, para 21.

[56]Ibid, para 12.

[57]Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, O.J. L 215 (2012).

carriers to provide PNR data to the US Department of Homeland Security and the US Customs and Border Protection for screening individuals who travel to the USA. This data was used in order to prevent, detect, investigate and prosecute terrorist acts and other transnational crimes. Since the USA had received data from European citizens too, an agreement was negotiated, which regulates the transferral of PNR data from European citizens to the USA. The EU–USA PNR agreement foresees that PNR data of all persons who travel between the EU and the USA is transferred to the US Department of Homeland Security.[58] The process of the PNR data is restricted to the purpose of fighting terrorism and other related crimes.[59] The USA may retain the data for up to 5 years, and access to the database is restricted to a limited number of officials.[60] The agreement provides for administrative and judicial redress under US law for individuals whose data was allegedly used contrary to the agreement.[61] The first agreement on PNR data between the USA and the European Community (EC) was concluded in 2004[62] and struck down by the CJEU in 2006 due to a wrong legal basis.[63] The PNR agreement with the USA fell outside the scope of the first pillar. Hence, the EC had no competence to conclude the agreement.[64] The EP heavily criticised the EU–US PNR agreement from 2007 because of the period of retention, inadequate redress measures and the lack of safeguards against abuse. Further negotiations resulted in the EU–US PNR agreement from 2012, of which the EP approved. On 25 June 2014, the EU and Canada signed their agreement on the transfer of PNR data to Canadian authorities.[65] The agreement was reached in order to prevent and combat terrorist offences or other serious transnational crimes.[66] The agreement has not come into force yet since the EP asked for the CJEU's opinion (pursuant to Art. 218 (11) TFEU) on the agreement, especially with regard to its compatibility with Art. 16 TFEU and Art. 7 and Art. 8 CFREU. On 8 September 2016, the Advocate General of the CJEU issued his opinion on the EU–Canada PNR agreement, in which he stated that the agreement was not yet compatible with Art. 16 TFEU and Arts. 7 and 8 CFREU. According to the Advocate General, several amendments have to be made. For

[58]Ibid., Article 2 (2) and Article 3.

[59]Ibid., Article 4 (1) (a).

[60]Ibid., Article 8 (1).

[61]Ibid., Article 13 (1).

[62]Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Borer Protection, O.J. L 183 (2004).

[63]Joined Cases C-317/04 and C-318/04, Parliament v. Council (PNR), ECLI:EU:C:2006:346, para 67.

[64]Faull and Sorecca (2008), p. 412.

[65]Proposal for a Council Decision on the conclusion of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data, 18 July 2013, Doc. No. COM(2013) 528 final.

[66]Ibid., Article 3 (1).

example, offences falling under the definition of serious transnational crimes ought to be exhaustively defined, and it ought to precisely indicate why it is objectively necessary to retain all PNR data for a maximum of 5 years.[67]

9.3.2.3 The EU Data Retention Directive

On 8 April 2014, the Grand Chamber of the CJEU invalidated Directive 2006/24/EC on the retention of data generated or processed in connection with the provisions of publicly available electronic communications services or of public communication networks (EU Data Retention Directive).[68] The Data Retention Directive was passed by the EP and the Council in November 2006, following the Madrid train bombing in 2004 and the public transport bombing in London in 2006.

The Directive aimed to harmonise the legislation of Member States on the retention of data, which is generated or processed by providers of electronic communication services or public communication networks. Providers were obliged to retain data (e.g., traffic and location data) to identify users. This data was used for the prevention, investigation, detection and prosecution of serious crimes such as terrorism and organised crime. The Directive did not foresee the retaining of the content of communication.

The complaint against the Data Retention Directive was brought by the High Court of Ireland and the Verfassungsgerichtshof of Austria before the CJEU pursuant to the preliminary ruling procedure in Art. 267 TFEU. In Ireland, a dispute arose between the Irish company Digital Rights and Irish authorities with regard to national measures, which demanded the retention of data from electronic communications. In Austria, disagreement existed on the implementation of the Directive in national law. The central issue was whether the Data Retention Directive was in harmony with EU law, particularly Art. 7 and Art. 8 CFREU.

According to the Court, the Directive did not pass the test of proportionality with regard to Art. 7 and Art. 8 CFREU as it covered all individuals, electronic communication and traffic data without differentiation, limitation or exceptions.[69] The Directive did not foresee any form of safeguard that the data is processed by public authorities only and that it is solely used for the purpose of prevention, detection or criminal prosecutions of serious crimes. Moreover, the Directive lacked a definition of the term 'serious crime' and did not require a prior review by courts or other institutions.[70]

The data retention period ranged from 6 to 24 months, and it was unclear under what circumstances data should be retained and for how long.[71] Further, no

[67]Opinion 1/15 (EU-Canada PNR agreement) of Advocate General Mengozzi from 8 September 2016, ECLI:EU:C:2016:656, Section VIII – Conclusion, paras 1-2.

[68]Joined Cases C-293/12 and C-594/12 (Data Retention Directive), ECLI:EU:C:2014:238.

[69]Ibid., paras 57–58.

[70]Ibid., paras 60–62.

[71]Ibid., paras 63–64.

differentiation was made between categories of data in relation to objective. The Directive did not offer sufficient protection from abuse as the level of security depended on the economic situation of the respective provider. There was no provision ensuring the irreversible destruction of data at the end of the retention period. Furthermore, the location of where the data was retained remained unclear.[72] Hence, the CJEU ruled that the Directive unjustifiably interfered with Art. 7 and Art. 8 CFREU.[73]

9.3.2.4 The Data Protection Reform

In 2012, the Commission initiated legislation in order to replace the Data Protection Directive 95/46/EC. The 1995 Directive laid down provisions that protected the rights of individuals with regard to the processing of personal data and on the free movement of such data. The data protection reform encompasses the General Data Protection Regulation 2016/679[74] and the Directive on law enforcement 2016/680.[75] The latter provides protection for individuals whose data are processed by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, as well as the free movement of such data. The EP approved the data protection reform on 14 April 2016.

Regulation 2016/679 includes provisions on the right to be forgotten and an active consent to the processing of private data by the person concerned.[76] Moreover, the Data Protection Regulation establishes a European Data Protection Board (the Board) in Art. 68, which is composed of the head of one supervisory authority of each Member State, as well as the European Data Protection Supervisor. The central task of the Board is to ensure a unified application of the Regulation, as well as of the Police Directive.[77]

Directive 2016/680 sets European standards for information exchange between enforcement authorities to prevent threats to public security while safeguarding fundamental rights. The Directive furthers the harmonisation of national legislation for a more effective cooperation between criminal law enforcement agencies and for a more efficient exchange of data between Member States. The Directive's aim is to stop the application of different rules on the basis of the origin of the data. As stipulated in Art. 2 (b) of the Directive, an exchange of data should not be restricted or prohibited for reasons regarding the protection of a person's personal data. Furthermore, it provides rules on data exchange with non-EU countries or

[72]Ibid., paras. 66–68.

[73]Ibid., para 69.

[74]OJ 2016, L 119, p. 1.

[75]OJ 2016, L 119, p. 89.

[76]Regulation 2016/679, Arts. 7 and 17.

[77]Regulation 2016/679, Article 70 and Directive 2016/680, Article 51.

international organisations.[78] The Directive contributes to the development of an area of freedom, security and justice pursuant to Art. 3 (1) TEU. It does not apply to European agencies, but it applies on all processing of data by national authorities.

The Regulation entered into force 20 days after its publication in the Official Journal, on 24 May 2016, and it will apply to EU Member States as of 25 May 2018. The Directive entered into force on 5 May 2016, and Member States will have two years (5 May 2018) in order to transpose its provisions into domestic law.

9.3.2.5 The SWIFT Agreement Between the EU and the USA

In 2010, the EU–US agreement on the processing and transfer of Financial Messaging Data from the EU to the USA for the purposes of the Terrorist Finance Tracking Programme (TFTP agreement/SWIFT agreement) was concluded and entered into force in August 2010.[79] This agreement between the EU and the US came into being following 9/11, when the US Department of Treasury and the CIA clandestinely received personal data from EU citizens from the Belgium-based Society for Worldwide Interbank Financial Telecommunications (SWIFT). The USA used the data in order to detect sources of terrorist funding. The EU–USA SWIFT agreement was reached in order to regulate the transfer of personal data of EU citizens to the USA.

Pursuant to Art. 4 of the TFTP agreement, the US Treasury's request for specified SWIFT data from the EU is subjected to approval by Europol. Moreover, Art. 11 of the TFTP agreement stipulates measures of legal redress for EU citizens in the USA. The Commission examined the feasibility of an own EU TFTP programme in November 2013 in order to stop the transferral of 'bulk data' and only deliver targeted data to the USA.[80] The Commission came to the conclusion that a proposal for an EU TFTP is not advisable at this stage because of multiple reasons such as high costs.[81] It is noteworthy that the EP has struck down the first EU–US TFTP agreement from November 2009 as it lacked protection for personal data and the right to privacy.[82] Furthermore, some EP members have criticised EUROPOL for too readily approving US' requests.[83]

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[78] See Chapter V of Directive 2016/680.

[79] Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Programme, O.J. L 8 (2010).

[80] Communication from the Commission to the European Parliament and the Council, A European terrorist finance tracking system (EU TFTS), Doc. No. COM (2013) 842 final, p. 2.

[81] Ibid., pp. 13–14.

[82] European Parliament legislative resolution of 11 February 2010 on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, Doc. No. P7_TA(2010) 0029.

[83] Lovelace (2015), p. 278.

9.3.2.6 The Resolution and the Follow-Up Resolution of the European Parliament on Surveillance Programmes

On 12 March 2014, the EP issued a resolution on the 'USA NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs'.[84] The resolution was passed following the disclosure of alleged surveillance activities of the NSA and intelligence services of some EU Member States on foreign citizens. In the resolution, the EP highlighted that trust between the USA and the EU has been profoundly shaken since the revelation that intelligence services of the US and some Member States collect, store, analyse personal data of all citizens around the world on an unprecedented scale. The EP took the stance that untargeted, secret and illegal mass surveillance programmes can never be a justification for the fight against terrorism since they are incompatible with the principles of necessity and proportionality.[85]

On this basis, the EP called upon Member States to fulfil their positive obligation under the ECHR to protect their citizens from mass surveillance by their own intelligence services or by agents of third States.[86] Moreover, the EP called upon the Commission to conduct an examination concerning a European whistle-blower protection programme.[87] In this context, the EP launched 'A European Digital Habeas Corpus – protecting fundamental rights in a digital age' with eight action steps and a timetable to monitor implementation.[88]

On 29 October 2015, the EP issued a follow-up resolution to the EP resolution from 12 March 2014 on the electronic mass surveillance of EU citizens.[89] On the positive side, the EP welcomed the CJEU's decision to declare Directive 2006/24/EC on Telecommunication Data Retention invalid. Pursuant to the EP, the Data Retention Directive entailed serious interferences with the right to private life and the protection of personal data enshrined in the CFREU.[90]

Furthermore, the EP welcomed that the CJEU invalidated the Commission's Adequacy Decision 2000/520/EC on the Safe Harbour arrangement as there was no adequate level of protection under this instrument.[91] The Parliament explicitly called upon Member States to drop any criminal charges against Edward Snowden

[84]EP Report on the USA NSA surveillance program, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs, Doc. No. PE 526.085v03-00.

[85]Ibid., paras 1 and 5.

[86]Ibid., para 22.

[87]Ibid., para 88.

[88]Ibid., para 132.

[89]EP follow-up to the EP resolution of 12 March 2014 on the electronic mass surveillance of EU citizens, Doc. No. P8_TA(2015)0388.

[90]Ibid., para 8.

[91]Ibid., para 17.

and to grant him protection in recognition of his status as an international human rights defender.[92]

On the negative side, the Parliament stated that it is highly disappointed of the overall lack of sense of urgency and willingness of most EU Member States and EU institutions to seriously address the issue of mass surveillance.[93] The EP emphasised that it is concerned about some recent laws that have extended secret surveillance capabilities. For example, in France, a new far-reaching intelligence law was passed in June 2015 as a response to the Charlie Hebdo attacks.[94]

Moreover, the EP considered the Commission's reaction to the 2014 resolution as highly inadequate, given the magnitude of the revelations. The EP regretted that the Commission has not started an examination of a potential whistle-blower protection programme. The Parliament warned of a downward spiral for the fundamental right to privacy if every information on human behaviour is considered potentially useful in fighting future crimes.[95]

In sum, these resolutions of the EP reveal that the Parliament is a determined advocate for a stronger protection of personal data and a strengthening of the right to privacy, in light of the recent revelations of mass surveillance measures against foreign citizens. On the other side, the Commission, as well as some EU Member States, appears to be lagging behind when it comes to the establishment and enforcement of stricter rules for surveillance measures.

9.4 German Law on Surveillance

In Germany, law enforcement authorities such as the Federal Criminal Police Office (BKA) are entitled to use surveillance measures as stipulated by national law. The State remains responsible for providing security to its citizens and for guaranteeing fundamental rights in the German Constitution. On 20 April 2016, the Bundesverfassungsgericht issued its judgment on provisions in the BKA law (BKAG), which enable authorities of the BKA to use secret surveillance measures in the fight against terrorism.[96] The Bundesverfassungsgericht ruled that some provisions of the BKAG are not in conformity with the GG. Provisions of the BKAG such as Art. 20 (h) (secret surveillance measures at home) are partly too unspecific and broad and violate the principle of proportionality.[97]

[92]Ibid., para 2.

[93]Ibid., para 3.

[94]Ibid., para 4.

[95]Ibid., paras 41 and 51.

[96]BVerfG, Urteil des Ersten Senats vom 20. April 2016, 1 BvR 966/09 and 1 BvR 1140/09 – Rn. (1-29).

[97]Ibid., paras 16–17; 180.

Pursuant to the Court, police powers need to be subjected to overarching requirements as they constitute serious interferences with the right to private life. For example, preventive police measures that would violate vital protected interests (e.g., inviolability of the home) should only be used if there is actual evidence for an immanent concrete danger or if the behaviour of an individual leads to a concrete probability of a commission of a crime in the foreseeable future.[98]

The BKA has been using a specialised software (Bundestrojaner) under strict conditions to secretly gather data from computers and laptops for criminal investigations. Now, the BKA plans to use the Bundestrojaner on mobile phones and tablets too.[99] Together with the Federal Office for the Protection of the Constitution (BfV) and the Federal Intelligence Service (BND), the BKA uses a common database on Islamic terrorism in the fight against terrorism.[100]

9.5 The Fight Against Terrorism

9.5.1 The EU and the Fight Against Terrorism

Member States of the EU share valuable information and personal data with each other via common databases such as the Schengen Information System (SIS)[101] and the Visa Information System (VIS).[102] The SIS enables competent authorities of the Schengen States such as the BKA in Germany and associated countries to enter and extract information on wanted or missing persons or objects. The central object of the SIS is to preserve internal security due to the absence of internal border controls. The VIS enables Schengen States the exchange of visa data (e.g., finger scans) in order to control the external borders of the EU.

The treaty of Prüm provides another database that EU Member States may use in order to exchange data such as DNA profiles, fingerprints and vehicle registration data. The treaty was concluded outside the EU framework between Germany, the Netherlands, Luxembourg, Belgium and Austria in 2005, but central parts of the

[98] Ibid., paras 112–113.

[99] Tagesschau BKA will neue Software entwickeln – Bundestrojaner direkt aufs Handy, https://www.tagesschau.de/inland/bka-trojaner-smartphones-tablets-101.html.

[100] Werthebach (2004), p. 245.

[101] Regulation 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), O.J. L 381 (2006) and Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), O.J. L 205 (2007).

[102] Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS), O.J. L 213 (2004).

treaty relating to police and judicial cooperation in criminal matters were incorporated into the EU's *acquis* in 2008 (Prüm Decision).[103]

The European Police Office (Europol) was established by the Council of the EU in 2009.[104] Its goal is to support national law enforcement authorities in fighting terrorism, as well as other related international crimes by collecting, storing, processing, analysing and exchanging information and intelligence. Europol notifies competent authorities of the EU Member States such as the BKA of information concerning the country and helps Member States by providing them with all necessary information for investigating international crimes.

A further system that serves as a platform for the exchange of information is Eurodac. Eurodac was originally established by the Council for the comparison of fingerprints between Member States for an effective application of the Dublin Convention in 2000.[105] On 26 June 2013, a new version of Eurodac came into being.[106] The new version of Eurodac allows law enforcement authorities of Member States, as well as Europol, to access fingerprint data collected by Eurodac for fighting terrorist offences and other serious crimes.

The exchange of personal data between national law enforcement authorities as well as international agencies such as Europol helps in the identification of individuals who are (allegedly) involved in terrorist activities or other serious crimes. In order to guarantee domestic security, interferences in human rights such as the right to privacy may be legitimate. In this context, the question arises whether rules on the protection of data and the right to privacy hinder the fight against terrorism. This can be answered in the negative. In order to effectively fight terrorism and other international crimes, legal provisions that allow the exchange of data need to be precise and targeted. This way suspects are targeted and not everyone.

As seen in the case of Eurodac, for example, terrorist activities and other serious crimes have an impact on the law on security and the legal system in general. In contrast to the old Eurodac version, the new Eurodac system allows the usage of fingerprint data not solely for monitoring (illegal) migration but also for the purpose

[103]Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, O.J. L 210 (2008).

[104]Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), O.J. L. 121 (2009).

[105]Council Regulation 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, O.J. L 316 (2000).

[106]Regulation 603/2013 of the EP and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, O.J. L 180 (2013).

of preventing and investigating serious crimes. It is of utmost importance that measures to fight serious offences do not entirely squash fundamental rights. In order to guarantee internal security, measures of law enforcement authorities have to proportionate. Hence, security measures need to be suitable (do the security measures result in or contribute to the aim of national security?), necessary (are there less intrusive security measures to achieve the objective of domestic security?) and appropriate (are the pros and cons of the security measures in a reasonable relation to each other?).

9.5.2 The International Fight Against Terrorism

There are several international players that are involved in the fight against terrorism by exchanging intelligence and personal data. Interpol is an intergovernmental organisation that supports police cooperation in the fight against terrorism and other crimes by sharing information via nearly 20 databases. For instance, the forensic database enables Member States to cross-check fingerprints and DNA profiles. In 2006, the UNGA issued the UN Global Counter-Terrorism Strategy.[107] The strategy, which enshrines a common approach of all UN Member States to counter terrorism, foresees the development of a database on biological incidents. The NATO supports military cooperation in the fight against terrorism and cybercrimes by sharing intelligence and information with its Member States. The OSCE is an intergovernmental organisation for security in Europe, including police operations. The organisation serves as a platform for cooperation between Member States, as well as the exchange of information and experience.

9.6 Approach of Differentiation

The implementation of secret surveillance measures and the exchange of personal data between (inter)national law enforcement authorities, intelligence services, private actors and international organisations are indispensable measures to prevent and combat international crimes and to guarantee national security. Because such measures inevitably interfere with internationally recognised fundamental human rights, the right to privacy, as well as the protection of personal data, surveillance measures and the exchange of personal data have to take place within strict legal boundaries. In democratic countries under the rule of law, national security cannot be achieved by a large-scale violation of fundamental rights. Therefore, a balance

[107] UNGA Resolution 60/288 of 8 September 2006 on the UN Global Counter-Terrorism Strategy, Doc. No. A/RES/60/288.

needs to be established between security measures on the one hand and fundamental rights on the other hand.

The ECtHR, CJEU and the Bundesverfassungsgericht have stipulated conditions, which constitute an overarching legal framework, within which secret surveillance measures can be used and the exchange of personal data can take place. The judgments of the three courts have shown that the reasons of justification for using security measures must be strong. The usage of security measures may only be justified in cases of serious offences such as organised crime, terrorism and other grave breaches of law. Secret surveillance measures, which inevitably interfere with particularly protected interests such as the inviolability of home, cannot be justified in cases of ordinary crime. The same principle applies with regard to the transferral of personal data that was collected by secret surveillance measures. There must be strong reasons that justify the exchange of such data.

All three courts demand that security measures and the exchange of personal data are restricted to what is absolutely necessary and that the principle of proportionality is adhered to. These overarching criteria ought to guarantee targeted surveillance and a targeted exchange of personal data in contrast to mass surveillance and a transferral of bulk of data. One central problem with mass surveillance and the exchange of bulk data is that it affects individuals who are not involved in serious offences. Hence, innocent persons may be put under general suspicion.

More specifically, the ECtHR, CJEU and the Bundesverfassungsgericht demand that legal provisions that allow security measures and the transferral of personal data are precise and targeted with regard to the measures, persons affected, competent authorities and the crime that ought to be prevented or investigated. There have to be clear and precise criteria that stipulate under what circumstances a security measure is used or discontinued. It has to be clear which persons are affected and why. There has to be a direct link between the measure applied with regard to a person and the specified crime that ought to be fought against.

The degree of suspicion of a person is decisive in deciding whether the use of security measures is appropriate or not. For example, it is not enough if the behaviour of a person merely suggests that he or she is or will be involved in serious criminal activities. There has to be concrete evidence or a concrete probability that the person concerned has committed a serious crime or will commit such a crime in the foreseeable future. The legislation ought to be precise regarding which competent authorities can use surveillance measures or access and use personal data. It ought to be specified which serious crimes are sought to be prevented or investigated to ensure that the security measures or the personal data are only used for a specific purpose.

Furthermore, the courts demand procedural precautions that should guarantee that the use of surveillance measures and the exchange of data are legitimate and not arbitrary. For example, the application of security measures in a lot of cases should be subjected to the prior obtaining of a judicial authorisation. Similarly, personal data should not be sent without prior authorisation by a competent authority. The prosecutors' scope of review over the usage of surveillance measures and the exchange of personal data ought not to be limited. In general, secret

surveillance measures and the transferral of personal data ought to be subjected to a continuous scrutiny by an independent control mechanism.

Moreover, those directly affected by security measures or those whose data were processed have to have the possibility to obtain judicial redress. This entails that the individuals affected are notified of the measures used against them. Furthermore, those affected have to have the possibility to obtain further information and to challenge the measure before court. Here lies one of the difficulties for lawmaking bodies as they have to guarantee a certain degree of transparency when creating the legal basis for surveillance measures and the exchange of personal data—two activities, which are secretive in nature.

The criteria demanded by the ECtHR, CJEU and the Bundesverfassungsgericht require lawmaking authorities, as well as law-enforcing officials, to take a differentiated approach when creating or applying the law that allows the use of surveillance measures and the transfer of personal data. By adhering to these material and procedural precautions, law enforcement officials can guarantee national security without infringing fundamental rights.

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Chapter 10
The Protection Against Crime as a Human Right: Positive Obligations of the Police

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Contents

Abstract The police are seen as a professional service provider when their duties and standards of care are enforced by the clients of their service, that is ordinary individuals. Actual or potential victims of crime use constitutional review, which examines positive obligations of the police in relation to specific human rights. Within the scope and limits of constitutional review, police duties are determined before, as well as after, harm has been inflicted on innocent individuals. These duties encompass both systemic and more specific and practical measures of protection of human rights against crime. The individual form of protection is

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subject to certain conditions of proximity (such as the element of knowledge of the personal need for human rights protection). Additional limits are recognised where there is a conflict of rights, and in relation to the availability of resources. Accordingly, the professional duties and requisite performance standards of the police are determined, reviewed and enforced under a consistent legal framework.

10.1 Introduction

In all professions, the work of professionals is assessed and regulated in relation to the individual duty of care of the professional person vis-à-vis the impact that his/her work has on other people, including legal persons, such as private companies. If a professional person fails in his/her duty of care and, as a result of this failure, another person suffers harm, which may have been prevented or mitigated, the legal liability of the professional person can be engaged. When a professional person is a member of an entity, the latter is vicariously liable for the failures of its members since training, facilities and supervision are responsibilities of the management. By analogy, the duty of care of the police officer, and by extension, of the police, as the organisational entity, can equally be approached as the work of professional persons and organisations.

More often and, traditionally, the responsibility of the police has been examined and reviewed by the organs of international law, including the EU, in relation to abuses of police powers.[1] The limits of police powers and the definition of ultra vires in this context is determined, to a great extent, by the scope of protection of human rights, as guaranteed by the legal provisions, rules and standards of constitutional review. Such a reflection of limits to police powers is the legal doctrine of negative obligations of the state under the European/international human rights law that requires state agents to abstain from interfering with human rights.

In contrast, the duty of the police to protect individuals against crime is mainly examined within the intra vires framework of police powers. In this respect, the question of police abuses is irrelevant or becomes relevant only when limits to police duties are concerned. The main focus is put on the professional duty of the police, which in human rights law involves the positive obligations of the state to

[1]Murdoch (2001); Buckley (2001), pp. 35–65; Reidy et al. (1997), pp. 161–173; Greer (2006), pp. 27–28; Koku v Turkey App no 27305/95 (ECHR, 31 May 2005); Osmanoglu v Turkey App no 48804/99 (ECHR, 24 January 2008); Gongadze v Ukraine App no 34056/02 (ECHR, 8 November 2005); Asadulayeva and Others v Russia App no 15569/06 (ECHR, 17 September 2009); Varnava and Others v Turkey App no 16064/90 (ECHR, 18 September 2009); Isaak v Turkey App no 44587/98 (ECHR, 24 June 2008); Solomou and Others v Turkey App no 36832/97 (ECHR, 24 June 2008); Gaysanova v Russia App no 62235/09 (ECHR, 12 May 2016). See also relevant papers presented at the international conference on the police and international human rights law, Brandenburg University of Applied Police Sciences, Oranienburg, 28–30 April 2016: Smith (2016), Stanchevska (2016), Garanina (2016), Heinz (2016), Goodey (2016).

actively protect and guarantee human rights within its jurisdiction. The key difference in the dual nature of obligations (negative/positive) of the police is mainly conceptual, in that the starting point of positive obligations is not about abuses of police powers but the (re)-emergence of the police as service provider and its officers as professionals, bound by a duty of care that characterises their work – which is to enforce the law and tackle crime.

The protection of individuals against crime is a known duty of the police and constitutes one of their main functions. From the legislative and ministerial level (usually the Home Office department) to the administrative level of police managers, the institutional function of the police to offer and guarantee protection against crime is detailed, organised and implemented by a series of well-defined duties, such as police patrol, physical presence in public spaces, investigation and apprehension of suspected criminals. In this respect, protection against crime is a job description, and therefore both the general and specific duties of the police are described accordingly. Unlike most of other professions, the duties of the police (as part of their function) and the duty of care of police officers are inextricably linked as the issue is not simply not to cause harm (or not to contribute to it), which is what duty of care means in other professions, but to actually prevent and mitigate harm caused by others. As a result, the duty of care of police officers is determined, to a great extent, by the general duty and function of the police (i.e., protection against crime). This kind of connection ensures a specific direction and policy purpose in the implementation of police duties. The protection against crime as the main duty and function of the police and the duty of care of the police officers are defined and implemented by police managers and supervisors, as well as by ombudsmen, and ministerial and legislative oversight. Therefore, protection against crime is the described job of police officers that is internally organised and supervised within the police organisation and the enlarged administrative framework of the state.

As with every job, the work of professional persons is subjected to market conditions and client demands, in that the clients of a service provider influence, to a considerable extent, the content and standards of the service in question. The clients of the police service are primarily the residents of the state, with whose money the work of the police and the salaries of their managers and officers are funded. In addition, being a core entity of the state (*polis*), and hence its trademark name, police, the needs and demands of citizens and residents of the state are safeguarded by the constitutional framework of a modern democratic society that arranges the relationship between the state and the individual. The established constitutional and administrative law mechanism allows individuals to assert their rights and seek judicial review of the performance of police duties. Because the described duty of the police to offer protection against crime usually relates to human rights violations, the review process is also constitutional in nature. As such, it has a broad scope as it can expand to the re-determination and re-definition of

police duties. As the initiator of judicial review is mainly the affected individual,[2] the client of police service is enabled to assert his/her rights and, by extension, to ask the (re)determination of the duty of the police in relevant circumstances.

The influence of the clients of the police service in determining the duty of the police and their standards of care is augmented by the possibility of judicial/constitutional review in international and supranational law (e.g., EU's). As the subject of the current book relates to International Human Rights Law, the growing relevance and impact of that law for the review, determination and development of the police's duties to protect individuals against crime should be explained (Sect. 10.2). For this purpose, the scope and limits of judicial constitutional review, seen as an interactive framework of national, supranational and international human rights law, need a clarification (Sect. 10.3).

Once the general judicial, constitutional framework of determination and development of police duties is described, the details of these duties should be provided. As a matter of legal and practical relevance, the key questions include when the police's duty to protect individuals against crime arises (Sects. 10.4, 10.5 and 10.6) and, how, and how much the police should protect individuals (Sects. 10.7 and 10.8). In this connection, limits to the duties of the police are also identified and explained in addition to those relating to the scope and limits of judicial/constitutional review (Sect. 10.9).

In sum, the current essay focuses on constitutional judicial review and especially, the influence of International Human Rights Law, which has long guaranteed the determination and continuous development of the scope and limits of police duties in the context of crime protection. Although a codification and collection of police duties appear subsequently in documents of hard and soft law relevance, it is the focus on judicial review that explains the gradual evolution of these duties and the practical issue that the judicial/constitutional review provides enforcement and development of police duties. In that way, all interested parties, the service provider (the police), its clients (taxpayers/residents of the state) and the review mechanism of professional duties (the courts) are connected under a consistent institutional framework that defines rights and obligations.

10.2 International/National Constitutional Review: Harmonising Police Duties

The mechanism of constitutional review provides institutional means of reviewing and enforcing police duties in the context of crime and, importantly also, of further developing and expanding these duties and the standards of care therein. Since police duties of protection against crime usually relate to the most

[2]In appropriate circumstances, a judicial review may also be initiated by a pressure group, see, e.g., R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement [1995] 1 WLR 386 (the 'Pergau Dam case').

fundamental human rights and basic societal guarantees, such as security and public order (ordre public), the constitutional review is not simply about the duties of the police but also about the legal system of protection of human rights and, ultimately, the relevance, potential and impact of that review, itself. In that connection, the examination of police duties in constitutional review impact on, and accordingly develop, the norms and level of protection of human rights far beyond crime-related issues, thereby affecting positively the entire human rights systems at both national and international levels.

The constitutional review of police duties is initiated at national level, taking into account the norms, principles and jurisprudence of European human rights law, especially of the European Convention of Human Rights (ECHR). Due to the intersection of the system of ECHR with other regional human rights systems and that of the UN, there is a considerable degree of harmonisation of the review principles and standards at both national and European/international levels.[3] The focus of the current essay is put on the constitutional review of police duties that is offered by the system of the ECHR because of its recognised relevance, impact and binding effect, as well as of wider policy considerations relating to European integration—an aim that requires constant effort and work. Due references to the norms and cases of the UN Human Rights Committee will also be made in the endnotes to confirm the relevance and degree of international harmonisation of human rights standards.

To encourage people to travel, seek employment and do business in other countries, high standards of protection of personal security, public order and human rights should constantly be guaranteed across the European continent and in the world. In this respect, the political and cultural issue of European integration, and also of peace, depends a great deal on these guarantees that are realised in practice by the work of the police. To the extent that the constitutional review (national/European/International) mechanism reviews and develops the duties of the police, its role is paramount.

There is no constitutional review without the involvement of the ordinary individual who is affected, actually or potentially, when police duties have not satisfactorily been discharged. It is the client and main funder of police work, that is the ordinary individual, who seizes the judicial review system that reviews and determines the duty of the police. Everything starts with what the individual client of the police service expresses in his/her judicial claim, and continues with judicial deliberations and decisions that subsequently and gradually influence legislative developments and European and international human rights standards, thereby expanding both the scope of constitutional review and the targeted subject, the duties of the police in the context of crime.

[3]M. and Others v Italy and Bulgaria App no 40020/03 (ECHR, 31 July 2012), para. 147: 'Account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part' (cited cases omitted). See also Forowicz (2010).

The European (and international) human rights law system does not simply facilitate and enhance the judicial forum-shopping strategies of ordinary individuals and civil society pressure groups but expands also the scope of examination beyond isolated acts (or omissions) of police officers and managers in order to review the general institutional system of the state through which police duties are determined, reviewed and enforced. In technical legal terms, the wider scope of constitutional review at international/European level is reflected and implemented by the principle of effectiveness that is embodied in the actual review and the doctrine of positive obligations of the state. As most of the following sections below deal with the latter, the principle of effectiveness should be introduced here.

The principle of effectiveness that the European Court of Human Rights (ECtHR) has long introduced and has consistently employed represents the wider scope of constitutional review at European level. It reviews systemic, procedurals and substantive failures of state authorities, such as the police. In this regard, the principle of effectiveness looks at individual and specific failures of police responses and also, more importantly, is capable of re-determining and developing further the duties and standards of police work.[4] For example, the principle has been used to include investigation as part of the general police duties in the context of crime, as well as to define and assess individual standards of effectiveness of such investigation, including specific steps, as may be required under the circumstances. As the ECtHR often reiterates, '[a]ny deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard [of effectiveness]'.[5] In this respect, the constitutional review that employs the principle of effectiveness is not confined to existing and already-defined standards but can expand, in appropriate circumstances, to 'any deficiency' that undermines or does not secure the effectiveness of the specific police duty (e.g., investigation).

The general, international constitutional framework, of which the principle of effectiveness forms part, is guaranteed by the doctrine of the positive obligations of the state that reviews whether the state and its authorities have effectively organised and implemented the protection of human rights in the given circumstances. To understand what the duties of the police in the context of crime are, it pays to know how these duties are determined, imposed and asserted in constitutional review by the clients of the police service, that is by those to whom police duties are owed. Thus, in order to train police managers and officers in the understanding and implementation of their professional duties, the content of positive obligations of the state in the context of crime should be identified and explained.

Before going to this discussion, it should briefly be mentioned that for a quick reference to the duties of the police, there are certain documents of both soft and hard law relevance that consolidate judicial review developments and good

[4] Xenos (2012a), pp. 112, 115–118.

[5] *Gungorv Turkey* App no 28290/95 (ECHR, 22 March 2005), para 69.

administrative practices. They include the Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power (2006), Council of Europe (CoE) Recommendation (2006) 8 on Assistance to Crime Victims, Guidelines of the Committee of Ministers of the CoE on child-friendly justice (2011), Convention on preventing and combating violence against women and domestic violence (2011). An additional consolidation has recently been undertaken by crime-related EU Directives, such as Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (hereinafter the Victims Directive) and Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (hereinafter the Anti-Trafficking Directive). The process of consolidating judicial/constitutional review developments of European and international human rights law that relate to the duties of the police and of the state makes more accessible the general framework of police duties to various stakeholders, including the ordinary individuals, administrators, politicians, police managers, etc.

The basis, origins and practical assertion of various rights, obligations and good practices that are listed in various authoritative documents, such as those mentioned above, are linked to the judicial/constitutional review, which provides a formal and binding legal mechanism for their practical realisation. Due to its binding nature and current degree of sophistication that characterises the ECtHR review, the focus of the next sections is reasonably put on its structure and process that define, review and develop police duties. In that way, the corresponding rights and obligations, including the limits involved, of both the service provider (the police) and its clients/funders (the ordinary individuals) can be discerned.

10.3 The General Scope of Constitutional Review of Police Duties: The Framework of Positive Obligations

Protection against crime is asserted as a human right, in legally binding terms, because the state and, by extension, its enforcement authorities, such as the police, have positive obligations to actively protect and secure human rights under European/international human rights law.[6] As positive obligations relate to specific measures of protection of human rights of both organisational and operational nature, they determine the professional duty of care of the police and their individual officers. Under this legal framework, the human rights of individuals, the scope of constitutional review (as positive obligations) and the duties of the police are interlinked.

[6]Xenos, n 4; Drögue (2003); Mowbray (2004). See also UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, paras 6 and 8.

The duties of the police are described in terms of positive obligations of the state and are subject to certain conditions. Where the conditions are met, measures of protection against crime, of which police duties consist, can be ascertained. The constitutional review recognises also limits in the form of negative obligations of the police (i.e., to abstain from interfering with human rights (of others)), and practical limits regarding to available resources. These limits reduce the scope of positive obligations in appropriate circumstances. Other limits relate to the constitutional review's own limits. These limits concern the relevance, scope and applicability of human rights in the given circumstances of crime and the standing of the individual seeking enforcement of policy duties.

The legal equation that summarises the emergence of a police duty and the possibility of enforcing it in the legally binding terms of constitutional review employs the mathematical symbol of subtraction to describe limits to police duties, as well as the symbol of multiplication to highlight a limit of preliminary importance (a precondition) which, if it cannot be established, the review comes to an end, there and then. The main variables involved can be abbreviated for reasons of convenience, as follows: human rights and the individual's locus standi (HRLS), police duties to which specific conditions are attached (PDs), limits to police duties, such as negative obligations (NOs) or other practical limits (L). Their combination forms the following legal equation, as positive obligations = (human rights × locus standi of the individual) × (police duties × specific conditions) − (negative obligations + practical limits):

$$\Rightarrow \textit{Positive obligations} = (HRLS \times PDs) - (NOs + L).$$

Although the terms positive obligations and police duties may be used interchangeably in scholarly commentary and also in the current article because, practically, both terms relate to specific duties of the police, the term positive obligations relates also to the very scope of constitutional review through which the specific duties of the police are determined, examined and enforced. Therefore, it describes both the process of determination of police duties, as a specific content, as well as the possibility of their enforcement. As police duties are determined and enforced though the constitutional review of the positive obligations of the state, the former are determined and appreciated through the scope and limits of the latter.

10.4 Preliminary Positive Obligations of the State Conditioning Those of the Police

Being a core public authority of the state, the police have positive obligations under international/European constitutional review to guarantee and protect the human rights of individuals because the state is subject to such review. In this respect, the positive obligations of the state in the context of crime are broader.

The state is under a positive obligation to respect and guarantee human rights within its jurisdiction by taking measures (e.g., legislative, administrative, operational, etc.) to ensure that individuals are able to enjoy these rights. The most common review of positive obligations regards the protection of human rights in relationships between private individuals that the state is ultimately responsible to regulate within its territorial jurisdiction. The state's positive obligations arise in the context of crime since tackling crime is a common form of protection against human rights violations. Since the early years of the emergence of positive obligations in the constitutional review of the ECtHR, victims of crime have asserted protection of their human rights from the state. As a result, the context of crime has long provided and continues to provide the judicial opportunities for developing not only the duties of the police but also the entire constitutional review of human rights obligations of the states.[7]

The broader scope of the positive obligations of the state can be seen in the early positive obligation jurisprudence, such as the case of *X and Y*.[8] In that case, a victim of rape could not initiate a criminal complaint against her perpetrator because she was mentally disabled. The state was found in breach of its positive obligations under Article 8 because protection of human rights in the form of a criminal law remedy could not be guaranteed by the state due to a procedural lacuna—the victim's guardians were not allowed to bring a criminal action. At that stage of constitutional review, the duty of the police is not yet relevant since specific actions, e.g. to arrest a suspect, depend on a prior regulation of criminal law provisions that condition their actions and intervention. In this respect, the duty of the police is examined only where the state has already regulated in criminal law the activity concerned to trigger a lawful police intervention.

For police powers to be exercised and, by extension, for their duties to be examined in constitutional review, the state is under a preliminary positive obligation to regulate and prohibit, through criminal law, a range of activities that have a negative impact on human rights. The ECtHR has clarified the starting point of its constitutional review, by constantly reiterating that the state's positive obligation

> involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.[9]

[7] *Delfi v Estonia* App no 64569/09 (ECHR, 16 June 2015), para 4: 'Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (cited case omitted).

[8] *X and Y v the Netherlands* App no 8978/80 (ECHR, 26 March 1985).

[9] *Osman v the United Kingdom* App no 23452/94 (ECHR, 28 October 1998), para. 115; *Kontrova v Slovakia* App no 7510/04 (ECHR, 31 May 2007), para. 49.

By stating the general scope of positive obligations of the state, the constitutional review identifies first the human right concerned that gives rise to positive obligations and then describes the positive obligations involved. These include, first, the regulatory framework of criminal law provisions that prohibit a given conduct and, second, their implementation by the enforcement authorities, i.e. the police.

The regulatory framework of crime that is examined in priority concerns the domain of criminal law. Its study and development focus on the determination of the criminal offence and the attached conditions. A recent study on the regulation of crime at legislative level is the work of Andrew Ashworth, *Positive Obligations in Criminal Law*.[10] The title of that work uses the constitutional term, positive obligations, but the subject of its inquiry is primarily on the internal criminology debate of crime regulations that aims at an effective security system in the society. Although there are overlaps between the security system and human rights, the latter is more specific (and sometimes more restrictive) and is attached to a constitutional review that gives the ordinary individual the right and opportunity to inform the state about what effective protection of human rights against crime ought to be (as with the *X and Y* case). In addition, the general issue of protection against crime as a human right is limited to the scope and limits of constitutional review as it is this review that provides a legal remedy for the enforcement and assertion of these rights.

It should also be noted that human rights and constitutional review pose also limits to the powers of the police since their exercise often interferes with human rights (of others) (e.g., of the alleged suspect). As the police are subject also to negative obligations, they cannot interfere with human rights without proper justification. A preliminary condition for a lawful exercise of police powers regards the prior regulation of the offence in criminal law.[11] An additional constitutional guarantee is provided for in the form of Article 7, ECHR, which expressly makes clear that there must be '[n]o punishment without law'[12] and requires that '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed'. In practice, this means that if state law does not previously regulate in criminal law the conduct concerned, police duties may not arise; neither can police officers act in their own initiative since the exercise of police powers will be unregulated, and, as such, it will constitute an unjustifiable interference with the human rights of others (e.g., alleged suspects).

[10] Ashworth (2013).

[11] The first condition for a lawful interference with human rights (esp. in Articles 8–11) requires that the interference must be regulated by law, e.g. Article 8(2), ECHR: 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law'.

[12] This is the known Roman maxim of *nulla poena sine lege*.

10.5 Crime in Human Rights Law: Human Rights × Locus Standi of the Individual

In criminal law, the issue of protection against crime regards an individual behaviour that is punishable by the provisions of that area of law and involves, subsequently, the police, as the enforcement authority, and the prosecution services. Defining an individual behaviour as criminal, which is punishable by criminal law, is an artificial and deliberative process that involves considerations of punishment and retribution, actual protection of individuals when dangerous criminals must be retained in prisons[13] and, mainly, deterrence—the more severe the penalty imposed, the less people will attempt the prohibited act. Rehabilitation of offenders is also aimed at, but whether enough resources are allocated for this purpose is a different matter. Historically, the creation of criminal law is much older than that of human rights and relates to various approaches and debates, interdisciplinary theories, studies and data, as well as to political and lobbying pressure. In general, as Ashworth has pointed out, '[t]he paradigm of a criminal offense is where X culpability wrongs Y in a way that is of public concern'.[14] The traditional focus of the criminalisation of individual behaviour has been put on pervasive acts and threats to human security and violence against the person in the physical sense of the term. It expands also to cover physical property, both public and private. Other recent criminalisation of individual behaviour includes infringement of certain intellectual property rights—an issue that is widely seen as controversial[15]—extreme pornography, hate speech, cyber security, etc. The determination of an individual behaviour as criminal and the scope of such criminalisation looks primarily at the harm that has been suffered by the given act, meaning that criminal law usually applies *ex post facto*. In some contexts, the aim of criminal law is the actual prevention of harm that involves a risk-based assessment to criminalise individual behaviour *ex ante*, that is before harm occurs. The underlying aim of prevention of harm can clearly be discerned in possession activities, e.g. of guns, drugs, etc. Accordingly, the duty of the police to tackle crime is inextricably linked to the prior regulation of the given behaviour in criminal law.

The creation and application of criminal law provisions in relation to certain individual conducts are and can be influenced by the constitutional review of ECtHR. The Court can approve, reject or demand a criminal law provision, taking account the context concerned, national practices and the state's margin of

[13] See also *Paul and Audrey Edwards v the United Kingdom* App no 46477/99 (ECHR, 14 March 2002); *Maiorano and Others v Italy* App no 28634/06 (ECHR, 15 December 2009); *Choreftakis and Choreftaki v Greece* App no 46846/08 (ECHR, 7 January 2012).

[14] Ashworth, n 10, p. 150.

[15] See, e.g., the Anti-Counterfeiting Trade Agreement (2011) that the European Parliament blocked its ratification on 4 July 2012. For criminal offences in copyright law, see, e.g., the Copyright, Designs and Patents Act 1988, sections 107–110.

appreciation.[16] In *X and Y*, mentioned above, the constitutional claim of the applicants covered the question of whether lack of access to a criminal remedy for a rape violated Article 8, ECHR. In their response, the state's counsels argued that a civil law remedy was available and could be used against the perpetrator. In rejecting the state's response, the ECtHR found a violation of Article 8 for lack of a criminal remedy, which would guarantee an appropriate deterring effect. In such circumstances, the preliminary positive obligation of the state is to arrange for criminal law provisions in order to safeguard certain aspects of human rights. In the previously quoted passage from the ECHR case law, the constitutional review of the state's positive obligations starts not with the duty of the police but with the 'primary duty' of the state to put in place effective criminal law provisions to deter the commission of offences against the person and legitimise the acts of protection (intervention) of police officers. Conversely, where such offences have not been criminalised in state law, the constitutional review may not examine the duties of protection of the police in the context of crime but only those of the state. Consequently, the professional duties of the police to tackle crime can be examined and enforced in constitutional review on the condition that the state has previously discharged its positive obligations to regulate the criminal offences concerned.

Being an external system of review to that of criminal law, the constitutional review targets the duties of the police as far as the protection of human rights is concerned. Accordingly, the scope of constitutional review of police duties, as is afforded at European level, is made exclusively and conditionally in relation to the human rights that are listed in the ECHR. This means that if some police duties cannot be asserted under the scope and rules of constitutional review and the human rights to which that review is connected, their enforcement can be made not in constitutional review but in other ways—if they exist or are effective.

The relevant human rights of the ECHR over which police duties are usually examined in the context of crime are mainly those of substantive nature and relate to personal harm that an individual may suffer due to an act (including omission) of another individual. These rights include the right to life (Article 2, ECHR), prohibition of torture and inhuman or degrading treatment (Article 3), prohibition of slavery and forced labour (Article 4) (covering also human trafficking and sexual trade). A more general provision that covers all previous rights but is mainly used for lower degrees of harm is that under Article 8, which guarantees the right to respect for private life. The term 'private life' has long been interpreted as the right to develop one's personality or personal development[17]

[16]See the dissenting opinion of judge Rozakis, joined by judge Bonello in *Calvelli and Ciglio v Italy* App no 32967/96 (ECHR, 17 January 2002). Cf. UN Human Rights Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 (replacing General Comment No. 10), para 9.

[17]*Pretty v the United Kingdom* App no 2346/02 (ECHR, 29 April 2002), para. 61; *Van Kuck v Germany* App no 35968/97 (ECHR, 12 June 2003), para. 69. This interpretation has been influenced by the German constitutional provision of Article 2 of the Basic Rights (Grundrechte)

and covers, as a result, the physical and psychological integrity of the individual.[18] Other substantive rights include free speech and its corollary right to peaceful demonstrations/assemblies, as seen in Articles 10 and 11, ECHR, respectively. As with criminal law, constitutional law protects also property whose relevance is recognised by Article 1 of Protocol 1, ECHR, which requires protection of property, a term covering physical and intellectual property (e.g., copyright, patents, etc.). The relevance of these human rights reveals a direct, personal interest for the individual concerned, which is a common denominator in all human rights cases of constitutional review. In this respect, the notion of crime regards an act of interference with certain human rights in circumstances where harm is suffered by an individual, which is physical, psychological or proprietary and expands to manifestations of free speech. This personal interest is reflected in locus standi conditions that make constitutional review and, by extension, review and enforcement of police duties, available only to the affected individual concerned (actual or potential victim).[19]

If the link between the human rights of the actual/potential victim and the criminal act cannot be established, the duty of the police still exists in relation to that criminal act but cannot be enforced or determined in constitutional review. In such circumstances, protection against crime cannot be asserted as a human right when no actionable human right can be engaged. An illustration of this point is the criminalisation of certain acts, such as hate speech and extreme pornography, for which there is a duty imposed on the police to tackle these forms of crime. In these contexts, however, a police duty may not be enforced by the constitutional review of positive obligations if an identifiable individual is not directly affected. In short, protection against crime is a human right, and the police and the state have positive obligations to protect human rights and tackle crime if a human right can be engaged in the circumstances concerned to trigger the constitutional review, which triggers, in turn, the enforcement of police duties under human rights law. In general, the issue of protection covers the traditional area of criminal law system that aims at guaranteeing human security, including often protection of property, plus manifestations of freedom of speech and related rights. Beyond that area of crime and where individual victims cannot be identified in direct relationship of proximity to the crime concerned, protection against crime may not be asserted as a human right, when human rights cannot be engaged for constitutional review.

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of 1949: 'Everybody has the right to the free development of his personality, as long as he does not violate the rights of others and does not contravene the constitutional order or moral laws.'

[18] *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009); *Branduse v Romania* App no 6586/03, (ECHR, 7 April 2009).

[19] Article 34, ECHR. See also *Klass and Others v Germany* App no 5029/71 (ECHR, 6 September 1978); *Monnat v Switzerland* App no 73604/01 (ECHR, 21 September 2006), para 31.

In the equation set out above, if the applicability of a human right, either alone or in combination with locus standi criteria, cannot be established, that is $HRLS = 0$, it will likely collapse the examination of positive obligations from the outset, as

$$\begin{aligned} \textit{Positive obligations} &= (HRLS \times PDs) - (NOs + L) = (0 \times PDs) - (NOs + L) \\ &= (0) - (NOs + L) = 0. \end{aligned}$$

Accordingly, the positive obligations of the police where protection against crime is asserted as a human right depends first on the relevance and applicability of human rights and the affected individual, in his/her status as an actual or potential victim of a crime.

10.6 Determining Police Duties: How and When to Protect

The work of the police is constitutionally reviewed to examine whether the police, both as an organisation and individual professionals, have adequately discharged their duty to protect individuals against crime in the circumstances concerned. The general scope of constitutional review has been clarified by the ECtHR in the known case of *Osman* in 1998,[20] a case that marked the beginning of the examination of the positive obligations of the police under a structured and detailed manner. The starting point of the examination of the police duties has been defined as follows:

> [i]t is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions … Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.[21]

In this passage, certain key terms need to be noted in order to understand the scope of the review of police duties, mainly those of 'in appropriate circumstances', 'preventive operational measures', 'life is at risk'. These terms correspond, respectively, to certain conditions, time factor and the human right involved.

It is made clear that positive obligations and the general issue of protection against crime are the subject of constitutional review to determine and enforce the duties of the police that arise in relation to a specific human right. Looking at the kind of harm involved, the review identifies first the human right that is engaged under the circumstances (i.e., right to life). It is under the heading of that human right that the positive obligations of the police arise and are examined. Protection is required when an individual's 'life is at risk'. The same or similar scope of positive

[20] Osman v the United Kingdom, n 9.

[21] Ibid., para. 115. Rantsev v Cyprus and Russia App no 25965/04 (ECHR, 7 January 2010), para. 218; Opuz v Turkey, n 18, para 128.

obligations applies in relation to other human rights to which the duties of the police relate, as discussed above in the previous section.

For example, in the case of *Rantsev*, the positive obligations of the police were mainly examined in relation to the killing of the applicant's daughter (under Article 2, ECHR), as well as to her being a victim of human trafficking. For the latter, the constitutional review had to identify the relevant human right. Based on judicial precedent and relevant international law instruments, it was reiterated that human trafficking fell within the scope of slavery, and servitude or forced or compulsory labour, which is prohibited by Article 4, ECHR.[22] As the positive obligations of the police are examined under a different human right, the scope of review, as defined in the *Osman* case with reference to the right to life, is modified accordingly to suit the scope of Article 4. Under that article, the police are under a duty (a positive obligation) to protect specific individuals against trafficking and exploitation. Therefore, positive obligations arise in relation to specific human rights and are examined separately under the heading of each right engaged. This is evident also from the outcome of the *Rantsev* case, where it was found that the police did not fail its positive obligations under the heading of the right to life but failed under Article 4 regarding their duties in the context of human trafficking and sexual exploitation.

The scope of police duties that are reviewable by constitutional review begins with (but is not limited to) 'preventive operational measures', as the *Osman* passage points out. It is clarified that the primary focus of positive obligations is the prevention of harm being inflicted on innocent individuals. In *Rantsev*, the term prevention is not mentioned and an alternative term is used, that is 'potential victims'.[23] In addition to the *ex ante* framework of positive obligations, the constitutional review encompasses the more traditional framework of liability of professionals that examines failures of duty of care in *ex post* circumstances, that is after harm has been suffered by a criminal act.

In this general framework of positive obligations of the police that is encapsulated in the *Osman* passage above, the actual examination of the specific circumstances involves a specific set of parameters reflecting reasonable and relevant questions, such as when exactly the police duty arises, that is when the police should actually perform their work, and how the police should protect individuals in the given circumstances. As the opening words of the *Osman* passage suggest, the positive obligation of the authorities, such as the police, arises 'in appropriate circumstances'. The applicable conditions are usually detailed and examined in the constitutional review. For the purpose of the current essay, a combination of various cases from the jurisprudence will be undertaken in order to present a more

[22]Ibid, para 282: ' the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol [the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime 2000] and Article 4(a) of the Anti-Trafficking Convention [the Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005] falls within the scope of Article 4 of the Convention [ECHR]'.

[23]*Rantsev v Cyprus and Russia*, n 21, para. 286.

complete, as far as possible, picture of the positive obligations of the police. The following sections cover the specific conditions of positive obligations in two main sections, corresponding to the *ex ante* and *ex post* framework of protection of human rights, namely before and after harm has been suffered by acts of crime.

10.7 Police Duties Before Harm Has Been Suffered: The *Ex Ante* Framework

In constitutional terms, prevention of crime relates to prevention of human rights violations, especially in the relationships between private individuals.[24] The constitutional determination and review of police duties start with prevention of crime, which is also one of the main aims of the police. It should be noted that crime prevention is not an invention of constitutional review since the preventive model of police work has been in operation long before constitutional review joined the field of law. As it had been stressed in mid-eighteenth century, 'for sure it is much better to prevent even one man from being a rogue than apprehending and bringing forty to justice'.[25] The preventive function of the police that describes accordingly their professional duties has subsequently been adopted by the constitutional review. Although constitutional review may not offer a novel approach of police duties, it has its own resources to develop and review these duties and assumes its own role as an indirect enforcement mechanism that provides a remedy to the individual seeking a review of how the police ought to have discharged their duty of care under the circumstances.

In passing, it should also be said that although prevention as an issue is at the core of the organisation of the police's function and operations, its adoption in the constitutional review of the state's positive obligations has positively influenced the entire field of human rights by expanding significantly these obligations in non-crime contexts also.[26] In this respect, the rules and principles that constitutional review has developed to review the duties of the police apply now across the board, improving in that way the entire system of human rights protection at both national and international levels.

Due to the broad scope of constitutional review at European level, which is addressed to the state, the examination of its positive obligations covers the role and acts of public actors in both their organisational and individual forms. Accordingly, the positive obligations of the police concern those that relate to its system, as such, as well as the isolated acts of the individual police officer(s) involved.

[24]See also Flogaitis and Petrou (2006). See also Anti-Trafficking Directive, Article 18 (Prevention).
[25]Fielding (1758). It was quoted in Chadwick (1829), pp. 252–308, 280.
[26]See n 3 and 7.

10.7.1 Systemic Duties of the Police

Traditionally, the police, as an organisation, have long arranged its operational system with the aim of tackling crime through investigations, patrol and surveillance. One can look at the history of the police and the work of those who contributed to the development and social purpose of that organisation to see that the aim of prevention of harm had long underlined its operational structure and activities. Sir John Fielding, the known British magistrate and social reformer of the eighteenth century, advocated a *Plan for Preventing Robberies* and approached 'prevention as being a matter of both pro-active surveillance and deterrence through effective detection'.[27] In his *Plan*, he saw that magistrates should employ professional runners to apprehend and arrest criminals.[28] The modern structure of the police adheres to the traditional purpose of prevention of crime and arranges their operational work in similar and yet more modern practices targeting current conditions and methods of crime.

In similar vein, the constitutional review adopts prevention as the positive obligation of the police and reviews, first, its system before going to specific operational duties of police officers. The review presupposes certain systemic positive obligations that concern training of police officers and co-operation with other state agencies in the context of crime concerned.

To the extent that crime as a form and specific act constantly changes due to changes in social circumstances and new advances in technology, it poses new challenges in police operations that require adaptive operational methods and adequate training. As crime often occurs in known social settings that are under the supervision of other governmental agencies, access to their data and use of their expertise and input are usually needed.

Accordingly, at the general organisational level, constitutional review examines systemic police duties as general positive obligations of the police and, by extension, of the state, focusing in particular on whether the police have co-operated with other state agencies in appropriate circumstances. In this regard, co-operation with other state agencies, such as immigration authorities, social services and rehabilitation centres, is added to the duties of the police that are examined and enforced in constitutional review.[29] The review expands also to the positive obligation of the police to provide adequate training to its officers in relation to the given category of crime. As constitutional review operates under the principle of effectiveness, it asks whether training exists and, if yes, whether it is effective in the given context. In that way, the judges can make use of case law standards, various relevant authoritative documents, suggestions, reports and hard and soft law materials listing

[27] Styles (1987), pp. 15–22, 17.

[28] Fielding (1755).

[29] See also Anti-Trafficking Directive, Article 11 (5,7) and the Victims Directive, Articles 8, 9 and 26.

specific duties and standards that enable them to review the effectiveness of the police training programme.[30]

In the case of *Rantsev*, the constitutional review of the ECtHR examined whether the police could protect the applicant's daughter against human trafficking and sexual exploitation; it was confirmed that state agencies, such as immigration authorities and law enforcement organisations (i.e., the police), should provide training in this particular context of crime, citing also other international law instruments as to the standards involved.[31] Although the constitutional review examines and concentrates on the actual operation (or the lack of) of the police under the particular facts, the general system of the police is also looked at.

The positive obligations of the police to provide adequate training and co-operate with other state agencies are systemic obligations that characterise police duties at various levels at which these duties are examined and reviewed. They have been introduced in the current section of the *ex ante* framework of police obligations, but they remain relevant at all levels where police duties are examined.

10.7.2 When Does the Duty of Protection of the Specific Individual Arise?

The determination of police duties in constitutional review is made within the scope and limits of that review, which is initiated by and accorded to a specific individual who is an actual or potential victim of a human right violation. As noted, constitutional review is a specific course of enforcement of police duties that is directly invoked and initiated by the client(s) of police service to enforce their duties and the attached standards of care in specific circumstances. Reasonably, therefore, the identity of the individual requiring the police service and/or of the alleged perpetrator should be known to the police in order for an individual and specific human right to be engaged and the duty of the police to be required under the circumstances.

In the constitutional review of the ECtHR, the personalised form of protection to which the police duty is connected is reflected in a legal test that was laid down in the *Osman* case. The courts should first be satisfied that certain conditions of proximity exist that are embodied in the following legal test, as follows:

> where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its [the

[30] *McCann and Others v the United Kingdom* App no 18984/91 (ECHR, 27 September 1995). De Sanctis (2006), pp. 31–44. See also Anti-Trafficking Directive, Article 9(3) and Article 18 (3) and the Victims Directive, Article 25. Suntinger (2016) (in this volume).

[31] *Rantsev v Cyprus and Russia*, n 21, paras 155, 167, 287 quoting Article 10 of the Palermo Protocol and the Anti-Trafficking Convention, n 22.

> Court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[32]

In that passage, the constitutional review sets a preliminary condition for the existence of a police duty. In the *Osman* case, it regards a legal test to examine the protection of an individual against crime in a life-threatening situation that engages, correspondingly, the right to life (Article 2, ECHR) of the individual concerned. The test and its key parameters are of general applicability. Thus, where other human rights are relevant, the test is modified accordingly to match the type of threat involved with the relevant human right involved. For example, in *Rantsev*, the threat of human trafficking and sexual exploitation was relevant under the circumstances, and therefore the *Osman* test was modified accordingly to require the police's awareness when 'an identified individual had been, or was at real and immediate risk of being, trafficked or exploited'.[33]

In the *Osman* test, three main parameters can be identified:

(a) the police '[already] knew';
(b) the police 'ought to have known';
(c) there is 'a real and immediate risk to' the human right concerned.

These parameters set conditions of proximity from which the police duty arises. The key parameter is (c), i.e. 'a real and immediate risk to' the human right concerned (such as human trafficking, personal security), of which the police are or ought to be aware (the element of knowledge, as seen in parameters (a) and (b), numbered above). These parameters can form two possible combinations, with parameter (c) being common to both: (c) + (a) and (c) + (b). Therefore, if it can be shown that the risk of a human right violation that a criminal act creates is real and immediate, the police will have a duty to protect the individual concerned if they know or ought to have known of that risk.

It is observed that the element of knowledge of the *Osman* test can be satisfied in circumstances where the police are expressly notified of a criminal act and/or of the need of protection of specific individuals. Such will be the case where a call for help is placed with the police, as seen in the case of *Opuz*, where the facts showed that the police had expressly been notified of death threats and incidents of violence in the applicant's family environment.[34] In such circumstances, the police duty to protect individuals of that specific family arose due to express calls for help that victims of domestic violence placed with the police. Accordingly, the police were

[32]Osman v the United Kingdom, n 9, para 115.

[33]Rantsev v Cyprus and Russia, n 21, para 286.

[34]*Opuz v Turkey*, n 18, paras 147, 173. See also Kilic v Turkey App no 22492/93 (ECHR, 28 March 2000). See also *Philip Afuson Njaru v Cameroon* (2007) UN Doc. CCPR/C/89/D/1353/2005, para 6.3.

under a human right obligation (positive obligation) to act and protect the individuals concerned.

In contrast, in *Osman*, the case that introduced the proximity conditions of the so-called *Osman* test (especially the element of knowledge), it was found by a narrow majority that the duty of the police to exercise their powers (e.g., arrest, search and seizure, etc.) did not arise since the calls for help did not point to a real and immediate risk to life. Similarly, in *Gungor*, it was held that the police had not been under a duty to offer protection and prevent the killing of the applicant's son, who was murdered in an upper-class residential area, since the police had no reason to suspect an imminent criminal activity.[35] At the conference, Professor Murdoch used the term '*Osman* warning', indicating how the *Osman* test is known by legal practitioners and police officers and managers. The inclusion of the word 'warning' suggests that it is now widely acceptable that the police duty arises in circumstances where the police have been contacted for their intervention to protect individuals. In this respect, the first combination of *Osman* parameters, that is (c) + (a), as numbered above, reflects the use of the term '*Osman* warning'.

In addition, the *Osman* test covers circumstances where there is no express call for help. The additional combination of the *Osman* parameters, i.e. (c) + (b), determines the police duty where the element of knowledge about a real and immediate risk of a human right violation can be established where the police ought to have known of the existence of such risk. Such circumstances may include previous incidents of violence. For example, with reference to the above-mentioned *Gungor* case, it can be said that although it is understandable that the likelihood of crime may be low in upper-class residential areas, in other areas, previous incidents of violence and data can clearly show that crime rate is very high. As noted above, the constitutional review starts not with the *Osman* warning but with the general system of the police, which presupposes training and co-operation with other agencies of the state. In this respect, the element of knowledge can be examined with reference to previous incidents and crime data. Such information may suffice to establish the police duty for crime prevention in circumstances, such as violent sport events, demonstrations and specific residential areas. The ECtHR has found the police in breach of their positive obligations where previous incidents of violence or threats have occurred against journalists and properties of media organisations (offices, equipment, etc.),[36] and in previously reported incidents of domestic physical abuses.[37] The systemic approach to crime prevention is also highlighted by the EU Victims Directive in recital 64 and Article 28 entitled provision of data and statistics.

[35] *Gungor v Turkey* App no 28290/95 n (ECHR, 22 March 2005), para. 60. See also, *Sakine Epözdemir and Others v Turkey* App no 26589/06 (ECHR, 1 December 2015).

[36] *Kilic v Turkey*, n 34, paras 55, 66. The Court referred also to previous case law regarding the same factual situations and 'pattern of attacks'. See also *Ozgur Gundem v Turkey* App no 23144/93 (ECHR, 16 March 2000), and the high-profile case of *Dink v Turkey* App nos 2668/07, . . ., 7124/09 (ECHR, 14 September 2010).

[37] *Opuz v Turkey*, n 18, paras 147 and 173.

An illustration and application of the *Osman* test can also be made with reference to the *Rantsev* case. The constitutional review examined the police duty to prevent the killing of the applicant's daughter (under Article 2) and to protect her against trafficking and sexual exploitation (under Article 4). It found that although it is general knowledge that victims of human trafficking face ill-treatment and violence, in the particular circumstances, the police could not establish that the victim was in real and immediate risk, that is the (c) parameter of the *Osman* test could not be established. As a result, the police were not under a duty to protect the applicant's daughter in such circumstances. However, when the duty of the police was examined under Article 4, the ECtHR looked at the surrounding circumstances to establish the element of knowledge of the need of human rights protection. It was shown that Ms Rantseva was summoned, at some point, by the police regarding an immigration issue, and she informed the police that she was employed as a cabaret artiste. In such circumstances, the *Osman* parameter of whether the police ought to have known whether the individual concerned is an actual or potential victim of human trafficking and exploitation depends on the police's own investigatory work. The particular context concerned can provide reasonable indicators for such proactive investigation. It has been shown that both the national Ombudsman and the Council of Europe Commissioner on Human Rights had stressed in their reports the known problem of human trafficking with cabaret artistes—a problem that was exacerbated by relaxed visa permit requirements.[38] As all these problems were known to state authorities, the police were also under a general positive obligation to co-operate with other state authorities, such as immigration authorities, and provide special training to police officers, especially when they conduct investigations in the context concerned. Therefore, it was reasonably expected that a number of relevant questions could have been addressed to the applicant's daughter at the police station. The ECtHR reasoned that the police were under a positive obligation to protect the individual because of the general knowledge that state authorities had had of the human trafficking phenomenon, as related to cabaret artiste visas. If such an investigation had been conducted and had been effective, the element of knowledge of the *Osman* test (parameter (b)) could be established by the police's own investigatory work. Based on the facts of the case, the Court found that the police failed to make immediate inquiries into whether *Ms Rantseva* had been trafficked. This means that the *Osman* test is not static but involves, in appropriate circumstances, a proactive and preliminary investigation by the police, which actively seek to find information, justifying a more substantive action of protection of the individual concerned.[39]

[38] *Rantsev v Cyprus and Russia*, n 21, paras 83, 89, 291 and 294: 'There can therefore be no doubt that the Cypriot authorities were aware that a substantial number of foreign women, particularly from the ex USSR, were being trafficked to Cyprus on artistes visas and, upon arrival, were being sexually exploited by cabaret owners and managers.'

[39] Ibid., para. 297, as to the substantive action see, para 130.

In sum, it can be said that the duty of the police to protect individuals against crime arises when the element of knowledge of a real and immediate risk to a human right can be established. This condition, as specified by the parameters of the *Osman* test, includes the '*Osman* warning', where an express call for help has been placed with the police, and expands, more importantly, to proactive and preliminary investigations in appropriate circumstances. Such circumstances are those where previous criminal incidents have taken place in the same or similar factual settings or where known issues and problems have been reported and confirmed by various state agencies with which the police are also under a general positive obligation to co-operate. In such circumstances, the element of knowledge in the *Osman* test, which concerns whether the police ought to have known of a real and immediate risk to a human right (i.e., parameter (b), as enumerated above), is actively searched and established by the police's own investigation. In other words, police officers do not merely sit around their office desk debating and assessing the *Osman* test, but they are expected to do fieldwork of proactive investigation to tackle crime and protect individuals.

10.7.3 Determining the Content of Police Duties: The Question of How to Protect

The general question of how the police can protect the human rights of individuals who are threatened by criminal acts relates to the content of the police duty that the constitutional review can enforce. This question requires a holistic approach and combines all information that is presented in various sections of the current essay. It has a systemic and an operational aspect targeting both the general system of police work and the specific operational tasks that are expected to be carried out in the particular circumstances of crime. As already discussed, the police have positive obligations to set up their system and conduct proactive and preliminary investigations. The progress of investigations provides new information and facts that determine additional duties for the police. The more evidence exists, the more duties the police have under the circumstances. The usual duties of the police, where incriminating evidence exists, include an additional investigation to apprehend criminal suspects and bring them to justice, as well as the protection of those whose personal security and/or property is threatened.

All these conditions and parameters are reviewed through flexible and reasonable adjustments under the circumstances. Thus, although an express call for help will give rise to police duties, the element of knowledge of a potential criminal act may also be deduced by the surrounding circumstances, such as previous incidents, for example those involving regular attacks on journalists and human rights defenders.[40] Where the element of knowledge of the *Osman* test can be established,

[40]See n 36. Xenos (2012b), pp. 767–783.

the duties of the police are examined in relation to more specific and practical work that includes manned protection of the individuals whose human rights are threatened and also a criminal investigation to identify and prevent a criminal act.[41]

For every measure of protection that the police are required to take, the standard of care of the police officers is assessed by the standard of effectiveness to determine and review each and every measure that has been taken (or not taken). Whether the specific duty concerns investigation or manned protection or seizure of items, etc., the review of such a duty is not confined to the taking of the measure concerned, as such, but covers also the requisite standard of care that is expected of police officers under the given circumstances. Such standards are often identified and assessed in similar ways, irrespectively of whether police duties are examined at the *ex ante* or *ex post* level of protection of human rights. Thus, the standards of effectiveness of the duty to investigate in *ex post* circumstances, which is discussed below in the following section, are similar to those required at *ex ante* level.

10.8 Police Duties Where Harm Has Already Been Suffered: The Ex Post Framework – Primary Focus on the Duty of Investigation

The primary duty of the police has been described in constitutional review as the prevention of harm, that is prevention of a human right violation. Where protection in the form of prevention is not possible, and irrespectively of whether the police were under a duty to intervene in the circumstances concerned or failed to act effectively and prevent harm when discharging their duty of care, an awareness (e.g., a call to the police, witnessing a crime) that a criminal act has taken place, and/or harm has been suffered as a result, triggers automatically additional police duties.

Where harm has been suffered, certain practical measures must be taken by the police that correspond to basic human rights obligations in *ex post* circumstances. Depending on the facts of the case, the review of police duties can apply to either the *ex ante* or *ex post* framework or to both. This would be the case where the police had a duty to prevent harm from being inflicted on specific individual(s), and their human rights obligations continue with additional duties where harm is suffered. In constitutional review, such a holistic examination of police duties is made in the same judgment, usually under different section headings of the judgment, and leads to a separate assessment and conclusion.

The duties of the police of which their human rights obligations consist in the context of crime at the *ex post* level are similar to those required at the *ex ante* level. Their main difference is that they are required at different time periods. Although the given police task may have the same name, its examination in *ex post* circumstances concerns a separate human right obligation. Thus, the police are required to

[41] *Kontrova v Slovakia*, n 9, para. 54. See also the Victims Directive, Articles 18–24.

organise their system by filing and evaluating incidents of crime and co-operating with other state authorities. In addition, they are required to offer manned protection to the victims of crime (often in co-operation also with other state agencies),[42] as well as to initiate an investigation in order to identify and apprehend those responsible for the crime committed and bring them to justice. There is no need to repeat the discussion of these police duties since they are similar to those already described above. Also, such duties have rarely been disputed by the police and the state or state departments in constitutional review proceedings.

In the *ex post* framework, the element of knowledge of human rights protection is not so pertinent anymore, where harm has been caused by a criminal act and has been reported to the police. In general, the justification of police duties is explained by the possibility of a direct and/or indirect form of protection. When harm has been inflicted but is not fatal, police intervention can mitigate the loss and prevent additional harm. In addition, the *ex post* duties of the police to apprehend the perpetrator aims at prevention of future harm in two ways: first, the apprehension of the perpetrator may lead to his/her lawful detention, thereby preventing that dangerous individual from causing additional harm; second, by bringing a suspected criminal to justice, the sentencing system and the jailed sentences that are required for serious crimes[43] act as deterrence to others who may have similar criminal intentions and instincts, thereby contributing to the prevention of crime at large.

The key police duty in *ex post facto* circumstances is investigation that police officers undertake following a criminal act that has been reported to them. Most of the other duties mentioned above depend on the investigation's findings. This assertion is also confirmed by the fact that the majority of constitutional review cases about police duties deal partially,[44] and sometimes exclusively,[45] with the duty of investigation at both *ex ante* and *ex post* levels of human rights protection. More practical police duties, such as the apprehension of criminals, are not usually disputed and are performed by police officers, but since these duties are conditioned and triggered by evidence that can only emerge through the means of police investigation, it has become clear that the police duty of investigation is of critical importance. The realisation of this practical fact is reflected in constitutional review, which devotes specific parts on the judgment to examine

[42] Article 10 of Palermo Protocol and the Anti-Trafficking Convention, n 22. See also the Victims Directive, Articles 18–24.

[43] *Osman v the United Kingdom*, n 9, para. 115: The 'primary duty on the State to secure the right to life by putting in place *effective criminal-law provisions* to deter the commission of offences against the person' (emphasis added). See also the Anti-Trafficking Directive, Article 18 (4).

[44] *Rantsev v Cyprus and Russia*, n 21; *Gungor v Turkey*, n 35, para 67. See also *Mohamed Grioua v Algeria* (2007) UN Doc. CCPR/C/90/D/1327/2004, para 7.10.

[45] *Menson and Others v the United Kingdom* (dec.) App no 47916/99 (ECHR, 6 May 2003); Mantog v Romania (No. 2) App no 2893/02 (ECHR, 11 October 2007); *Uzeyir Jafarov v Azerbaijan* App no 54204/08 (ECHR, 29 January 2015). See also *Philip Afuson Njaru v Cameroon* (2007) UN Doc. CCPR/C/89/D/1353/2005, para 5.3.

exclusively if and how the police performed their investigatory work. Under such focused approach, investigation is highlighted as a 'procedural obligation', and the constitutional review examines the duty of investigation in its own right. This means that although other police duties may arise earlier or later, and irrespective of whether they have been dully performed, the review of police investigation is made in addition and leads to a separate conclusion about a violation of a human right.

In *Rantsev* case, the ECtHR examined first the police duty to protect the life of the applicant's daughter and prevent fatal harm being inflicted on her. As already discussed above, the constitutional review of that police duty concluded that the police did what they were required to do under the circumstances since the element of knowledge of a real and immediate threat to life could not be established under the circumstances. However, the examination of the positive obligations of the police under Article 2, ECHR (the right to life) continued with a separate review of the 'procedural' police duty to conduct an effective investigation in *ex post* circumstances, that is following the killing of the applicant's daughter, which was reported to the police. In a separate section of the judgment entitled 'B. The procedural obligation to carry out an effective investigation',[46] the ECtHR stressed the importance of the police duty of investigation, which was the subject of its review, pointing out as follows:

> The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The authorities must act of their own motion once the matter has come to their attention.[47]

The passage makes first a reference to the preliminary positive obligation of the state to have criminal laws that prohibit criminal acts that can be enforced by the police. In practice, therefore, everything comes down to the investigatory work of the police, which secure the requisite evidence for the identification and apprehension of criminals. In *Rantsev*, the ECtHR found that the police of Cyprus did not seek the testimony of the two Russian women who worked with Ms *Rantseva* at the cabaret. As a result, vital information about the circumstances and causes of her death could not be explored in police investigation. The applicant's daughter died in 2001, and by the time the ECtHR conducted its constitutional review, he had not been informed of the circumstances leading to her death.

An interesting aspect of the *Rantsev* case is that the applicant's complaint was submitted against Cyprus, where the fatal incident occurred, but expanded also against Russia, since the applicant's daughter had moved to Cyprus from Russia.

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[46] *Rantsev v Cyprus and Russia*, n 21, after para 223.

[47] Ibid., para 232. See also *Association '21 December 1989' and Others v Romania* App nos 33810/07, 18817/08 (ECHR, 24 May 2011), cf *Giuliani and Gaggio* v Italy App no 23458/02 (ECHR, 24 March 2011). See also *Salem Saad Ali Bashasha and Milhoud Ahmed Hussein Bashasha v The Libyan Arab Jamahiriya* (2010) UN Doc. CCPR/C/100/D/1776/2008. See also the Anti-Trafficking Directive, Article 9.

This has meant that the general duty of the state police to co-operate with other state authorities may extend also to authorities of other states, in appropriate circumstances.[48] Conversely, the authorities of other European states are also subject to positive obligations to assist their counterparts, as far as it is possible and within the limits of their territorial jurisdiction. In *Rantsev*, the ECtHR rejected the ratione loci argument of the Russian government but found that the Prosecutor General of the Russian Federation had pressed the Cypriot authorities for further investigation and had expressed willingness to comply with any mutual legal assistance request regarding witness statements that Russian authorities could seek in their jurisdiction. Since no such request was made in the end, the Russian authorities did not violate their procedural duty of investigation under this heading of constitutional review.[49] The legal conclusion is that police duties, and especially those relating to the investigation process, are reviewed as to the examination of evidence relating to the crime concerned and may require co-operation with other state authorities and, where relevant and possible, with authorities of other states.

In addition to specific steps of investigation of which the police duty comprises, and which are practically required under the factual circumstances concerned, the constitutional review determines and develops standards of investigation to assess the principle of effectiveness and evaluate the actual exercise of the duty of care of the police. In particular, as highlighted in the last quoted passage above, the investigation must start as soon as the criminal incident has been reported to the police. As the police duty of investigation arises automatically, there must be no formal requirement for the victim of crime or their relatives to submit an express request.[50] In addition, it is not enough for an investigation to be launched; it must also be effective under the circumstances. One of the standards that the courts have developed to assess its effectiveness regards the requirement of promptness and reasonable expedition of police forces.[51] If there are unreasonable delays in the investigation, evidence and vital leads may not be secured on time, thereby affecting negatively the effectiveness of the investigation and, by extension, the apprehension of perpetrators. In some circumstances where criminal acts are inflicted on political persons, journalists or human rights defenders, the standard of promptness is generally seen as a reassurance about the independence of the police, which is essential in maintaining public confidence and adherence to the rule of law.[52] The standard of independence is also examined in its own right and requires that those

[48]Ibid., para 289. See also the Victims Directive, Article 17.

[49]Ibid., para 246.

[50]*Paul and Audrey Edwards v the United Kingdom*, n 13, para 69; *Rantsev v Cyprus and Russia*, n 21, para. 233.

[51]Yaşa v Turkey App no 22495/93 (ECHR, 2 September 1998), paras 102–104; *Çakıcı v Turkey* App no 23657/93 (ECHR, 2 September 1998), paras 80-87 and 106; *Kelly and Others v the United Kingdom* App no 30054/96 (ECHR, 4 May 2001), para 97; *Rantsev v Cyprus and Russia*, n 21, para 233. See also *Sundara Arachchige Lalith Rajapakse v Sri Lanka* (2006) UN Doc. CCPR/C/83/D/1250/2004, para 9.5.

[52]*Dink v Turkey*, n 36, para 79.

responsible for conducting the investigation must be independent from those implicated in the events. This requirement focuses not only on hierarchical or institutional independence but also on practical independence.[53] Moreover, the victims or the next of kin must be allowed to be involved in the investigation, as far as possible, in order to help the investigation and provide useful evidence and evaluation.[54]

It should be noted that the standards of investigation that are mentioned in the current section apply in order to assess the effectiveness of the standard of care of the police when performing their investigatory work. Due to their indispensable nature, they are endemic to the process and effectiveness of investigation, and as such, they are required wherever the police duty of investigation arises, either in *ex ante* or *ex post* circumstances.

10.9 Limits to Police Duties

The duties of the police to protect individuals against crime, which are determined and enforced in constitutional review in relation to the state's positive obligations, are subject to certain limits. These limits may not mean that a police duty does not apply (although such an eventuality may be possible in certain circumstances) but, usually, that the intensity of police intervention may be restricted on various grounds, both practical and legal. In the positive obligation equation set out above, (positive obligations = (HRLS × PDs) – (NOs + L)), the limits are abbreviated as (NOs + L). The first category of limits concerns the negative obligations (NOs) of the police that are often encountered when there is a conflict of human rights. The second category regards other limits (L), such as the availability of resources that precondition police operations. Both these categories of limits are discussed below.

10.9.1 Conflicts of Rights

The acts of the police that aim to protect individuals against crime are often interferences with the human rights of others. As crime usually occurs in the relationships between private individuals (e.g., individual A as a victim and individual B as a perpetrator), the police, which have a positive obligation to intervene and protect the individual in need of protection (individual A), may interfere with

[53] *Hugh Jordan v the United Kingdom* App no 24746/94 (ECHR, 4 May 2001), para 120; *Kelly and Others v the United Kingdom*, n 51, para 114; *Rantsev v Cyprus and Russia*, n 21, para 233. See also *Salem Saad Ali Bashasha*, n 47, para 7.3.

[54] Uzeyir Jafarov v Azerbaijan, n 45, para 51.

the human rights of the alleged perpetrator (individual B). For example, in the context of violence against the person, to arrest the perpetrator whose criminal acts have caused harm to another individual will interfere with the perpetrator's right to liberty, as guaranteed by Article 5 of the ECHR, although the interference can legitimately be justified under the conditions laid down in Article 5.[55] Therefore, in order to comply with their positive obligations and protect individuals in need of protection against crime, the police must, simultaneously, respect their negative obligations and refrain from interfering with the human rights of others without appropriate safeguards, as required by the standards of constitutional review and its constitutional texts.

Examples from case law include the context of police intervention in large demonstrations in circumstances where the risk of violence and physical harm against the person and/or property may be high.[56] Such is the case of *Austin and Others*, where the complaint against the police was that a demonstrator and some passers-by were detained in open space (a practice known as 'kettling') when an anti-globalisation protest was in its way.[57] The police estimated that they had to impose a cordon for around seven hours to prevent violence and harm on persons and property. In such a circumstance, it can be observed that, one on hand, the police have a duty to protect the physical security of individuals and their property where there is a perceived risk of immediate harm (the element of knowledge, as discussed in Sect. 10.7.2 above). On the other hand, some of the police actions (kettling) that are taken to protect human rights may interfere with the human rights of individuals, such as their right to liberty and freedom-of-speech-related rights (Article 11, ECHR). In *Austin*, the ECtHR found that the urgent measure of 'kettling' was a legitimate interference, having taken into account the particular facts and evidence concerned. In other circumstances, however, the same police practice may not be justified and a violation of Article 5 will ensue even if the police act in order to protect individuals.

Where a conflict of rights exists,[58] the police duty of protection against crime requires a balance between the competing human rights involved. In general, and without considering the specific facts involved, guidance can be taken by identifying the most pressing issue involved.[59] In circumstances such as those described in *Austin* and that pose frequently difficult challenges to the police work, threats to physical security of persons can engage ECHR's right to life, which the constitutional

[55]Golder v the United Kingdom App no 4451/70 (ECHR, 21 February 1975), para. 45; Osman v the United Kingdom, n 9, para. 116. Murdoch (1998), pp. 31–48. Guillén Lasierra (2016).

[56]Siegert (2016).

[57]*Austin and Others v the United Kingdom* App nos 39692/09, 40713/09 and 41008/09 (ECHR, 15 March 2012).

[58]Brems (2008).

[59]Warbrick (1983), pp. 82–119, 85: '[t]he "fundamental" rights clash one with another and a balance needs [sic] must be struck between them in particular cases. Neither the enumerated rights themselves nor the balance which must be struck between them are "neutral" between possible ways of organising society or values which may be pursued.'

review recognises as 'the supreme value in the hierarchy of human rights'.[60] Thus, as far as their intervention in large demonstrations is concerned, the police may reasonably be expected to intervene and protect the life of individuals, even where other rights of some individuals can temporarily be compromised.[61] However, this is a general position that does not look at the specific facts involved. In addition, only a proportionate interference with human rights can be legitimate, and this requires the police intervention not to go beyond what is necessary under the circumstances.[62]

Conflict of rights can also be identified in relation to certain types of individuals who may be present in police operations. Their identification can be illustrated in the following factual example: on a crowded pedestrian street, individual A grabs the bag of individual B and runs away, pushing his way through the crowd. From the three police officers who happened to be on patrol service in the area, officers X and Y run in pursuit of individual A. A few minutes later, having seen that his colleagues cannot stop the thief, police officer C starts shooting to stop him. Individual A and police officer Y drop dead, and a 10-year-old child is severely injured. In such circumstances, all identified individuals have human rights, and therefore the duties of the police are determined and limited by taking into account the conflict of rights involved, which reflect, correspondingly, a conflict between the positive and negative obligations of the police. In the circumstances described in the scenario, the police have a duty to act in order to protect the property of individual B, as the latter is entitled to such protection (i.e, under Article 1 of Protocol 1, ECHR (protection of property)). However, the use of firearm and the ensuing shooting, although it is a measure of protection of property, interferes with the human rights (protection of life and limb guaranteed by Articles 2 and 8, ECHR) of the alleged perpetrator,[63] an innocent bystander[64] and the other police officers participating in the operation.[65] In the scenario, they include the following victims, respectively: individual A, the 10-year-old child and police officer Y.

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[60] K.-W. V Germany App no 37201/97 (ECHR, 22 March 2001), para. 75; *Isaak v Turkey*, n 1, para. 103; *Solomou and Others v Turkey*, n 1, para 63.

[61] See also *Opuz v Turkey*, n 18, para 147: 'In any event, the Court would underline that in domestic violence cases perpetrators' [Article 8 rights, i.e. family life] cannot supersede victims' human rights to life and to physical and mental integrity'.

[62] Feldman (1999), pp. 117–144; Jowell (2000), pp. 671–683; Klatt and Meister (2012); Gerards (2013), pp. 466–490. A stricter test of necessity (proportionality) applies under the right to life, see, e.g., *Andreou v Turkey* App no 16094/90 (ECHR, 27 October 2009); *Nachova and Others v Bulgaria* App nos 43577/98 43579/98 (ECHR, 6 July 2005); *Soare and Others v Romania* App nos 43577/98 43579/98 (ECHR, 22 February 2011); cf *Finogenov and Others v Russia* App nos 18299/03 27311/03 (ECHR, 20 December 2011).

[63] *Makaratzis v Greece* App no 50385/99 (ECHR, 20 December 2004); *Leonidis v Greece* App no 43326/05 (ECHR, 8 January 2009); *Wasilewska and Kalucka v Poland* App nos 28975/04 33406/04 (ECHR, 23 February 2010).

[64] *Ergi v Turkey* App no 23818/94 (ECHR, 28 July 1998), para 79; *Abdurashidova v Russia* App no 32968/05 (ECHR, 8 April 2010), para 79.

[65] *Halit Dinc v Turkey* App no 32597/96 (ECHR, 19 September 2006), paras 49, 55–56.

The performance and intensity of police intervention in situations where a conflict of human rights exists are limited by the negative obligations of the police that require a lawful and proportionate police intervention wherever human rights are interfered with. As this proportionality requirement relates to both ends and means, it limits police intervention and, by extension, the duties of the police. Knowing the limits of police duties is a constitutional requirement of compliance with the negative obligations of the police. The job of the police is surely difficult, and a failure to act will breach their positive obligations, but their duties have limits when police acts interfere with the human rights of others and a fair balance needs to be maintained. In this respect, police intervention can be required as a positive obligation to protect human rights, but must be kept within acceptable limits, reflecting the negative obligations with which the police are also required to comply.

10.9.2 Limited Resources

Protection against crime is usually an issue that regards the relationships between individuals, although in certain cases some incidents may involve state officers as the main perpetrators or collaborators (e.g., police corruption).[66] Because the relationships between individuals are almost infinite, it is not reasonably expected that the police can provide protection everywhere. Therefore, the availability of resources can be raised as an issue to limit police duties in certain circumstances.

Pragmatic considerations of the issue of resources can be seen in constitutional review in two ways: first, the legal tests that determine when positive obligations arise already embody limitations that reflect practical realities of criminal acts and of police responses. As has already been seen above with reference to the right to life, the *Osman* test contains conditions of proximity that require police intervention only where there is a real and immediate risk to life. In that way, constitutional review acknowledges and, accordingly, sets a more realistic stage at which police duties are required to be performed. Adjusting the legal tests accordingly, reasonable considerations regarding state resources are recognised.

Second, where a police duty has arisen, the issue of resources can be invoked independently to assess the adequacy of police intervention under the circumstances. This question relates not to the existence of a police duty, as such, but to how much protection the police must offer. As it was stated in *Osman*, 'such [a positive] obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities'.[67] In that case, the police duty to undertake a proactive investigation that could furnish incriminating

[66]Murdoch (2001), n 1. See also *Skendžić and Krznarić v Croatia* App no 16212/08 (ECHR, 20 January 2011).

[67]*Osman v the United Kingdom*, n 9, para 116; *Mahmu Kaya v Turkey* App no 22535/93 (ECHR, 28 March 2000), para. 86.

evidence was not questioned as such; rather, the focus was put on what, and how extensive, the investigatory steps should be.[68] Another relevant case is *Plattform 'Arzte für das Leben*, in which the applicants complained that the police did not protect their right to demonstrate (Article 11, ECHR) when they were obstructed by a counter-demonstration of which the police had expressly been informed that it would cross their schedule route.[69] The issue in that case was not simply whether the police had a duty to guarantee the applicant's right to demonstration but mainly whether the number of police officers that had been sent in the field was adequate under the circumstances. In this respect, the availability of resources becomes a critical aspect of the constitutional examination to assess the effectiveness of the police response, determining, correspondingly, the requisite standard of care. In that case, ECtHR concluded that the police did not fail to take reasonable and appropriate measures, as they were required under the circumstances.[70]

10.10 Conclusion

Protection against crime is the traditional function of the police, which shapes their organisation, the professional duties of their managers and officers and their operational work. When protection against crime is asserted as a human right, the duties of the police concern the positive obligations of the state of which the police, as a core public authority, forms part. The content of police duties is not usually disputed, as such, since the police due to their expertise and daily fieldwork can understand the operational needs and framework of their work. What changes is that police duties can be asserted by individuals as an entitlement to human rights. In this respect, police work is subjected to the legal system of judicial and constitutional review, which determines, reviews and enforces police duties in the context of human rights. As that review is mainly available to individuals who are directly affected by the acts (or omissions) of public authorities, such as the police, the enforcement of police duties is undertaken by the client of the police service for whose protection the police act and function. In that way, the police, as service provider, are subjected to the views and criticism of their clients, which the judicial/constitutional review system allows them to express in legally binding terms.

The effort for the professionalisation of police service approaches the police as a professional entity that has to define its operational framework and ensure the standards of work performance of its employees and managers, including minimum standards of duty of care in relation to specific professional duties. The determination of both police duties and the minimum standards of their performance can be

[68] *Osman v the United Kingdom*, n 9, paras 104–105.

[69] *Plattform 'Arzte für das Leben v Austria* App no 10126/82, (ECHR, 21 June 1988).

[70] Ibid paras 35–39.

made and enforced by judicial and constitutional review and, in particular, where the protection of human rights is concerned under the circumstances.

The human rights connection must be established from the beginning because the notion of crime and the legal provisions regulating the criminalisation of offences may expand beyond the content and scope of these rights. The force of advocating protection against crime as a human right is given by the constitutional review mechanism that is associated with these rights. In this respect, therefore, the determination and enforcement of police duties is linked to the scope and limits of constitutional review.

The relevant content of human rights concerns mainly the physical security of individuals, their property and freedom-of-expression-related rights (speech, demonstrations, etc.). With reference to the text of the ECHR, the corresponding rights are provided by the right to life (Article 2), right to respect for private life (covering the protection of physical and psychological integrity of the person (Article 8), prohibition of torture and inhuman or degrading treatment (Article 3), prohibition of slavery and forced labour (Article 4) (covering also human trafficking and sexual trade) and protection of property (Article 1 of Protocol 1). If one of these rights can be engaged in the given incident of crime, police duties are required and accordingly enforced by the constitutional review, as initiated by affected individuals.

The focus on constitutional review and, in particular, of the ECtHR is justified by the fact that the European Court has contributed substantially to the determination of police duties and their development, and through its case law it has managed to harmonise relevant standards across the European continent. Its principles and standards can also be discerned in the international human rights law systems. It should be noted that the codification and listing of police duties have been undertaken by various soft and hard law instruments, including EU crime-related directives. However, the interpretation and enforcement of legislative provisions rely directly or indirectly on the body of principles, standards and decisions that the case law of the ECHR has long developed and entrenched.

Beyond the preliminary requirements that a human right must be engaged under the circumstances and that the review can only be initiated by affected individuals who are actual or potential victims of crime (as locus standi criteria), the duties of the police must first be identified. Their identification and determination depend on certain conditions and purposes. The latter reflects the policy that protection of crime means, first and foremost, prevention of harm. In this respect, police duties are determined in both *ex ante* and *ex post* circumstances, that is before, as well as after, a criminal act has taken place and/or harm has been inflicted on individuals.

In general, the duties of the police are examined as systemic measures that include the filing and processing of operations, training in the given context of crime and co-operation with other state authorities, including, in appropriate circumstances, with those of other states. More specific police duties are determined in relation to the victims of crime. The police can offer manned protection to individuals to guarantee their human rights and also, and more so, to identify and apprehend those responsible for acts of crime. Where protection is asserted in the

form of prevention of harm, the element of knowledge of the need of human rights protection and the attached conditions of proximity (e.g., real and immediate threat) determine if and when the police duty arises (i.e., the *Osman* test). This element can be established by an express call for help or by surrounding circumstances (e.g. previous incidents of violence), including the police's proactive investigation.

The duty to investigate is encountered both *ex ante* and *ex post* and is generally regarded to be of preliminary and indispensable importance. The constitutional review recognises this fact by labelling investigation as a 'procedural obligation', which is examined and evaluated in its own right. Thus, whether or not the police have discharged other positive obligations requiring the active protection of human rights, the police's duty of investigation is examined in addition and separately. In this regard, the duty of investigation is of dual nature, both circumstantial and systemic. The constitutional review does not simply define and name the police duty that is relevant at the various stages of their operation but also require standards of professional care that can be identified and addressed through the principle of effectiveness. As a result, for police duties and, in particular, that of investigation, which is individually assessed, certain objective standards of professional competence are involved and include co-operation with victims and their next of kin, co-operation with other authorities, independence and promptness. In other words, it does not suffice to show that police duties are recognised and some steps are taken while standards of effectiveness have not been guaranteed in the police operation concerned.

Limits to police duties are also recognised and relate to the availability of resources and conflicts of rights. Practical issues regarding expedition of police forces and the nature and intensity of crime can reasonably limit police duties in appropriate circumstances. Considerations of resources are already incorporated in legal tests where conditions of proximity are imposed (e.g., the *Osman* test) but can also expressly be raised and defended by state authorities. Additional limits in the form of conflict of rights give rise to negative obligations of the police requiring that the police must refrain from interfering with human rights of other individuals without lawful justification. Certain categories of individuals are usually encountered in circumstances of conflict of rights and include alleged perpetrators, innocent bystanders and police officers participating in the given operation. In such contexts, the police, when discharging their positive obligations to protect individual against acts of crime, are also bound by parallel negative obligations in relation to the human rights of other individuals. Where such a conflict of rights and obligations can be contemplated, the operations of the police should be organised and executed in such a way as to maintain a fair balance between the various competing interests concerned. This balance requires a proportionate police response regarding the ends and means involved. Such situations are not always clear-cut, and a great degree of uncertainty may exist, but a close look at the relevant case law shows an emerging set of pertinent factors (e.g., hierarchy of rights) that can guide police work accordingly.

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Chapter 11
The Police and the Human Right to Peaceful Assembly

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Contents

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Abstract Given the importance of public gatherings for functioning democracies and their power to trigger far-reaching change processes in the political sphere, the right to freedom of peaceful assembly is particularly prone to infringements. The provisions concerning this human right, which are enshrined in various binding international and regional human rights treaties, have been construed and underpinned by a significant body of case law and additional standard-setting documents, thus further defining the scope of protection of the right to freedom of peaceful assembly.

However, especially in light of the dynamics of public gatherings as, for example, large-scale political manifestations, it remains crucial to transfer the relevant human rights standards to appropriate crowd management measures. This is where the police come in. Their role and function are twofold: respecting and protecting the right to freedom of peaceful assembly are key features of police professionalism. In order to accomplish this, the police should take into consideration a broad range of interrelated influential factors.

This chapter examines selected elements of case law and other standard-setting documents pertaining to the right to freedom of peaceful assembly with particular relevance for the police, before approaching the question of how to implement the requirements emerging from the regulatory framework by exploring good practices in policing public assemblies, thus linking the theoretical with the practical perspective. It concludes that in light of ever-changing sociopolitical conditions, police services have to cope with adapting their strategies and tactics to new developments.

11.1 Introduction

Freedom of peaceful assembly can be considered a fundamental human right, which constitutes one of the cornerstones of a functioning democracy. Especially for those who are not a member of an established political party, demonstrations and other forms of assemblies provide an important opportunity for communicating opinions they hold in common with others, attracting media attention and participating in public debates. However, bearing in mind its potential to multiply and empower critical voices, the right to peaceful assembly is particularly prone to infringements. Authorities might take direct action against disagreeable protesters or show reluctance in securing them against aggressive counterdemonstrators.[1]

[1] Heringa and van Hoof (2006), p. 821; OSCE (2012), paras. 1–7; Harris et al. (2014), p. 711.

As regards the regulation of freedom of peaceful assembly at international level, first and foremost, Article 20 (1) of the Universal Declaration of Human Rights (UDHR) has to be mentioned. The UDHR itself, which was adopted by a United Nations (UN) General Assembly resolution in 1948, is not a treaty document.[2] However, it can be stated that the UDHR has inspired the subsequent creation of a number of general as well as subject-specific human rights treaties at both international and regional levels, which also give legal force to the right to freedom of peaceful assembly.

Looking into international human rights treaty instruments, Article 21 of the International Covenant on Civil and Political Rights (ICCPR) stipulates the right to freedom of peaceful assembly.[3] One hundred sixty-eight states are party to the ICCPR, thus formally accepting the obligations set forth in this treaty document.[4] Individuals may claim violations of the rights enshrined in the ICCPR, including those incorporated in Article 21, to the Human Rights Committee, the specific UN monitoring body for the ICCPR, if these violations were caused by states that have ratified the First Optional Protocol of the ICCPR.[5] One hundred fifteen states are bound not only by the ICCPR but also by its First Optional Protocol.[6] With a view to the right to freedom of peaceful assembly, other major international treaty instruments include the International Covenant on Economic, Social and Cultural Rights (Article 8),[7] the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5 ix)[8] and the Convention on the Right of the Child (Article 15).[9]

As an example of a human rights treaty instrument at regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) sets forth in its Article 11 the legal framework concerning the freedom of association and of peaceful assembly for the currently 47 Council of Europe member states.[10] At the same time, the ECHR establishes with the European Court of Human Rights (ECtHR) a related enforcement machinery. Additionally, Article 12 of the European Charter of Fundamental Rights (ECFR), which was introduced with the entry into force of the Lisbon Treaty on 1 December

[2]Adopted by UN General Assembly resolution 217 A of 10 December 1948.

[3]Adopted by UN General Assembly resolution 2200 A (XXI) of 16 December 1966, entry into force on 23 March 1976.

[4]UNOHCHR (2016).

[5]See n 3.

[6]See n 4.

[7]Adopted by UN General Assembly resolution 2200 A (XXI) of 16 December 1966, entry into force on 3 January 1976.

[8]Adopted by UN General Assembly resolution 2106 (XX) of 21 December 1965, entry into force on 4 January 1969.

[9]Adopted by UN General Assembly resolution 44/25 of 20 November 1989, entry into force on 2 September 1990.

[10]Adopted by Council of Europe member states on 4 November 1950, entry into force on 3 September 1953.

2009 and binds European Union (EU) institutions, should be noted. Regulations in other regional treaty documents can be found, for example, in Article 15 of the American Convention on Human Rights[11] and in Article 11 of the African Charter on Human and Peoples' Rights.[12]

Complementary to the human rights treaty instruments, with a view to practice-oriented standard setting in the area of freedom of peaceful assembly, various non-treaty instruments have been endorsed by international or regional bodies. In 2013, for example, the UN Human Rights Council adopted a resolution on 'The promotion and protection of human rights in the context of peaceful protests', which encourages member states to dedicate special attention to the vulnerability of human rights in connection with assemblies.[13] In February 2016, the 'Joint report of the Special Rapporteur on the right to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies' was presented.[14] This report contains a number of practical recommendations as regards dealing with public assemblies in accordance with human rights standards. In 2012, the second edition of the 'Guidelines on freedom of peaceful assembly' was released by the Organization for Security and Co-operation in Europe (OSCE).[15]

Assuming that demonstrations held in public places represent a typical example for exercising the right to freedom of peaceful assembly, it is mainly the police who are at the forefront when it comes to safeguarding the human rights standards set forth in the aforementioned treaty and non-treaty instruments. In this respect, the role and function of the police should be twofold: they are to respect the right to peaceful assembly, which requires primarily refraining from any interference with this human right unless an intervention can be justified.[16] At the same time, the police are to protect peaceful assemblies against disruptions caused, for example, by hostile opponents.[17] Given the dynamics of crowd behaviour, the often heated and tensed atmosphere, which demands decisions under time pressure and the various competing interests normally revolving around assembly-related scenarios, it becomes immediately clear that managing such events in a professional manner is a highly complex and challenging task for the police.

[11]Adopted at the Inter-American Specialized Conference on Human Rights on 22 November 1969, entry into force on 18 July 1978.

[12]Adopted by Organization of African Unity member states on 27 June 1981, entry into force on 21 October 1986.

[13]UN Human Rights Council resolution 22/10 of 21 March 2013.

[14]UN Human Rights Council report 31/66 of 4 February 2016. The post of the Special Rapporteur on the right to freedom of peaceful assembly and of association was established by UN Human Rights Council resolution 15/21 of 6 October 2010.

[15]For an overview of international and regional standard setting documents see UNOHCHR (2016).

[16]See *Oya Ataman v Turkey*, App. no. 74552/01, ECHR 2006-XIV, para. 42.

[17]See *Plattform 'Ärzte für das Leben' v Austria,* App. no. 10126/82, 1988 Series A no. 139, para. 32; *Djavit An v Turkey*, App. no. 20652/92, ECHR 2003-III, para. 57.

11.2 Regulatory Framework for Police Activity: Selected Aspects

In order to approach the question of how the police should act to fulfil their role and function in terms of respecting and protecting the right to freedom of peaceful assembly, selected aspects of the regulatory framework that determines both requirements and boundaries for assembly-related police activity should be examined as point of departure.

11.2.1 Peaceful Assembly

The UN 'Joint report of the Special Rapporteur on the right to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies' describes an assembly as an 'intentional and temporary gathering in a private or public space for a specific purpose'.[18] Although 'sporting events, music concerts and other such gatherings can potentially be included', the focus should be on those assemblies that serve a common expressive purpose.[19] The OSCE 'Guidelines on freedom of peaceful assembly', which define an assembly as 'the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose', point in the same direction.[20] There can be no doubt that particularly assemblies where people come together to discuss or proclaim information or ideas deserve special safeguarding against infringements.[21] The common expressive purpose has to be seen in a wide sense and may be, for example, of political, cultural or social nature.[22] In light of these key features, a broad range of activities, comprising static and moving assemblies, are protected, including demonstrations, meetings, marches and parades. Moreover, new and creative forms of assemblies, including sit-ins, flash mobs, protest camps, convoys and mass processions by cyclists or drive-slow protests by motorists fall under the right to freedom of peaceful assembly.[23] Apart from being held in public places such as streets, roads or squares, the right to freedom of peaceful assembly, in general, also covers meetings on private property.[24] The question at which point an assembly can no longer be regarded as temporary depends on the individual circumstances of the

[18]UNHRC (2016) para. 10.
[19]UNHRC (2016) para. 11.
[20]OSCE (2012) para. 16.
[21]Arndt and Engels (2015), p. 342. See also Nowak (2005), p. 484.
[22]Harris et al. (2014) p. 711 with respective examples from Strasbourg case law.
[23]OSCE (2012) para. 17.
[24]Ibid para. 23.

case and has to be assessed in light of the standpoint of the ECtHR that demonstrators ought to be given enough time to manifest their views.[25]

The scope of protection is limited to peaceful assemblies. The ECtHR has underlined in its case law that an assembly should be deemed peaceful if its organisers have professed peaceful intentions, and this should be presumed unless there is compelling and demonstrable evidence that those organising or participating in that event intend to use, advocate or incite imminent violence.[26] The Court has stated that 'the burden of proving the violent intentions of the organisers of a demonstration lies with the authorities'.[27] Moreover, the use of violence by a small number of participants should not necessarily result in regarding an otherwise peaceful assembly as non-peaceful. Thus, an individual does not cease to enjoy the right to peaceful assembly because of sporadic violence committed by others if the individual in question remains peaceful in his or her intentions or behaviour.[28]

Peacefulness also includes conduct that may annoy or give offence to persons opposed to the ideas that it is seeking to promote. This refers in particular to the views held or statements made by participants in the course of an assembly. The fact that a peaceful assembly may trigger a violent counterdemonstration does not in itself render it non-peaceful.[29] An assembly remains peaceful even if the conduct of the participants temporarily hinders, impedes or obstructs the activities of third parties. Therefore, assemblies involving purely passive resistance are still to be categorised as peaceful.[30]

Approaching the right to peaceful assembly in a holistic manner, the so-called destruction of rights provisions, as contained in Article 5 of the ICCPR and Article 17 of the ECHR, should be taken into account. These provisions were created to prevent totalitarian groups from exploiting the principles enshrined in these human rights treaty documents. Relevant activities could lead to the result that the person in question may forfeit the protection under certain articles of the ICCPR and ECHR respectively, including the right to freedom of peaceful assembly. As regards the ECHR, the Strasbourg Court has adopted the view that Article 17 is

[25]Ibid para. 18.

[26]*Stankov and the United Macedonian Organisation Illinden v Bulgaria*, App. no. 29221/95 and 29225/95, ECHR 2001-IX, paras. 78, 85-90; *Cisse v France*, App. no. 51346/99, ECHR 2002-III, para. 37; *Schwabe and MG v Germany*, App. no. 8080/08, 8577/08, ECHR 2011, para. 105. See also Heringa and van Hoof (2006), pp. 821–823; OSCE (2012) paras. 25–28; UNHRC (2016) para. 18.

[27]*Christian Democratic People's Party v Moldova*, App. no. 25196/04 (no. 2), judgment of 2 February 2010, para. 23.

[28]*Ezelin v France*, App. no. 11800/85, 1991 Series A no. 202, para. 53. See also UNHRC (2016), para. 20.

[29]*Christians against Racism and Facism v UK*, App. no. 8440/78, DR 21 (1981) pp. 138, 148; *Plattform 'Ärzte für das Leben' v Austria,* App. no. 10126/82, 1988 Series A no. 139, para. *32; Alekseyev v Russia*, App. no. 4916/07, 25924/08, 14599/09, judgment of 21 October 2010, para. 80; Reid (2011), p. 444.

[30]*G v Germany*, App. no. 13079/87, DR 60 (1989), admissibility decision of 6 March 1989, p. 256; *Cisse v France*, App. no. 51346/99, ECHR 2002-III, para. 37.

applicable only in extreme cases. One such example pertains to the denial of the Holocaust.[31] For the prevailing number of cases, the limitations included in the specific articles are deemed sufficient to address possible cases of abuse of rights.[32] An application of the provisions included in Article 5 of the ICCPR and Article 17 of the ECHR concerning the right to freedom of peaceful assembly might be considered, for example, in relation to the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[33]

11.2.2 Positive Obligations to Ensure the Right to Peaceful Assembly

There is a positive duty on a state to create the necessary conditions for the enjoyment of the right to freedom of peaceful assembly. Apart from, for example, traffic regulation and the provision of medical services on the assembly site, this includes the obligation to actively protect those exercising their right to peaceful assembly against any person or group that attempts to disrupt or inhibit them. In the case of counterdemonstrations, the state is, in general, obliged to put in place necessary arrangements that both events can take place within sight and sound of each other and for participants of both events to be protected. Both those who demonstrate and those who counterdemonstrate can claim the right to do so without being threatened or disrupted.[34]

A particular problem occurs concerning assemblies advocating opinions that are unpopular and may entail the likelihood of hostile opposition and violent counterdemonstrators. The ECtHR has affirmed that the positive obligation of the authorities comprises reasonable and appropriate measures to enable lawful demonstrators to proceed peacefully.[35] However, in principle, the ECtHR grants a wide margin of appreciation to the authorities to decide what concrete measures are appropriate in a particular case to sufficiently protect the right to freedom of peaceful assembly.[36]

The question as to how far the state might have a positive obligation to allow access to privately owned places for exercising the right to freedom of expression

[31] See Garaudy v France, App. no. 65831/01, admissibility decision of 24 June 2003, ECHR 2003-IX.

[32] See Jacobs et al. (2014), p. 123.

[33] See OSCE (2012) paras. 15 and 96. See also UNHRC (2016) para. 33.

[34] Geneva Academy (2014), p. 13. See also UNHRC (2016) para 14.

[35] *Plattform 'Ärzte für das Leben' v Austria,* App. no. 10126/82, 1988 Series A no. 139, para. 32; *United Macedonian Organisation Illinden and Ivanov v Bulgaria*, App. no. 44079/98, judgment of 20 October 2005, para. 115; *Barankevich v Russia*, App. no. 10519/03, judgment of 26 July 2007, paras. 32-33; *Alekseyev v Russia*, App. no. 4916/07, 25924/08, 14599/09, judgment of 21 October 2010, para. 76.

[36] *Plattform 'Ärzte für das Leben' v Austria,* App. no. 10126/82, 1988 Series A no. 139, paras. 34–36; Mowbray (2011), pp. 749–750.

arose in the case Appleby and Others versus United Kingdom. With a view to Article 10 of the ECHR, the Court stated that where the denial of access 'has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed', a positive obligation to protect the freedom of expression by regulating property rights could occur.[37] These considerations also might be applied to the enjoyment of the right to freedom of peaceful assembly.[38]

11.2.3 Possible Interferences with the Right to Peaceful Assembly

Interferences with the right to freedom of assembly may take place before, during or after an assembly in various forms. Moreover, it should be underlined that participants in an assembly may—apart from the right to peaceful assembly and depending on the specific circumstances of the individual case—also claim various other rights, including the freedom of expression and of thought, conscience and religion, as well as the right to liberty of person, to bodily integrity and to privacy. However, the focus of the following examples should be on possible interferences with the right to peaceful assembly.

Prior restraints can directly emerge from the legislation as blanket legislative provisions that ban, for example, assemblies at specific times or in specific locations or may be individually imposed by the regulatory authorities before the date of the event. They can take the form of an outright prohibition of an assembly and also of so-called time, place and manner restrictions, which require changes to the time or place of an event or the manner in which an event should be conducted. Preventive arrests, which impede the participation in an assembly or render it impossible, not only represent an interference with the right to liberty of person but at the same time affect the right to freedom of peaceful assembly. In this context, restrictions on liberty and freedom of movement within a state, as well as across international borders, which can have the same negative effect on participation in an assembly, should also be noted. The right to freedom of peaceful assembly includes the right to plan, organise, promote and advertise an assembly in any lawful manner. Therefore, restrictions on these activities can be considered to be interferences with the right to freedom of peaceful assembly.

Given that circumstances may change and assemblies may develop in a way other than anticipated, authorities may impose restrictions or additional restrictions on organisers or participants of an assembly in the course of the event. These restrictions, in principle, may take the same form as those that could be imposed

[37] *Appleby and Others v United Kingdom*, App. no. 44306/98, judgment of 6 May 2003, ECHR 2003-VI, para. 47.

[38] Ibid para. 52. See also OSCE (2012) para. 23.

prior to an assembly. They may include the early termination of the assembly and the dispersal of the crowd, but also time, place and manner restrictions may be applied at a point in time when the assembly is already in progress. Restrictions relating to the content of messages can constitute an interference with both the right to freedom of expression as well as the right to freedom of peaceful assembly. In light of the chilling effect it might have on potential participants in an assembly, data collection and processing relating to assemblies might interfere not only with the right to privacy but also with the right to freedom of peaceful assembly.

A typical interference with the right to freedom of peaceful assembly after the event is the imposition of sanctions, for example criminal or disciplinary sentences, as well as the prosecution of a person as a reaction to his or her participation in or a specific conduct during an assembly.[39]

The ECtHR judges the obligation by domestic law pertaining to advance notification of an assembly in public places, as well as the requirement to obtain an authorisation not as interference as long as the purpose of these regulations is to furnish the authorities with the relevant information to discharge their obligations.[40] This might include measures to protect an assembly against hostile counterdemonstrators, as well as traffic diversions or other preventive measures, such as the presence of first-aid services on the site.[41] However, the Court's opinion on this matter is not undisputed. It is argued that both notification and authorisation requirements constitute a dispensable burden on organisers, especially when it is obvious that disturbances to public life are unlikely to occur, for example due to the venue of the assembly or the relatively low number of participants. Moreover, authorisation requirements appear to be particularly prone to abuse by state authorities.[42] An intermediate opinion, according to which reasonable notification procedures, but not authorisation requirements, are acceptable, can be found in the 'Joint report of the Special Rapporteurs on the freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies'.[43]

[39]See for possible interferences before, during and after an assembly OSCE (2012) paras. 94–112; Harris et al. (2014), pp. 714–715; UNHRC (2016) paras. 19 and 74.

[40]Cf. *Balcik and Others v Turkey*, App. no. 25/02, judgment of 29 November 2007, para. 48.

[41]*Rassemblement jurassien v Switzerland*, Commission decision of 10 October 1978, DR 17, 119; *Oya Ataman v Turkey*, App. no. 74552/01, ECHR 2006-XIV, paras. 38-39; *Kuznetsov v Russia*, App. no. 10877/04, judgment of 23 October 2008, para. 42. See also Harris et al. (2014), p. 714; Arndt and Engels (2015), p. 343; Geneva Academy (2014), p. 16.

[42]OSCE (2012) paras. 115–119; Geneva Academy (2014), p. 11.

[43]UNHRC (2016) paras. 21–22.

11.2.4 Justification of Interferences

Article 11 (2) of the ECHR contains provisions as to which interferences by state bodies with the right to freedom of peaceful assembly could be justified. With reference to the first sentence of Article 11 (2), the ECtHR has developed a standard formula according to which an interference will constitute a breach of Article 11 unless three conditions are met: prescription by law, pursuance of one or more legitimate aims under Article 11 (2) and necessity in a democratic society for the achievement of those aims.[44] In principle, this methodological approach is equally applicable for Article 21 of the ICCPR.[45]

As a guiding principle for the justification of interferences, the ECtHR has affirmed in its case law that the right to freedom of peaceful assembly as one of the foundations of a democratic society should not be interpreted restrictively.[46] In essence, a presumption in favour of holding assemblies can be considered.[47] Accordingly, the ECtHR found that 'states must not only safeguard the right to assemble peacefully but also refrain from applying unreasonable indirect restrictions upon that right'.[48] Therefore, relevant regulations and procedures contained in domestic legislation must not be unduly bureaucratic.[49]

As regards the prescription of a restriction by law, the interference in question needs to have its basis in domestic legislation. Additionally, the law should be formulated in a sufficiently precise manner. The fact that the law confers discretion in itself does not withstand this requirement as long as the scope of the discretion is indicated with sufficient clarity to safeguard the individual against arbitrariness. If these criteria are not met, the Court will not need to examine the remaining two requirements relating to the legitimacy of the aim and the necessity in a democratic society.[50]

Article 11(2) mentions various legitimate aims to justify restrictions of the right to freedom of peaceful assembly. They are in principle identical to those contained in the second sentence of Article 21 of the ICCPR. Those that are of particular relevance for the police are examined below.

The 'interest of national security' bears the risk of giving it a too extensive interpretation. Kempees, cited by Jacobs, White and Ovey, summarises the scope of this limitation as measures protecting the 'safety of the state against enemies who might seek to subdue its forces in war or subvert its government by illegal means'.[51]

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[44]Cf. *Kuznetsov v Russia*, App. no. 10877/04, judgment of 23 October 2008, para. 37; Jacobs et al. (2014), p. 309.

[45]Nowak (2005), p. 488.

[46]*Djavit An v Turkey*, App. no. 20652/92, ECHR 2003-III, para. 56.

[47]OSCE (2012) para. 30; Geneva Academy (2014), p. 7; UNHRC (2016) para. 18.

[48]*Oya Ataman v Turkey*, App. no. 74552/01, ECHR 2006-XIV, para. 36.

[49]OSCE (2012) para. 30.

[50]Harris et al. (2014), pp. 715–716; Jacobs et al. (2014), pp. 310–314.

[51]Jacobs et al. (2014), p. 316.

In order to construe the term 'national security', the ECtHR has stated that 'the defence of territorial integrity is closely linked with the protection of national security'.[52] According to the 'Siracusa principles on the limitation and derogation of provisions in the ICCPR', national security may only be invoked to justify limitations on certain rights to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.[53]

In this context, especially in view of the latest terrorist attacks in Europe and elsewhere in the world, legislation intended to counter terrorism and extremism is of particular importance. As regards the ECHR, the 'Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis' should prevent undue restrictions on the exercise of freedom of assembly and expression during crisis situations.[54] Additionally, the option for states to derogate in times of war or public emergency—under restrictive conditions—from their obligation to guarantee the right to freedom of peaceful assembly, as set forth in Article 15 of the ECHR and Article 4 of the ICCPR, should be borne in mind.

As regards 'public safety', the ECtHR has applied this head often alongside national security and prevention of public disorder, which partly overlap with public safety aspects.[55] Specific safety issues might arise if an assembly causes safety risks for others or is itself endangered. The heightened risk of accidents caused by a protest march that is planned to be held on a road with heavy traffic outside daylight hours might serve as an example.[56]

The 'prevention of disorder or crime' as a legitimate aim for interferences with the right to freedom of peaceful assembly appears to be given a wide interpretation by the ECtHR.[57] As regards the prevention of disorder, the Court has found that 'the protection of a state's democratic institutions and constitutional foundations relates to the prevention of disorder, the concept of order within the meaning of the French version of Article 11 encompassing the institutional order'.[58] The prevention of crime may include the securing of evidence for the purpose of detecting and prosecuting crime.[59] Restrictions pertaining to a peaceful assembly could be legitimate for the prevention of disorder when there is evidence that participants themselves intend to act in a lawless or disorderly manner.[60] An example can be

[52] *Republican Party of Russia v Russia*, App. no. 12976/07, judgment of 12 April 2011, para. 101.

[53] UNCHR (1984) paras. 29–32; OSCE (2012) paras. 85–86. See also UNHRC (2016) para. 31.

[54] Adopted at the 1005th meeting of the Ministers' Deputies of the Council of Europe on 26 September 2007.

[55] Jacobs et al. (2014), p. 317.

[56] OSCE (2012) para. 74.

[57] Jacobs et al. (2014), p. 319.

[58] *Republican Party of Russia v Russia*, App. no. 12976/07, judgment of 12 April 2011, para. 101.

[59] See *van der Heijden v The Netherlands*, App. no. 42857/05, judgment of 3 April 2012 [GC], para. 54.

[60] OSCE (2012) para. 72.

found in the blocking of the entrance to military barracks in the case G versus Germany.[61] The peaceful and purely passive blocking of the entrance falls within the scope of Article 11 of the ECHR, but nonetheless the prevention of disorder or crime was a legitimate aim for police intervention.

As a third requirement, restrictions on the right to peaceful assembly need to be necessary in a democratic society to achieve one of the aforementioned legitimate aims. This includes that the action taken is in response to a pressing social need and that the interference with the right protected is the least intrusive option to deal with that need. The proportionality test requires that the interference is proportionate to the legitimate aim pursued. This can be examined by balancing the nature and extent of the interference against the reason for interfering.[62]

In practice, it is acknowledged that freedom of assembly, especially when exercised in public space, is likely to collide with competing rights, such as the right to freedom of movement of motorists or pedestrians. According to the ECtHR, protests 'may cause a certain level of disruption to ordinary life'.[63] In general, these temporary disturbances, which lie within the nature of assemblies in public space, are of themselves not a sufficient justification for interferences.[64]

The ECtHR grants states, in principle, a broad discretion concerning the necessity of restrictions pursuing one of the legitimate aims if it is the intention of the organisers or participants of an assembly to impede others.[65] However, if a peaceful assembly concerns questions of public interest, the Court examines the case more in depth. In the Stankov case, for example, the ECtHR rejected that 'every probability of tension and heated exchange between opposing groups calls for a wide margin of appreciation'.[66] As there was, according to the circumstances of the case, no real foreseeable risk of violent action or incitement to violence, the actions taken by the authorities were not necessary and therefore not justified.[67]

11.2.5 Assemblies Without Prior Notification or Authorisation

The ECtHR has dealt in a number of cases with assemblies that did not comply with notification or authorisation requirements. The guiding principle for the Court here was to assess whether the authorities had shown 'a certain degree of tolerance

[61] *G v Germany*, App. no. 13079/87, DR 60 (1989), admissibility decision of 6 March 1989, p. 256.
[62] Jacobs et al. (2014), p. 325.
[63] *Oya Ataman v Turkey*, App. no. 74552/01, ECHR 2006-XIV, para. 38.
[64] OSCE (2012) para. 80.
[65] Harris et al. (2014), p. 716.
[66] *Stankov and the United Macedonian Organisation Illinden v Bulgaria*, App. no. 29221/95 and 29225/95, ECHR 2001-IX, para 97.
[67] Ibid.

towards peaceful gatherings if the freedom of assembly is not to be deprived of all its substance'.[68] Whereas, for example, the speedy and forceful dispersal of an assembly solely for the reason of lacking authorisation, which could have been obtained without jeopardising its purpose, was considered disproportionate,[69] the imposition of moderate fines for participating in an unauthorised assembly appears, with particular focus on proportionality considerations, to be generally acceptable to the Court.[70]

11.2.6 Spontaneous Assemblies

Spontaneous assemblies, i. e. assemblies that comprise circumstances where 'an immediate response to a current event is warranted in the form of a demonstration', are exempt from notification and authorisation obligations.[71] The sudden nature of triggering events can make it impossible to notify the authorities at all or within a certain time limit before launching the gathering. Insisting on notification or authorisation requirements would render a response by way of public assembly ineffective.[72] Of primary importance for the Court concerning these cases is the question whether respecting the procedural rules really results in the ineffectiveness of the assembly or simply constitutes a burden that could be shouldered by the organisers.[73] The ECtHR has judged for spontaneous assemblies that 'a decision to disband such assemblies solely because of the absence of prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly'.[74]

11.2.7 Police Officials as Demonstrators

As regards the second sentence of Article 11 (2), where the possibility of special restrictions on the exercise of the freedom of assembly for members of the armed forces, the police and the state administration is enshrined, the ECtHR found that

[68] *Oya Ataman v Turkey*, App. no. 74552/01, ECHR 2006-XIV, para. 42. See also UNHRC (2016) para. 23.

[69] *Oya Ataman v Turkey*, App. no. 74552/01, ECHR 2006-XIV, paras. 42-44; *Izci v Turkey*, App. no. 42606/05, judgment of 23 July 2013, para. 90.

[70] *Rai and Evans v UK*, App. no. 26258/07, 26255/07, admissibility decision of 17 November 2009.

[71] *Bukta and Others v Hungary*, App. no. 25691/04, ECHR 2007-III, para. 32. See also UNHRC (2016) para. 23.

[72] Harris et al. (2014), p. 720.

[73] *Bukta and Others v Hungary*, App. no. 25691/04, ECHR 2007-III, paras. 31-39; *Molnar v Hungar*, App. no. 10346/05, judgment of 7 October 2008, paras. 40–43.

[74] *Bukta and Others v Hungary*, App. no. 25691/04, ECHR 2007-III, para. 36.

this provision is to be construed narrowly. The aim of any such restrictions should be to ensure that the responsibilities of the relevant service members are properly discharged and, moreover, to maintain the confidence of the public in the neutrality of the respective services.[75]

11.3 Good Practices in Policing Public Assemblies in Consistency with Human Rights Standards

Seen against the background of the regulatory framework, the key question for the police is how to operationalise relevant human rights standards, thus transferring, for example, Court decisions to concrete crowd management measures in a given scenario.

11.3.1 Changing Police Approach to Public Assemblies in Light of Developing Case Law

In the course of the paradigm shift from police force to police service that has taken place not only in Europe but also in democratic countries throughout the world over the last decades, human rights and police ethics are given prominence in the debate about the purposes of public policing.[76] In this context, the approach of the police to public assemblies has also changed. At the core of the new thinking—reflecting the developing case law and underpinned by practical experiences and scientific research in the area of crowd psychology—rests the idea that police are not only to reactively intervene in connection with assemblies, but their primary task is to proactively facilitate the enjoyment of the right to peaceful assembly. The main aim of this approach is to promote a human-rights-friendly environment by way of striking a balance between competing positions based on negotiation with all parties concerned and, in consequence, de-escalate tension and render the use of force unnecessary.[77] However, mere dialogue is not sufficient in all cases, and police also have to be prepared for more robust action if necessary and proportionate to stay in control of the situation.

Given the dynamics and complexity of large crowds, a high degree of professionalism is a prerequisite for the police to meet the requirements set out by case law and transfer them to concrete problem-oriented measures. Especially in heated

[75]See OSCE (2012) para. 60.

[76]UN (1979), AI (1998), CoE (2001), OSCE (2008). See also Neyroud and Beckley (2004), p. 4; Crawshaw et al. (2007), p. 3.

[77]OSCE (2012) paras. 149 and 157; Geneva Academy (2014), p. 6. See also Porta and Reiter (1998), pp. 1–32.

and tensed situations, unprofessional police action might easily launch a vicious circle of escalation and nourish an atmosphere that increases the possibility of human rights infringements.

As regards police assembly management, considerable research has been carried out over the recent decades. The Elaborated Social Identity Model (ESIM), for example, assumes that crowd events are inter-group encounters where the police are one of the participants. The way the police act has important influence on the behaviour of the crowd. Four guiding principles are suggested for police action in order to de-escalate tension: education, facilitation, communication and differentiation.[78] These findings and recommendations have had significant impact on changes in crowd control policing in many countries. The escalation of force alongside a negative view of protesters, as was common in the 1960s, has been replaced more and more by a cooperative policing style.[79] The EU has funded a number of projects aimed at coordinating national research programmes on security during major events, including public assemblies, and supporting the implementation of the relevant provisions. As output, various tools and methodologies, which should aid practitioners and researchers when dealing with major events, have been developed. They include guidelines and manuals, intended at harmonising, coordinating and adjusting national efforts in this field, as well as furthering cross-border cooperation. Examples for these research projects are EU-SEC (2004–2008),[80] EU-SEC II (2008–2011)[81] and The House (2012–2014).[82] Parts of the results of this research have been incorporated into the 'EU Handbook for police and security authorities concerning cooperation at major events with an international dimension'.[83] The GODIAC project (2010–2013) was specifically designed to develop and promote 'good practice for dialogue and communication as strategic principles for policing political manifestations in Europe'. It has produced, among others, a booklet titled 'Recommendations for policing political manifestations in Europe'.[84]

11.3.2 Key Elements of Police Professionalism in Connection with Public Assemblies

The following not exhaustive overview highlights important elements of police professionalism—understood as respecting and protecting human rights[85]—as

[78]Reicher et al. (2004, 2007).

[79]Polisen (2013a), p. 10.

[80]UNICRI (n.d.) EU–SEC.

[81]Ibid.

[82]UNICRI (n.d.) The House.

[83]Council of the European Union, 14143/07 REV 3, 6 December 2007.

[84]Polisen (2013b).

[85]Neyroud and Beckley (2004), p. 78.

regards assembly management. When it comes to safeguarding human rights, a wide range of complementary aspects need to be taken into account in order to achieve a tangible output in the form of police action consistent with relevant standards.[86]

A cross-cutting and decisive factor for success is the political determination to fully implement a human-rights-centred model of policing public assemblies. The unambiguous political support for relevant change processes is indispensable—especially in developing democracies and countries in transition.[87]

11.3.2.1 Organisational Culture Based on Human Rights and Police Ethics

Respecting and protecting human rights are core functions of the police in democratic societies. This is not limited to assemblies but holds true for all areas of policing. Strict compliance with human rights standards and relating ethical values is a prerequisite for the successful implementation of modern participatory policing styles.[88] Human-rights-compliant and ethical policing does not contradict the notion of effective and efficient policing but, on the contrary, is key to achieving it through enhancing public confidence in the police.[89] Bearing this in mind, the creation of a respective organisational culture based on human rights and police ethics represents the bedrock for an overall police professionalism, which also creates the environment for police attitude, action and conduct relating to assemblies.

11.3.2.2 Police as Facilitator: Need for Flexibility

In the context of safeguarding human rights, the overall role and function of the police as regards assemblies can best be depicted as that of a facilitator.[90] Therefore, cooperation with the organisers should commence prior to the event at an early stage. In the ideal case, the police offer advice, and agreements can be accomplished, for example on the number of stewards, the venue of a demonstration or the route for a march. If time, place and manner restrictions are deemed necessary and proportionate, they should be discussed with the organisers beforehand, and police might assist in finding alternative solutions. In brief, the police need to be supportive to the organisers and enable them to achieve their goals while at the same time trying to strike a balance between the right to freedom of peaceful assembly and

[86]Cf. Council of the European Union (2007), p. 14.
[87]Cf. Crawshaw et al. (2007), pp. 356–359.
[88]Ibid p. 681.
[89]Ibid p. 26.
[90]Polisen (2013a), pp. 41–42; Geneva Academy (2014), p. 6; UNHRC (2016) paras. 37 and 49.

possible competing interests. This requires a certain degree of flexibility from the police. Relevant concepts for policing assemblies, as well as the readiness to adapt swiftly plans to changing framework conditions whenever required, should reflect this flexibility.[91]

Especially when it comes to spontaneous assemblies, assemblies without prior notification or authorisation and those that have been notified or authorised but divert from the original notification or authorisation, increased police flexibility is crucial for success.[92] The ban or termination of an assembly based solely on the ground of missing notification or formal authorisation or diversion from the notification or formal authorisation is, in general, not acceptable, unless there are additional reasons that would justify a respective police order.[93] In light of this, police need to be prepared to improvise and deal with unexpected events, for example by keeping a sufficient number of adequately equipped units on standby.[94]

Counterdemonstrations, especially when hostile, constitute another example where increased police flexibility is necessary in order to meet the protection requirements set out by case law.[95] In these situations, police will mainly focus on physically separating the different groups of protesters by way of enforcing relevant restrictions. It should be noted that respective police action that implements the legal obligation of states to protect peaceful assemblies against violence might in the end be beneficial for protesters who themselves deny the basic values of democratic societies, for example right wing ideologists. However, in view of the case law affirming the fundamentality of the right to peaceful assembly for democracies, as well as the neutrality of the authorities regarding the contents of the message, police are obliged to be prepared for these scenarios. In order to combat misperceptions of the role of the police and negative impact on the police–citizen relationship, detailed explanation of the legal requirements binding the police to the public is of particular importance.

11.3.2.3 Continuous Communication with Organisers, Participants and the Wider Public as Means of Choice

Continuous communication before, during and after an assembly with all relevant individuals and groups who are involved in or affected by an assembly should be at the centre of the police approach and is key to successful facilitation.[96] This primarily includes the communication with organisers and participants, as well as with third parties. A comprehensive communication concept should include

[91] Ibid.

[92] Polisen (2013a), p. 42.

[93] See Sects. 11.2.5 and 11.2.6.

[94] Cf. OSCE (2012) paras. 126–131; AI (2013), p. 15.

[95] Geneva Academy (2014), p. 13.

[96] AI (2013), p. 11; UNHRC (2016) paras. 37–39.

personal contacts but also the dialogue with the wider public through traditional and new media, for example newspapers, television, radio, Internet and social networks.[97] With regard to personal communication with organisers and participants, positive experiences have been made with the deployment of specialised dialogue and anti-conflict officers who possess the relevant soft skills, as well as with neutral mediators. Even if organisers or participants might be reluctant as regards conversation with the police, the latter should persist to engage in communication. Liaison officers might help to create a basis for cooperation. Communication with organisers and participants is of particular importance in order to exchange information on developments of interest and combat rumours if tension arises in the course of an assembly. Whenever possible, police should directly address the organisers whose first and foremost responsibility is to steer the event, maintain peacefulness and ensure compliance with legal regulations and police orders. If police intervention is necessary, depending on the situation, the organisers should be pre-informed to give them the opportunity to solve emerging problems by themselves. This openness helps to avoid negative surprises and foster confidence in the police as partner of the organisers; it constitutes an important element for de-escalation and prevention of violence.[98]

The communication-centred and non-provocative police approach can be underpinned by avoiding open visibility of force. This might refer, for example, to the dress code (regular uniform) and the equipment (protective equipment and means of coercion not immediately visible) of the police officers who are deployed within sight of the crowd.[99] The police strength on the venue (reasonable police–protesters ratio) as well as the grouping of police units (hidden positioning of robust intervention units) are other aspects that should be mentioned. However, the expected effects of de-escalating measures have to be weighed against potential risks to the safety and security of the deployed police personnel. By no means shall a de-escalating approach be pursued at the expense of the bodily integrity of deployed police officers.

As a rule, communication does not stop when an assembly is finished. With a view to deepening mutual trust and confidence and laying the foundation for possible future cooperation, a de-briefing with the organisers is essential.[100]

[97]Polisen (2013a), pp. 37–38.

[98]Polisen (2013a), pp. 38–41; AI (2013), pp. 12–14 and 20. See also Geneva Academy (2014), p. 24 for the responsibilities of the organisers.

[99]Cf. Polisen (2013a), p. 43; AI (2013), pp. 17–18.

[100]Polisen (2013b), p. 39; UNHRC (2016) para. 49 e).

11.3.2.4 Neutrality

It is important to point out that the authorities' own view on the merits of a particular protest should be irrelevant. Therefore, in general, strict neutrality is required from the police.[101]

11.3.2.5 Planning Procedures and Preparatory Measures: Centrality of Knowledge

Problem-oriented strategic, tactical and operational concepts, as well as related command and control structures, are pivotal prerequisites for meeting human rights standards when policing assemblies. Relevant concepts should support the transfer of the requirements set out by the case law to concrete measures. Effective command and control structures ensure that these measures are swiftly implemented and have the intended impact on the ground. Especially as regards assemblies, an integrated approach, involving various other agencies and organisations as cooperation partners of the police, should be pursued.[102]

A reliable situation assessment is of utmost importance for the police to successfully plan assembly operations. One of the main objectives of information gathering and analysis is to receive a realistic and detailed notion on the likelihood of violence or other unlawful actions by protesters or expected counterdemonstrators.[103] Therefore, especially with a view to the obligation of the police to protect peaceful protesters against hostile counterdemonstrators, particular attention has to be given to the information gathering and analysis in order to allow the police to effectively fulfil their protective tasks.[104] Depending on the outcome of this assessment, the concrete police approach might place the emphasis either more on communication and facilitation or more on intervention and coercion. It is essential to include contingency plans and precautionary measures. To uphold human rights standards, whenever appropriate, planning and preparation should also consider the need for follow-up measures, as, for example, the identification or detention of a large number of persons.[105] Clearly, the better the police are prepared and able to anticipate certain developments as the result of thorough planning procedures, the lower the risk that they might lose control of the situation or overreact.

Given the modern police management and leadership styles, which rely on delegation and decision-making at the lowest possible hierarchical level, it is essential for success that all officers involved in an operation have available the

[101] Cf. OSCE (2012) para. 94. See also Sect. 11.2.1 for an abuse of the right to freedom of peaceful assembly.

[102] OSCE (2012) para. 151; AI (2013), p. 16; Polisen (2013b), pp. 44–45.

[103] Polisen (2013b), pp. 36–37.

[104] See Sect. 11.2.2.

[105] OSCE (2012) para. 162.

information that they need to fulfil their tasks in a professional manner. Apart from the relevant background knowledge on policing concepts and command and control structures and how they work, this includes having updated information on all important aspects relating to the operation in question, for example aims and expected conduct of protesters, high-risk locations or persons alongside the route of a march, and experiences made with the protesters in the past.[106]

Police operations in connection with assemblies are often protracted and stressful. Therefore, special attention should be paid to the well-being of the deployed law enforcement personnel, for example, by way of good quality catering and opportunities for sufficient rest. Appropriate measures contribute to maintaining the physical and mental fitness of the officers involved, help to reduce stress and thus mitigate the likelihood of police misconduct.[107]

11.3.2.6 Measures to Prevent the Outbreak of Violence

Preventive police measures, commencing in the pre-event phase, might range from the mere presence of a few police officers on the scene to targeted stops and searches, seizures, arrests and a variety of surveillance and data collection measures, depending on the situation assessment. As these interventions might be intense and threatening to potential participants, strict compliance with the principles of necessity and proportionality is of particular importance. In general, the mere participation of an individual in a peaceful assembly does not provide reasonable grounds for these measures.[108]

11.3.2.7 Differentiation: Targeted Intervention and Minimum Use of Force

One of the major challenges for policing assemblies emerges from the fact that a crowd is not homogenous but comprises various individuals. Thus, police have to differentiate between peaceful participants, including participants who are only verbally aggressive but not violent, and participants who use, intend to use or incite violence and whose behaviour therefore can be characterised as non-peaceful.[109] Bearing this in mind, sophisticated police crowd control concepts rely on targeted interventions directed in a quick and concentrated manner solely against those individuals who are non-peaceful or have non-peaceful intentions in order to minimise the risk of human rights infringements of those participants who remain

[106]Polisen (2013b) pp. 36–37.

[107]See AI (2013), p. 26.

[108]Cf. OSCE (2012) para. 161. See also UNHRC (2016) para. 43 (stops and searches), para. 44 (arrests), para. 47 (administrative detention), and chapter G. (data collection).

[109]Reicher et al. (2004), p. 568; AI (2013), p. 9; UNHRC (2016) para. 61.

peaceful. If a larger group of individuals commits hostilities, police might attempt to separate this violent group from the peaceful demonstrators, thus allowing the latter to continue enjoying their rights without disturbance.[110]

In this regard, measures that concentrate on the indiscriminate containment of persons in that they do not distinguish between participants and non-participants or between peaceful and non-peaceful protesters appear to be highly problematic. Although this technique might be—under specific conditions—in accordance with the law,[111] given that respective police interventions often do not take into account the individual conduct, it could be easily disproportionate and unlawful to indiscriminately cordon a group of people and prevent them from leaving the area. Moreover, in many cases, unacceptable containment conditions and the possible escalation of tension between police and demonstrators are strong arguments against this technique.[112]

Depending on the circumstances, an alternative for the police to an immediate intervention against demonstrators who are violent or commit other unlawful acts might be to collect evidence of the criminal offences and prepare for discrete arrests after the event in order to avoid any provocation of the prevailing majority of peaceful participants. In brief, the exercise of effective law enforcement while at the same time mitigating negative impact on public order appears to be the solution of choice for the police.[113]

Special attention has to be paid to the use of force in connection with assemblies as means of coercion might easily get out of control, accidentally do harm to uninvolved persons and provoke resistance from the side of the demonstrators. In particular, the indiscriminate use of force against crowds is not tolerable. Unless immediate coercive intervention is unavoidable, police are obliged to pursue a graduated approach, starting with a warning before action is taken.[114] Adequate self-defence equipment for law enforcement personnel, as, for example, helmets, shields, fire-retardant clothing and bullet-proof vests, as well as the provision of suitable means of coercion for crowd control, including truncheons, water cannons and tear gas, is of paramount importance to decrease the need for them to draw upon more powerful and possibly lethal weapons. Especially when the risk of violence directed against law enforcement officials is high, a responsibility of the state to provide appropriate equipment in order to prevent excessive use of force by the police can be concluded.[115] Even if the use of force in a particular situation

[110]OSCE (2012) para. 158; Polisen (2013b), pp. 42–43; AI (2013), pp. 20–22; Geneva Academy (2014), p. 17.

[111]Cf. *Austin v United Kingdom*, App. no. 39692/09, ECHR 2012, paras. 67–68. This application did not include a complaint under Article 11 of the ECHR but focused on Article 5.

[112]OSCE (2012) para. 160; AI (2013), pp. 22–23.

[113]Cf. AI (2013), pp. 10 and 20.

[114]OSCE (2012) para. 171; Geneva Academy (2014), p. 22.

[115]Cf. *Gülec v Turkey*, App. no. 21593/93, judgment of 27 July 1998, para. 71; *Simsek v Turkey*, App. no. 35072/97, judgment of 26 July 2005, para. 91; AI (2013), pp. 17–19; UNHRC (2016) para. 53.

complies with the requirements of necessity and proportionality, a key question for its justification is whether it could have been reasonably prevented by appropriate measures in the planning and preparatory phase of the police operation.[116] In general, the use of firearms against a crowd or individuals in a crowd cannot be justified and thus can be considered prohibited.[117] These core ideas are also reflected in various international and regional standard-setting documents.[118] The 'UN basic principles on the use of force and firearms by law enforcement officials' provide specific guidance relating to the use of force.[119]

11.3.2.8 Limitations to Police Discretion: Necessity and Proportionality

The guiding principle for the police should be the presumption in favour of holding assemblies, which reflects the importance attached to this fundamental right for functioning democracies.[120] The high threshold for justifying interferences with the right to freedom of peaceful assembly, as established by case law, has to be taken into account by each police officer and at all hierarchical levels when it comes to decision-making concerning police action. The principles of necessity and proportionality, which narrow the margin of appreciation principally granted to states, are decisive factors for balancing colliding interests, in particular the human rights of the persons involved, the state's obligation to maintain public order and safety, and the rights of others. Consequently, bans imposed prior to the start of the event, as well as early terminations of assemblies by police order and the subsequent dispersal of the crowd, can only be justified when other less intrusive means such as restrictions concerning time, place and manner of an assembly are deemed inappropriate or insufficient. In consequence, police first have to consider the application and enforcement of time, place and manner restrictions and prepare themselves accordingly for enforcing them.[121] Given that protests seek to convey a message to a particular audience and therefore should be allowed to take place within sight and sound of that audience, time, place and manner restrictions must also meet the strict tests of necessity and proportionality.[122] Especially as regards the use of force, the principles of necessity and proportionality are to be considered carefully to determine the least intrusive means of coercion.[123]

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[116]Cf. *McCann and Others v United Kingdom*, App. no. 18984/91, judgment of 27 September 1995, para. 194.

[117]Geneva Academy (2014), p. 21; UNHRC (2016) para. 67 e).

[118]Cf. UN (1979); CoE (2001); OSCE (2008).

[119]Adopted by the Eight UN Congress on the Prevention of Crime and Torture of Offenders, Havana, Cuba, 27 August to 9 September 1990.

[120]OSCE (2012) para. 30; Geneva Academy (2014), p. 7.

[121]OSCE (2012) paras. 39–41, 99–102, and 165–67; Geneva Academy (2014), p. 20.

[122]UNHRC (2013) para. 59.

[123]See also Sect. 11.3.2.7.

11.3.2.9 Transparency

Transparency regarding police operations, not only concerning assembly-related tasks, is an important means for building confidence and establishing partnerships between police, organisers, participants and third parties. This should include a good relationship with the media. Given its protection under the right to seek and receive information as, for instance, enshrined in Article 19 (2) of the ICCPR, law enforcement services should be open and supportive to the monitoring of police performance relating to public assemblies by representatives of non-governmental organisations in the field of human rights. This could be a vital source of independent information. Relevant observations could inform the public debate and serve as basis for dialogue between the actors concerned.[124]

11.3.2.10 Accountability

In order to combat human rights violations by the police, especially as regards public gatherings where formed police units are often deployed and the difficulty of identifying and prosecuting individual officers arises, accountability represents an important pillar of a human rights-oriented approach to policing assemblies. As a rule, each police officer remains individually accountable for his or her action even if he or she acts as member of a formed unit. Therefore, the feasibility of identifying individual officers, for example by way of displaying sufficiently large identification numbers on the police uniforms, becomes crucial.[125] The use of body-worn cameras by police officials is a relatively new means, which might facilitate the investigation into alleged human rights violations by officers in the course of assemblies.[126] In order to send out a clear signal to the members of the police organisation and also to the public, a thorough investigation of alleged human rights violations by police officers, along with the provision of an effective remedy to victims, is of great importance.[127] Regulations should be in place according to which each police intervention or non-intervention could be subject to an administrative or judicial review.[128]

[124]OSCE (2012) paras. 61–64 and 201–205; AI (2013), p. 29; Polisen (2013b), p. 44. For more details concerning the right to observe, monitor and record assemblies see UNHRC (2016) chapter F.

[125]OSCE (2012) paras. 171–174; AI (2013), p. 18. See also UNHRC (2016) para. 92 for the use body-worn cameras by law enforcement personnel.

[126]See UNHRC (2016) para. 92.

[127]Geneva Academy (2014), p. 27; UNHRC (2016) para. 90.

[128]OSCE (2012) para. 137; Geneva Academy (2014), p. 27.

11.3.2.11 After the Event: De-briefing and Evaluation

A de-briefing of the police personnel involved in crowd control operations should be mandatory, in particular with a view to the psychological well-being of the officers and the derivation of learning points for future events.[129] Additionally, with regard to the idea of a learning organisation, a well-prepared and effective evaluation of each police operation might reveal detailed information for improvement. Invaluable sources for gaining relevant knowledge are the police officers and other agencies involved in the operation, as well as the organisers of an assembly. Their views and experiences allow a critical assessment of several aspects, comprising a variety of areas, including, for example, relevant policing concepts and structures, personal skills of police officials and suitability of crowd control equipment. Scientific support by way of cooperation with relevant research institutes might provide complementary input for further developing assembly-related policing, for instance in the area of crowd psychology and dynamics.[130]

11.3.2.12 Training

Based on the results of evaluation procedures, continuous practice-oriented training of the officers and units that are tasked with policing assemblies is the basis for tangible improvements. It should be stressed that mere theoretical knowledge of human rights standards is not sufficient. Rather, the focus should be on the transfer from theory to practice, or, in other words, from legal standards to concrete measures. This comprises all aspects decisive for success, as, for example, methods for de-escalation and non-coercive conflict solution techniques, as well as effective planning and command and control procedures. If the use of force is inevitable, police officers need to possess proper skills to apply coercive means effectively in a professional manner and minimise the risk of casualties.[131]

11.4 Conclusions and Outlook

Over the last decades, a remarkable body of case law and additional standard-setting documents concerning the right to freedom of peaceful assembly has been developed. In essence, by further carving out the scope of protection of the right to freedom of peaceful assembly while at the same time narrowing the margin of appreciation for states, the paramount importance of this fundamental right for a

[129] Cf. Polisen (2013b), p. 45.
[130] Cf. AI (2013), p. 24; Polisen (2013a), p. 5.
[131] Cf. AI p. 25; Geneva Academy p. 16.

functioning democratic society has been underpinned, and consequently high thresholds for justifying interferences with this right have been established.

When it comes to applying the human rights standards to real-life scenarios, police are at the centre stage. Given the difficulties and dynamics regarding the control of large crowds, transferring these standards to concrete measures aimed at respecting and protecting the right to freedom of peaceful assembly proves to be a complex task for the police. In order to succeed in this area, a systematic and long-term approach comprising a wide range of complementary measures and backed by the political will to make safeguarding human rights the underlying purpose of public policing is crucial.

However, precisely framing states' and, consequently, police services' obligations deriving from the right to freedom of peaceful assembly remain a work in progress.[132] Along with the sociopolitical and technical development, new assembly scenarios, as well as new potential threats to the right to freedom of peaceful assembly, will come up. In this context, actual questions revolve, for example, around the role of multilateral organisations in safeguarding and promoting the right to freedom of peaceful assembly,[133] the possible use of privately owned public space for assemblies[134] and the possibility of public assemblies on the Internet.[135] Moreover, the rise of global protest movements and the growing use of social media in organising assemblies should be considered.[136] In order to act in compliance with human rights standards in an ever-changing environment, police services are well advised to adapt their strategies and tactics to new developments. To this end, the critical evaluation and continuous progression of good practices in policing assemblies might be a useful tool. Respective work could comprise, for example, enhanced cooperation at national, regional and international levels between law enforcement services, other agencies, scientific institutes, legal practitioners and independent human rights organisations, as well as other civil society actors. In this regard, recent efforts at EU level, such as the provision of funding for relevant research projects and the development of handbooks, fostering cooperation and exchange of knowledge, constitute steps in the right direction.[137] Seen against the background of budgetary restraints in many countries, which result, on the one hand, in downsizings of law enforcement personnel and outdated equipment while, on the other hand, there is a growing number of priority tasks in the area of internal security, dealing with assemblies in accordance with human rights standards remains an issue for the police throughout the world.

Bearing in mind that confidence in the police and their professionalism is key to effective and efficient public policing in democratic societies, the paramount

[132]Geneva Academy (2014), p. 6.

[133]Cf. UN (2014).

[134]Cf. UNHRC (2016) chapter I.

[135]Cf. UNHRC (2016) para. 10.

[136]Cf. AI (2013) p. 5.

[137]See Sect. 11.3.1.

importance of good and longstanding police–citizen relations cannot be overemphasised. Thus, strict compliance with human rights standards and ethical values constitutes a decisive factor in gaining and maintaining the confidence of the citizens in the work of the police. In the end, the mindset of each individual officer and the extent to which he or she makes human rights and ethics the driving force for decision-making can be crucial for the success or failure of police action, particularly in relation to assemblies. Therefore, not only from the legal but also from the practical angle, there is no alternative for police services to increasing their efforts in placing human rights and police ethics central to their duties.

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Chapter 12
United Nations Police Missions and Human Rights

Judith Thorn

Contents

Abstract This contribution deals with selected issues on UN police and international human rights law. It focuses on the police component of peace operations led by the United Nations. Starting with the question 'What is UN police' or, more precisely, 'How is the term legally defined?' the article highlights the legal framework for police in UN peace operations. Different levels of human rights

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involvement in peacekeeping are scrutinized: the law of the host State, the law of the police-contributing States, and the United Nations as such. Specific issues such as the extraterritorial application of human rights treaties (especially the ICCPR and the ECHR), the applicability of human rights to the United Nations, violations of human rights by members of the police component, aspects of accountability, immunity, and disciplinary measures are addressed. Furthermore, the paper discusses selected fields of human rights issues in the practice of the police, namely the protection of civilians, the use of force, as well as arrest and detention.

12.1 Introduction

> Within a system which denies the existence of basic human rights, fear tends to be the order of the day. Fear of imprisonment, fear of torture, fear of death, fear of losing friends, family, property or means of livelihood, fear of poverty, fear of isolation, fear of failure [. . .]. It is not easy for a people conditioned by fear under the iron rule of the principle that might is right to free themselves from the enervating miasma of fear. Yet even under the most crushing state machinery courage rises up again and again, for fear is not the natural state of civilized man.[1]

Conflict and postconflict situations are characterized by various types of fear, deprivation, and despair. Therefore, they pose outstanding challenges for the actors involved to regain the 'courage' of the people and to stabilize the society and the affected State. Down to the present day, the United Nations (UN) is one of the main actors in the theater of postconflict situations. Peacekeeping seems to be one of the most prominent but also most demanding undertakings of the UN to 'maintain international peace and security'[2] and 'to save succeeding generations from the scourge of war'.[3]

However, the conflicts and also the peace operations have become more complex and 'multidimensional'.[4] Since the 1990s, 'human rights have been mainstreamed through all activities of the UN and incorporated into the mandate of the peace operations.'[5] Therefore, nowadays, it is indisputable that international human rights law is a crucial part of the normative framework for United Nations peacekeeping operations.[6]

The following discourse, however, will focus only on one aspect of UN peace operations, namely 'United Nations Police Missions and Human Rights'. It focuses

[1] Kyi (2010), Freedom from fear, p. 184.

[2] Art. 1 No. 1 Charter of the United Nations, San Francisco, 26 June 1945, 1 UNTS XVI.

[3] Preamble Charter of the United Nations, San Francisco, 26 June 1945, 1 UNTS XVI.

[4] For an comprehensive overview see Bellamy, Williams (2010), pp. 71 et seqq.

[5] Kondoch (2011), p. 75.

[6] UN DPKO/DFS (2008) United Nations Peacekeeping Operations, Principles and Guidelines, http://www.un.org/en/peacekeeping/documents/capstone_eng.pdf. Accessed 15 July 2016, p. 14: 'integral part of the normative framework for United Nations peacekeeping operations'.

particularly on United Nations led peacekeeping operations; operations led by States, groups of States (so-called coalition of the willing), or regional organizations, which are mandated by the Security Council, cannot be addressed in depth. To understand the function and role of human rights for UN police in peace operations, it is important to provide a brief background on UN police and the functions carried out in peacekeeping operations. Subsequently, the levels of human rights involvement in peace missions will be discussed. Finally, a short outlook on specific aspects of human rights in 'policekeeping'[7] practice will be given.

For several decades, the police component forms a key part of peace operations of the United Nations. The first ever police component was dispatched in 1960 to the Congo.[8] Since then, UN police has changed significantly in terms of quality and quantity. Today, around 12,611 police women and men are serving for the UN in 11 missions around the world,[9] and we speak not solely of peacekeeping but moreover also of peacebuilding, peacemaking, and peace enforcement.[10] Other authors characterize the development by so-called generations of peacekeeping,[11] a chronological categorization[12] or a categorization according to functions and tasks.[13] Especially in the 1990s, an enormous increase in the number and scope of UN peacekeeping missions took place. Consequently, functions and tasks of the police component have risen dramatically in the last decades.[14] Since the end of the cold war, 'the roles of UN police evolved beyond monitoring and advising host State police services to consistently include reforming, rebuilding, and restructuring them; offering them tactical- and operational-level support; and (occasionally) taking the reins of law enforcement themselves.'[15] Therefore, nowadays, the police tasks comprise a broad range of activities,[16] and the UN police

[7]Term by Day and Freeman (2005).

[8]Schmidl (1998a), Police functions in peace operations, pp. 30 et seq.; Schmidl (1998b), Informationen zur Sicherheitspolitik, pp. 20 et seqq.

[9]UN (2016) UN Peacekeeping Fact Sheet. http://www.un.org/en/peacekeeping/documents/bnote0416.pdf. Accessed 15 July 2016.

[10]Furthermore the concept of conflict prevention is mentioned: Bellamy, Williams (2010), pp. 14 et seqq., 173 et seqq.; UN DPKO/DFS (2008) United Nations Peacekeeping Operations, Principles and Guidelines, pp. 17 et seqq. http://www.un.org/en/peacekeeping/documents/capstone_eng.pdf. Accessed 15 July 2016.

[11]For an overview see: Sloan (2011), p. 20; Larsen (2012), pp. 7 et seqq. with further references; some authors even distinguish between six generations: e.g. Thakur and Schnabel (2001), pp. 9 et seqq.

[12]For an overview see Larsen (2012), p. 8 with further references.

[13]For an overview see Larsen (2012), pp. 8 et seq. with further references.

[14]Durch (2014), p. V; Durch (2015).

[15]Durch (2014), p. 1.

[16]For a comprehensive list of possible tasks for UN Police please consult: UN DPKO/DFS (2014) Policy on United Nations Police in Peacekeeping Operations and Special Political Missions, Ref. 2014.01, Annex 1, pp. 2 et seqq. http://www.un.org/en/peacekeeping/sites/police/documents/Policy.pdf. Accessed 15 July 2016. See also Durch (2014), pp. 6 et seqq.; Durch (2015).

components 'play a critical role in addressing law and order vacuums in post conflict situations and in developing the capacity of national law enforcement actors.'[17]

The UN currently endeavors to further improve UN policing through a variety of strategies and instruments. This notwithstanding, it is surprising that only in 2014 the UN Security Council adopted its first resolution (Resolution 2185 [2014][18]) that addresses the UN police component exclusively. In November 2017 the Security Council adopted Resolution 2382 (2017), the second resolution on UN Policing. please insert FN: UN (2017) Security Council Resolution 2382 (2017), UN Doc. S/RES/2382 (2017). It seems that the UN tries to respond to the growing complexity of policing and to give the police further structural and political guidance. A fundamental aspect is the evolution of a 'Strategic Guidance Framework for International Police Peacekeeping (SGF)',[19] which is composed particularly of the 'United Nations Police in Peacekeeping Operations and Special Political Missions',[20] as well as the recently adopted guidelines on Capacity-Building and Development,[21] on Command,[22] and on Police Operations.[23]

12.2 Police in Terms of the United Nations?

Before we take a look at the human rights framework for police in peace missions in detail, we should briefly take a simple question: what is meant by UN police? Or, more precisely, how is UN police legally defined?

Equally, as in the field of the military, the United Nations does not possess its own 'police force'. The UN therefore depends on Member States to contribute personnel, national individual police personnel, as well as entire units, so-called Formed Police Units (FPUs). Furthermore, the work of the UN is reinforced by

[17]Grenfell (2011), p. 93.

[18]UN (2014) Security Council Resolution 2185 (2014), UN Doc. S/RES/2185 (2014).

[19]For an overview see: http://www.un.org/en/peacekeeping/sites/police/initiatives/framework.shtml. Accessed 15 July 2016.

[20]UN DPKO/DFS (2014) Policy on United Nations Police in Peacekeeping Operations and Special Political Missions, Ref. 2014.01, Annex 1, pp. 2 et seqq. http://www.un.org/en/peacekeeping/sites/police/documents/Policy.pdf. Accessed 15 July 2016.

[21]UN DPKO/DFS (2015) Guidelines on Police Capacity-Building and Development, Ref. 2015.08. http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines.pdf. Accessed 15 July 2016.

[22]UN DPKO/DFS (2016) Guidelines on Police Command in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.14. http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Command.pdf. Accessed 15 July 2016.

[23]UN DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15. http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf. Accessed 16 July 2016.

specialized police units (for example, canine units, close protection units, investigation or forensic teams, explosive ordinance disposal units, special weapons and tactics teams [SWAT], small arms and light weapons disarmament, and disaster response teams) and so called Specialized Police Teams (SPTs), which support the host-state police with specialized policing expertise e.g. on sexual and gender-based violence or terrorism and transnational organized crime.[24]

This multicultural and multinational composition of the UN police entails practical and legal difficulties. The police officials are influenced by different cultural and legal backgrounds.[25] Even though the national backgrounds are important, they cannot be the focal point of the following reflections. It must be asked what the United Nations mean by the term 'police'.

The shortly adopted Security Council Resolution 2185 (2014)[26] does not define the term 'police'. Yet the 2014 published policy 'United Nations Police in Peacekeeping Operations and Special Political Missions'[27] and the guideline 'Police Operations in United Nations Peacekeeping Operations and Special Political Missions'[28] of the Department of Peacekeeping Operations (DPKO) and the Department of Field Support (DFS) do give further guidance. The 'police component' thereby consists of

> All United Nations police officers in a given mission, i.e. individual police officers (IPOs), Specialised Police Teams (SPTs) and/or Formed Police Units (FPUs).[29]

Individual police are defined as

> **Police or other law enforcement** personnel **assigned to serve** with the United Nations **on secondment by Governments** of Member States **at the request** of the Secretary-General (emphasis added).[30]

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[24]See e.g. Sebastián (2015), p. 14. For the SPTs please see: UN, Specalized Police Teams, https://police.un.org/en/specialized-police-teams. Last Accessed: 29 November 2017.

[25]E.g. Kondoch (2011), pp. 89 et seq.

[26]UN (2014) Security Council Resolution 2185 (2014), UN Doc. S/RES/2185 (2014).

[27]UN DPKO/DFS (2014) Policy on United Nations Police in Peacekeeping Operations and Special Political Missions, Ref. 2014.01. http://www.un.org/en/peacekeeping/sites/police/documents/Policy.pdf. Accessed 13 July 2016.

[28]UN DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15. http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf. Accessed 14 July 2016.

[29]UN DPKO/DFS (2014) Policy on United Nations Police in Peacekeeping Operations and Special Political Missions, Ref. 2014.01, section E, http://www.un.org/en/peacekeeping/sites/police/documents/Policy.pdf. Accessed 13 July 2016; UN DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15, section E, http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf. Accessed 13 July 2016.

[30]UN DPKO/DFS (2014) Policy on United Nations Police in Peacekeeping Operations and Special Political Missions, Ref. 2014.01, section E, http://www.un.org/en/peacekeeping/sites/police/documents/Policy.pdf. Accessed 13 July 2016; UN DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15, section E, http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf. Accessed 13 July 2016.

Further emphasis should be given to the term 'law enforcement personnel'. The definition of the term 'police' is closely connected to the concept of 'law enforcement'; however, the concept is not defined in public international law.[31] Yet it can be specified by reference to so-called soft law instruments,[32] especially the 1979 adopted 'Code of Conduct for Law Enforcement Officials'.[33] Thereby, 'law enforcement official' does have the following meaning:

> All officers of the law, whether appointed or elected, who **exercise police powers**, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, **the definition of law enforcement officials shall be regarded as including officers of such services** (emphasis added).[34]

This includes, for example, 'gendarmerie, paramilitary and constabulary forces, customs, immigration, border services, as well as related oversight bodies.'[35]

Formed Police Units are defined as

> Cohesive mobile police units, providing support to United Nations operations and ensuring the safety and security of United Nations personnel and missions, primarily in public order management.[36]

Unlike individual police, FPUs usually are armed and deliver a more robust form of policing.[37] FPUs, inter alia, are equipped with riot control equipment (including helmets, batons, and shields), tear gas, tasers, and police crowd control vehicles.[38]

To conclude, all in all, the UN bases its principles on a broad definition of the term 'police'. Consequently, all persons who **exercise police powers** in their home

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[31] Melzer and Gaggioli Gasteyger (2016), p. 63.

[32] See Melzer and Gaggioli Gasteyger (2016), pp. 63 et seq.

[33] UN, Code of Conduct for Law Enforcement Officials, UN General Assembly resolution. 34/169, annex. UN Doc A/34/46 (1979).

[34] Art. 1, Commentary, UN, Code of Conduct for Law Enforcement Officials, UN General Assembly resolution. 34/169, annex. UN Doc A/34/46 (1979).

[35] UN DPKO/DFS (2014) Policy on United Nations Police in Peacekeeping Operations and Special Political Missions, Ref. 2014.01, section E, http://www.un.org/en/peacekeeping/sites/police/documents/Policy.pdf. Accessed 13 July 2016; UN DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15, section E, http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf. Accessed 13 July 2016.

[36] UN DPKO/DFS (2014) Policy on United Nations Police in Peacekeeping Operations and Special Political Missions, Ref. 2014.01, section E, http://www.un.org/en/peacekeeping/sites/police/documents/Policy.pdf. Accessed 13 July 2016.; DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15, section E, http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf. Accessed 13 July 2016.

[37] Hansen (2011), p. 2.

[38] White (2014), p. 233 with reference to the UN Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual), 27 October 2011, UN Doc A/C.5/66/8, Chapter 8.

country and are **assigned to serve with the UN** can be regarded as police. Therefore, primarily, functional definitions of the terms 'police' and 'law enforcement officials' are adopted by the UN documents.[39] They describe them 'as those persons whom a State authorizes to vertically impose public security, law and order in its behalf, regardless of military or civilian status.'[40] Furthermore, no difference is drawn between contracted and seconded police officers.[41]

12.3 Legal Framework

The legal framework of peacekeeping operations in general and in the fields of human rights law still suffers from a severe lack of clarity, and there exists a 'great difficulty in providing adequate guidance.'[42] As *Scott Sheeran* puts it: 'The general problem of applying international law to UNPKOs [United Nations Peacekeeping Operations] is particularly apparent in the case of International Human Rights Law (IHRL).'[43] This is even more challenging due to the increasingly complex functions of the military and police components.

Human rights standards applicable to UN peace operations can be taken from a broad variety of international law. According to Article 38 of the Statute of the International Court of Justice,[44] a distinction can be drawn between (1) treaty law, (2) customary law (which consists of State practice and *opinio juris*), and (3) general principles of law. UN peace operations as subsidiary organs of the UN, more precisely of the mandating organ, mostly the Security Council,[45] share the international legal personality of the UN and 'are subject to all internal and external law applicable to peace operations.'[46] 'Human Rights Law hence is an integral part of the normative framework for United Nations peacekeeping operations.'[47]

The Charter of the United Nations and the mandate of the Security Council form the most important pillars of the legal framework. Furthermore, conventions of the

[39]Of the same opinion are Melzer and Gaggioli Gasteyger (2016), p. 64.

[40]Melzer and Gaggioli Gasteyger (2016), p. 64.

[41]UN DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15, para 20: 'United Nations police components consist of Individual Police Officers (IPOs), both contracted and seconded, and Formed Police Units (FPUs).' http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf. Accessed 17 July 2016.

[42]Sheeran (2011), p. 3.

[43]Sheeran (2011), p. 5.

[44]UN, Statute of the International Court of Justice, 26 June 1945, San Francisco, entered into force 24 October 1945, UNCIO 15, 355.

[45]Oswald et al. (2011), pp. 11 et seq.

[46]Oswald et al. (2011), pp. 11 et seq.; see also Sands and Klein (2009), Chapter 14.

[47]UN DPKO/DFS (2008) United Nations Peacekeeping Operations, Principles and Guidelines, p. 14. http://www.un.org/en/peacekeeping/documents/capstone_eng.pdf. Accessed 15 July 2016.

UN, bilateral agreements between the UN and host States (so-called status of forces agreements) and with police-contributing States (so-called memorandums of understandings), guidelines, directives, and policies are relevant instruments. The 'UN Policy on Police'[48] and the 'Guideline on Police Operations',[49] for example, place heavy emphasis on the 'respect for human rights, including the rights of women and children, investigation of human rights violations, not tolerating corruption and fighting impunity.'[50]

The UN Charter contains a number of references to human rights. According to Article 1 No. 3 UN Charter, '[t]he Purposes of the United Nations are: [. . .] To achieve international co-operation [. . .] in promoting and encouraging respect for human rights and for fundamental freedoms.' Additionally, Articles 55 lit c. UN Charter states: '[T]he United Nations shall promote: [. . .] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' Also, Article 56 UN Charter deserves to be mentioned. Although the Charter itself does not include a specific catalog of human rights, it is evident that it sets out a common objective for the UN.[51]

The second fundamental legal basis is the resolution of the Security Council (SC), which mandates the respective operation. The resolution is the 'source of powers'[52] and simultaneously the 'limitation'[53] of a specific peace operation. The mandate of the Security Council ergo builds the backbone of a mission and sets out the general organization, aims, and functions of a mission.[54] Furthermore, so-called landmark resolutions of the SC on particular themes can influence the legal foundation of a mission (e.g., resolutions on Women, Peace and Security; Children and Armed Conflict or the Protection of Civilians).[55] Even though the mandate is an important aspect of the mission, it is usually not framed in very specific terms. Rather, the wording requires further interpretation. This is also true in the field of international human rights law. As *Katarina Månsson* puts it: 'With respect to "*international* human rights law", however, it [the Security Council] is silent.'[56]

[48]UN DPKO/DFS (2014) Policy on United Nations Police in Peacekeeping Operations and Special Political Missions, Ref. 2014.01. http://www.un.org/en/peacekeeping/sites/police/documents/Policy.pdf. Accessed 13 July 2016.

[49]UN DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15. http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf. Accessed 14 July 2016.

[50]Durch (2014), p. 20.

[51]See also Kondoch (2011), p. 78: 'Although the Charter (. . .) lacks precise definitions to scope and content, it is clear that UN Police should strictly observe human rights as the promotion of human rights is one of the purposes and principles of the UN'.

[52]Bothe (2002), p. 265.

[53]Bothe (2002), p. 265.

[54]Oswald et al. (2011), p. 5; Kondoch (2011), p. 79.

[55]For an overview see Oswald et al. (2011), pp. 275 et seqq.

[56]Månsson (2008a), Integration of Human Rights in Peace Operations, p. 96. She also states that the SC 'avoids referring to international human rights law per se.'

This statement, however, is only partly true[57] since the Security Council does refer in general terms to international human rights law.[58] It is constant practice to include broad expressions on 'UN peace operations promoting and encouraging respect for human rights and fundamental freedoms'[59] in resolutions establishing a peace operation.[60]

The UN, moreover, acknowledges in several documents its commitment to human rights in peacekeeping operations (e.g., Capstone Doctrine,[61] the Model Status of Forces Agreement,[62] the revised Model Memorandum of Understanding,[63] and the Code of Conduct for Law Enforcement Officials[64]—all these documents include explicit references to the Universal Declaration of Human Rights[65]). Also, further nonbinding, internal guidelines and principles may be relevant.[66] Especially, the recently adopted 'Guideline on Police Operations'[67] addresses the implications of international human rights law to the police component:

> All United Nations police operations [. . .] shall be guided by the obligation to respect and protect human rights, norms, ethics and standards in crime prevention and criminal justice and international human rights and humanitarian law. In all aspects of their operations, United Nations personnel shall ensure their compliance with human rights standards, shall promptly record and share allegations of violations with the human rights component, and

[57]This is also acknowledged by Månsson (2008a), Integration of Human Rights in Peace Operations, p. 96.

[58]Kondoch (2011), p. 79.

[59]Oswald et al. (2011), p. 69.

[60]See e.g. UN, Security Council, Resolution 1542 (2004), 30 April 2004, UN Doc S/RES/1542 (2004), p. 3: 'promote and protect human rights'. UN, Security Council, Resolution 1590 (2005), 24 March 2005, UN Doc S/RES/1590 (2005), p. 4: 'protect and promote human rights in Sudan'. See also Oswald et al. (2011), p. 69 and Kondoch (2011), p. 79 Fn 22 with further examples.

[61]UN DPKO/DFS (2008) United Nations Peacekeeping Operations, Principles and Guidelines, pp. 17 et seqq. http://www.un.org/en/peacekeeping/documents/capstone_eng.pdf. Accessed 15 July 2016.

[62]UN, Model Status-of-Forces Agreement for Peace-Keeping Operations, 9 October 1990, UN Doc A/45/594.

[63]UN, Model Memorandum of Understanding (revised), 27 October 2011, Official Records of the General Assembly, Sixty-first Session, Supplement No. 19 (UN Doc A/61/19/Rev.1); the revised text can be found in Chap. 9 of the UN Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)', UN Doc A/C.5/66/8.

[64]UN, Code of Conduct for Law Enforcement Officials, UN General Assembly resolution. 34/169, annex. UN Doc A/34/46 (1979), Art. 2, Commentary, lit a.

[65]UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, General Assembly Resolution 217 A (III).

[66]See an overview at: Kondoch (2011), p. 82.

[67]UN DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15. http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf. Accessed 14 July 2016.

shall be prepared to intervene, including through the use of force where mandated, to stop ongoing human rights violations and to protect civilians.[68]

Overall, the impact of human rights on peace operations is not limited to the 'passive subordination to the body of law.'[69] Police in peace missions do, moreover, play an active part in promoting and protecting human rights.[70] As *Patryk I Labuda* puts it: 'This distinction is best illustrated by the truism that peacekeepers must not only promote but also respect human rights.'[71]

12.4 Levels of Human Rights Involvement in Peacekeeping

Human rights can affect the legal framework applicable to police on several levels. The first level is the law of the host State, the second level is the law of the sending State, and last but not least is the UN as such. The applicability of human rights law to all these levels is not as obvious as it may seem from first glance.[72]

12.4.1 Law of the Host State

With regard to the law of the host State, it should be shortly mentioned that according to Article 6 of the Model Status of Forces Agreement,[73] 'peace operations are to respect the law of the receiving State including its obligations under international law of which human rights are an important part.'[74]

Particular issues, however, arise if the host State has collapsed. In cases of a breakdown of a State system, the legal framework is indistinct or at least partly missing (for example, in Kosovo and East Timor).[75] In these situations, it is especially challenging for the individual officers to evaluate which law should be applied. This could be also true for States where the existing legal framework does not fully comply with international human rights standards.[76] Those situations pose

[68]UN DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15, para 11. http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf. Accessed 26 July 2016.

[69]Labuda (2015), para 50.

[70]Labuda (2015), para 50.

[71]Labuda (2015), para 50.

[72]Quénivet (2011), p. 101.

[73]UN, Model Status-of-Forces Agreement for Peace-Keeping Operations, 9 October 1990, UN Doc A/45/594.

[74]Fleck (2008), pp. 372 et seq.

[75]Among others: Hansen (2002), p. 81.

[76]O'Connor (2008), p. 67.

complex and State-specific legal issues, which cannot be addressed in detail. However, it should be mentioned that the 2016 adopted 'Guideline on Police in Peacekeeping Missions' takes these issues into account and stipulates as follows:

> If no host-State legal framework exists or can be applied, the Special Representative of the Secretary-General (SRSG) shall promulgate a transitional Criminal Code, Code of Criminal Procedure, Detention Act and Police Act.[77]

Another means to make human rights law applicable to a specific mission is the promulgation of 'a regulation which proclaims the adherence to human rights found in different human rights instruments.'[78] This method was, for example, applied in the cases of Kosovo and East Timor.[79]

12.4.2 Law of the Police-Contributing States

Turning to the police-contributing States, the law applicable to sending States and the respective agents includes the particular legal obligations of this State, thus the treaties signed and the applicable customary law. The great majority of States contributing personnel to peace missions of the UN are parties to core international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR);[80] the International Covenant on Economic, Social and Cultural Rights (ICESCR)[81]; or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment.[82,83] Furthermore, many States are bound to regional human rights treaties such as the European Convention on Human Rights

[77]UN DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15, para 13. http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf. Accessed 26 July 2016.

[78]Kondoch (2011), p. 79.

[79]See further details: Kondoch (2011), p. 79.

[80]International Covenant on Civil and Political Rights, 16 December 1966, New York, entered into force 23 March 1976, 999 UNTS 171 and 1057 UNTS 407.

[81]International Covenant on Economic, Social & Cultural Rights, 16 December 1966, New York, entered into force 3 January 1976, 993 UNTS 3.

[82]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, New York, entered into force 26 Jun 1987, 1465 UNTS 85.

[83]Quénivet (2011), p. 102. Please find a list of the core human rights instruments at: www.ohchr.org/EN/professionalInterest/Pages/CoreInstruments.aspx. Accessed 9 June 2016.

(ECHR),[84] the African Charter on Human and Peoples' Rights,[85] or the American Convention on Human Rights.[86,87]

However, one problem is inherent regarding all of these treaties: are the human rights obligations applicable to State agents acting outside of the territory of a State? The aspect of the 'extraterritorial application of human rights obligations' and the question which standards apply in these cases have been widely discussed subjects. Yet this question cannot be answered in a general way but must be determined for each treaty individually.[88]

The application of human rights treaties to States acting outside their territory and therefore also the acts of States involved in peacekeeping operations in the majority of cases must be evaluated on the means of 'jurisdiction'.[89] Generally, the principle of 'effective control' is applied.[90] But legal theory and jurisdiction vary to a certain extent with regard to the specific treaties. For example, the European Court of Human Rights developed a distinctive case law on the extraterritorial application of the ECHR (namely, cases *Loizidou*,[91] *Ilaşcu*,[92] *Banković*,[93] *Issa*,[94] as well as *Behrami and Behrami* and *Saramati*[95]). Also, the Human Rights Committee, which is the body of independent experts that monitors the implementation of the ICCPR, and the International Court of Justice (ICJ) have dealt with this legal issue. The extraterritorial application of the ECHR and the ICCPR should be addressed in detail.[96] A short outlook should be given to the rulings of the International Court of Justice.

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[84]Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Rome entered into force 3 September 1953, 213 UNTS 222.

[85]African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, Nairobi, entered into force 21 October 1986, 1520 UNTS 218.

[86]American Convention on Human Rights, 21 Nov 1969, San José, entered into force 18 July 1978, 1144 UNTS 123.

[87]Quénivet (2011), p. 102.

[88]See also Milanović (2011), pp. 10 et seq.

[89]Wenzel (2008), para 3; Quénivet (2011), p. 103.; see also Milanović (2011), pp. 11 et seq. for more examples concerning the treaties with an jurisdictional approach and treaties which do not include a jurisdictional clause (e.g. treaties with provisions on territorial application and treaties without provisions on jurisdiction or the territorial application).

[90]Dannenbaum (2010), p. 130.

[91]ECHR, Loizidou v. Turkey, 18 December 1996, Application no. 15318/89, ECHR 1996-VI.

[92]ECHR, Ilaşcu a.o. v. Moldova and Russia, 08 July 2004, Application no. 48787/99, ECHR 2004-VII.

[93]ECHR, Banković a.o. v. Belgium a.o., 12 December 2001, Application no. 52207/99, ECHR 2001-XII.

[94]ECHR, Issa a.o. v. Turkey, 16 November 2004, Application no. 31821/96, ECHR 2004, 629.

[95]ECHR, Behrami and Behrami v. France and Saramati v. France, Germany and Norway, 2 May 2007, Application no. 71412/01, Application no. 78166/01.

[96]For the extraterritorial application of other treaties (e.g. the ICESCR and CAT) please refer to Milanović (2011), pp. 11 et seq.

12.4.2.1 International Covenant on Civil and Political Rights (ICCPR)

According to Article 2 (1) ICCPR, '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.' The applicability of the ICCPR to acts outside of a State's territory could be ruled out due to the wording of the norm ('within its territory **and** subject to its jurisdiction').[97] However, this is only one possible interpretation; especially, the systematic and the teleological interpretation must be taken into consideration.[98] It could be argued that the wording leaves room for a different interpretation.[99] First of all, historical arguments could be brought up: it is clear from the drafting history that no compelling reasons for a restrictive interpretation can be given.[100] In fact, the 'drafting history [. . .] permit[s] a broad interpretation of the jurisdictional reach of human rights obligations.'[101] Besides, the wording of Article 5 (1) ICCPR[102] does not preclude a broad interpretation.[103] And finally, Article 1 of the Optional Protocol of the ICCPR[104] does not entail a territorial restriction but merely refers to the phrasing 'subject to its jurisdiction'.[105,106] The Human Rights Committee (HRC) dealt with the issue of extraterritorial application of the ICCPR in the leading case *Lopez Burgos v. Uruguay*.[107] The case deals with the alleged torture, ill treatment, kidnapping, arrest, and detention of *Sergio Euben Lopez Burgos* by

[97]Some States (e.g. USA and Israel) and commentators still invoke the narrow wording and the trevaux préparatoires. For the discussion and the history see Tomuschat (2014), pp. 100 et seqq. and Quénivet (2011), pp. 104 et seqq.

[98]See also Nowak (2005), ART. 2 CCPR para 27.

[99]Quénivet (2011), p. 104; Opie (2006), pp. 11 et seq.

[100]For the drafting history see Nowak (2005), ART. 2 CCPR para 27; See also Quénivet (2011), p. 104; Opie (2006), pp. 11 et seq. both with further references.

[101]Opie (2006), p. 11 with further references.

[102]Art. 5 (1) ICCPR: 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.'

[103]Quénivet (2011), p. 104; Opie (2006), p. 11.

[104]Optional Protocol to the International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI), 16 December 1966, New York, entered into force 23 March 1976, 999 UNTS 171.

[105]Art. 1 Optional Protocol (Fn 105): 'A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. (. . .).'

[106]Quénivet (2011), p. 104; Opie (2006), pp. 11 et seq. See also: Nowak (2005), Art. 2 CCPR para 28 with further arguments.

[107]HRC, Lopez Burgos v. Uruguay Case, 29 July 1981, Communication No. 52/1979, UN Doc. CCPR/C/OP/I.

Uruguayan security and intelligence forces in Buenos Aires (Argentina). The HRC notes in the *Lopez Burgos v. Uruguay* case:

> [it] would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.[108]

Christian Tomuschat, in his individual opinion, further emphasized that the 'strict literal meaning' of the term 'within its territory' would 'lead to utterly absurd results.'[109] The ruling of the HRC was confirmed in other instances, especially the case *Lilian Celeberti de Casariego v. Uruguay*[110] and the *Concluding Observations of the Human Rights Committee Concerning Israel*.[111,112] Thus, due to the settled ruling of the HRC, there is no doubt that States are bound by the ICCPR when deploying troops and/or police personnel in peace operations, provided the members of the forces/police are in control of the territory or wield authority over a person.[113] However, it should be mentioned that some States have opposed to this broad interpretation and the extraterritorial application of the ICCPR.[114]

12.4.2.2 European Convention on Human Rights (ECHR)

The scope of the ECHR is 'framed in jurisdictional terms'.[115] Article 1 ECHR reads as follows:

> The High Contracting Parties shall secure to everyone **within their jurisdiction** the rights and freedoms defined in Section I of this Convention (emphasis added).

Emphasis should be put on the phrase 'within their jurisdiction'. The question arises whether this phrase is to be interpreted in a broad way. The European Court of Human Rights (ECtHR) today, in general, accepts the extraterritorial application of the Convention. The Court developed a distinctive case law and basically outlined three distinct exceptional cases for the extraterritorial application:

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[108]HRC, Lopez Burgos v. Uruguay Case, 29 July 1981, Communication No. 52/1979, UN Doc. CCPR/C/OP/I, para 12.3.

[109]Tomuschat C, Individual Opinion, HRC, Lopez Burgos v. Uruguay Case, 29 July 1981, Communication No. 52/1979, UN Doc. CCPR/C/OP/I.

[110]HRC, Lilian Celeberti de Casariego v. Uguguay, 29 July 1981, Communication No. 56/1979, UN Doc. CCPR/C/OP/1, para 92.

[111]HRC, Concluding observations of the Human Rights Committee, Israel, 18 August 1998, UN Doc. CCPR/C/79/Add.93, para 10.

[112]For further cases and details see Quénivet (2011), p. 106 and Opie (2006), pp. 12 et seq.

[113]Quénivet (2011), p. 107.

[114]They still invoke the narrow wording and the *travaux préparatoires*. For the discussion and the history see Tomuschat (2014), pp. 100 et seqq. and Quénivet (2011), pp. 104 et seqq. with further references on statements by Israel and the USA. For the USA see also: Walsh (2009), pp. 50 et seqq.

[115]Quénivet (2011), p. 107.

(1) jurisdiction based on the authority over individuals[116] (e.g., cases of arrest and detention), (2) jurisdiction based on the 'effective (overall) control'[117] over a territory,[118] and (3) the so-called diplomatic exception, which covers cases involving the diplomatic or consular agents abroad or on board craft and vessel registered in, or flying the flag of, that State.[119]

This jurisdiction was questioned by the Court in the case *Banković v. Belgium*.[120] The case was concerned with NATO (North Atlantic Treaty Organization) airstrikes on the Radio Televizije Srbije in Belgrade in 1999. Sixteen persons were killed and 16 seriously injured. The Court dealt with the admissibility and found that the Member States of NATO did not exercise effective control and therefore declared the applications inadmissible.[121] The case was wildly criticized and discussed by the academia.[122] However, the Court clarified its jurisdiction in *Al-Skeini and Others v. United Kingdom*.[123,124] While the *Banković* ruling seemed to interpret the term 'jurisdiction' in a narrow sense, the judges in *Al-Skeini* concluded:

> However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, a contrario, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. The Court has not in its case-law applied any such restriction.[125]

The Court by its ruling 'adds further clarification to the contentious concept of jurisdiction laid down in Article 1 ECHR.'[126] The judges furthermore confirm the established case law and state that while the 'competence under Art. 1 is primarily

[116]Important is the State's ability to exercise control over the individual. Opie (2006), p. 30 gives a good example for this case group: 'When UNMIK Police arrest and detain individuals, they assert effective control over those persons, bringing them temporary within their State's jurisdiction.'

[117]ECHR, Loizidou v. Turkey, 18 December 1996, Application no. 15318/89 (1996), 23 ECHR 513, para 52.

[118]The term 'effective (overall) control' is disputed, however a deeper analysis is beyond the scope of this discourse: see among others Dannenbaum (2010), pp. 131 et seq.; Wenzel (2008), paras 16 et seqq.

[119]ECHR, Banković et al. v. Belgium et al., 12 December 2001, Application no. 52207/99 (Admissability), para 73.

[120]ECHR, Banković et al. v. Belgium et al., 12 December 2001, Application no. 52207/99 (Admissability).

[121]ECHR, Banković et al. v. Belgium et al., 12 December 2001, Application no. 52207/99 (Admissability), paras 74 et seqq., 82, 85.

[122]Among others Wenzel (2008), paras 10 et seqq. with further references; see also Happold (2003) and Roxstrom et al. (2005).

[123]ECHR, Al Skeini and others v. United Kingdom, 7 July 2011, Application no. 55721/07.

[124]For further details and critique on the Al-Skeini Judgment see among others: Ryngaert (2012), Milanović (2012), pp. 132 et seq.; Miltner (2012).

[125]ECHR, Al Skeini and others v. United Kingdom, 7 July 2011, Application no. 55721/07, para 142.

[126]Ryngaert (2012), p. 58; see also Milanović (2012), p. 127.

territorial',[127] there may be exceptions on the basis of the following principles: (1) State authority and control over (a) acts of diplomatic and consular agents, (b) consent, invitation, or acquiescence of the government of that territory, and (c) use of force by a State's agent operating outside its territory/individual brought under the control of the State's authorities); (2) effective control over an area ('as a consequence of lawful or unlawful military action'); and (3) the legal space (*espace juridique*) of the Convention (the Convention is a 'constitutional instrument of European public order' and 'does not govern the actions of States, which are not party to the convention').[128]

The cases *Behrami and Behrami*[129] and *Saramati*[130] were the first cases of the ECtHR that were concerned with actions of armed forces by Member States of the ECHR taking part in United Nations mandated peace operations.[131] Both cases occurred in Kosovo during the interim international administration by the UN, which was established by Security Council Resolution 1244 (1999).[132] In the case *Behrami and Behrami*, children played with a left-behind cluster bomb that detonated. Gadaf Behrami was killed and Bekim Behrami seriously injured. The case *Saramati* was concerned with arrests and detentions of Mr. Saramati. The Court, however, did not primarily deal with aspects of the extraterritorial application but furthermore discussed the compatibility '*ratione personae* of the applicants' complaints with the provisions of the Convention',[133] in other words the attribution of the acts in question.[134] The judges determined that the United Nations Interim Administration Mission in Kosovo (UNMIK) was a subsidiary organ of the Security Council, and the Kosovo Force (KFOR) was exercising powers lawfully delegated under Chapter VII of the Charter by the Security Council; therefore, the actions were directly attributable to the UN, not to the individual Member States.[135] The 'Court concludes that the applicants' complaints must be declared incompatible

[127]ECHR, Al Skeini and others v. United Kingdom, 7 July 2011, Application no. 55721/07, para 131.

[128]ECHR, Al Skeini and others v. United Kingdom, 7 July 2011, Application no. 55721/07, paras 130 et seqq.

[129]ECHR, Behrami and Behrami v. France, 2 May 2007, Application no. 71412/01.

[130]ECHR, Saramati v. France, Germany and Norway, 2 May 2007, Application no. 78166/01.

[131]See also Larsen (2008), p. 510.

[132]UN (1999) Security Council Resolution 1244 (1999), UN Doc. S/Res/1244 (1999).

[133]ECHR, Behrami and Behrami v. France and Saramati v. France, Germany and Norway, 2 May 2007, Application no. 71412/01, Application no. 78166/01, para 72.

[134]ECHR, Behrami and Behrami v. France and Saramati v. France, Germany and Norway, 2 May 2007, Application no. 71412/01, Application no. 78166/01, paras 71 et seq., 144 et seqq.

[135]ECHR, Behrami and Behrami v. France and Saramati v. France, Germany and Norway, 2 May 2007, Application no. 71412/01, Application no. 78166/01, para 151.

ratione personae with the provisions of the Convention'[136] and the applications were inadmissible. The judgment was criticized by scholars.[137]

12.4.2.3 International Court of Justice (ICJ)

Lastly, a short outlook should be given on the rulings of the ICJ. The judges of the Court in The Hague have affirmed the opinion that international human rights treaties are applicable extraterritorially.[138] The judges in the *Advisory Opinion on the Israeli Wall*[139] declared that the ICCPR 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.'[140] In the *Armed Activities on the Territory of the Congo*[141] case, the Court stated: 'The Court further concluded that international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory" particularly in occupied territories.'[142] Here, also, the test of 'effective control over a territory or a person' must be applied.[143]

12.4.2.4 Conclusion

In a very simplified form, the following common findings can be drawn from an analysis of the jurisdiction: all these bodies accepted the extraterritorial application of international human rights law under certain preconditions. Peacekeepers and also members of the police component can thus in fact be bound by international human rights law applicable to a sending State while acting abroad. Generally, the precondition for the applicability is the exercise of effective control over a territory or control over an individual, e.g. in cases of arrest and detention.

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[136]ECHR, Behrami and Behrami v. France and Saramati v. France, Germany and Norway, 2 May 2007, Application no. 71412/01, Application no. 78166/01, para 152.

[137]See e.g. Sari (2008), pp. 158 et seqq.; Milanović and Papić (2009), pp. 271 et seqq.; Krieger (2009), Burke (2012), pp. 20 et seqq. with further reference on critique in Fn 136.

[138]See also Quénivet (2011), p. 116.

[139]ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Reports 2004, 139.

[140]ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Reports 2004, 139, para 111, see also paras 109 et seqq.; ICJ, Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment, 19 December 2005, ICJ Reports 2005, 168, para 216.

[141]ICJ, Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment, 19 December 2005, ICJ Reports 2005, 168.

[142]ICJ, Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment, 19 December 2005, ICJ Reports 2005, 168, para 216 with reference to ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Reports 2004, 139, paras 178–182, 107–113.

[143]Quénivet (2011), p. 117.

12.4.3 The United Nations

Addressing the UN, the applicability of international human rights to international organizations is a very controversial issue. But, nowadays, a growing consensus exists that human rights law binds the UN itself.[144] The United Nations as a subject of international law enjoys rights and is subject to obligations under international law.[145] Nonetheless, the UN possesses only partial legal personality. Indeed, 'its legal personality and rights and duties are not the same like those of a State'[146] or even 'a super State'.[147] The legal personality rather is determined by the functions entrusted to it by its Member States.

The ICJ stated in the *Reparation for Injuries*[148] case:

> It must be acknowledged that its members, by entrusting certain functions to it [the United Nations] with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.[149]

Hence, in theory, the UN could be a member of international treaties. But most human rights treaties do not provide for the accession of an international organization; they are designed for States. States are the primary addressees to ensure the protection of human rights.[150] The UN thus *stricto sensu* is not party to and not bound by any human rights treaty.[151]

Nevertheless, generally it is accepted that the UN is bound by international human rights law. However, the 'precise source and content of these obligations are hard to determine'.[152] Different legal opinions exist on the applicability of international human rights law to the United Nations.

First of all, it could be reasoned that the UN itself acknowledges international human rights in several internal documents. But even though 'a plethora of internal peacekeeping instruments, ranging from the mission mandate to SOFAs [Status of Forces Agreements], RoEs [Rules of Engagements] and codes of conduct, outline various human rights obligations, none of them as such is legally binding.'[153]

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[144] Howland (2008), p. 6.

[145] In detail see Sands and Klein (2009), paras 15-004 et seqq.

[146] ICJ, Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), 11 April 1949, ICJ Rep 1949, 174, 178.

[147] ICJ, Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), 11 April 1949, ICJ Rep 1949, 174, 178.

[148] ICJ, Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), 11 April 1949, ICJ Rep 1949, 174.

[149] ICJ, Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), 11 April 1949, ICJ Rep 1949, 174, 179.

[150] Among others Mégret and Hoffmann (2003), pp. 316 et seq.

[151] Labuda (2015), para 54; see also Mégret and Hoffmann (2003), p. 316.

[152] Labuda (2015), para 54.

[153] Labuda (2015), para 54. Also Dannenbaum (2010), p. 135.

Hence, the different legal opinions on the applicability of international human rights law to the United Nations should be outlined.

One argument could be drawn from the UN Charter and the accompanying documents like the Universal Declaration of Human Rights. Some authors argue that these documents reflect a set of core values and stipulate 'purposes and principles' upon which the international organization rests.[154] The Universal Declaration of Human Rights 'could be considered as an authoritative interpretation of the Charter'.[155] Thus, the UN is bound by its own 'constitutional legal order'.[156] As one author puts it: '[i]t is self-evident that the Organization is obliged to pursue and try to realize its own purpose.'[157] Or even more straightforward is this: 'One cannot violate human rights on the ground that one is promoting human rights.'[158]

Other authors argue that the UN is bound as a result and to the extent of the Member States obligations. States should not be able to evade 'their human rights obligations by forming an international organization.'[159] International organizations should not be established to do the 'dirty work'[160] for the Member States. By this means, also, the respective international organization must be bound to the extent of the Member States obligations.[161] This could also be described as a 'functional treaty succession' (*Funktionennachfolge*) 'by international organizations to the position of their Member States'.[162] The binding force derives out of the fact that the international organization is taking over functions from its Member States.[163]

Furthermore, it may be argued that the UN is bound by customary international law. It is generally accepted that the UN has partial legal personality in international law and therefore enjoys rights and is subject to duties.[164] To the extent of the functions of the UN, respective customary international human rights law can apply. The applicability of customary human rights law, especially *ius cogens* norms, is not seriously disputed, but the content of these norms is to some extend unclear in the context of peacekeeping operations.[165]

Despite these legal designs, it could be invoked that a morally binding effect influences the UN.[166] Besides, a certain political effect cannot be denied.

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[154]Dupuy (1997), p. 3; Murphy (2008), p. 81; Dannenbaum (2010), pp. 136 et seq.

[155]Cassin R as cited in Rehman (2003), p. 58.

[156]Mégret and Hoffmann (2003), p. 317.

[157]Stavrinides (1999), p. 40.

[158]Dannenbaum (2010), p. 137.

[159]Reinisch (2001), p. 143.

[160]Reinisch (2001), p. 143.

[161]Reinisch (2001), pp. 137–138 and 141–143; see also Mégret and Hoffmann (2003), p. 318.

[162]Reinisch (2001), p. 137.

[163]Quénivet (2011), p. 121 with further references.

[164]Sands and Klein (2009), paras 15-004 et seqq.

[165]Labuda (2015), para 50; Reinisch (2001), p. 136 with further references.

[166]Quénivet (2011), p. 122.

International organizations are 'highly dependent upon their member states, the political accountability of their organs toward their member constituency serves as an effective restraint and internal control mechanism that precludes even the mere possibility of harm to third parties.'[167] A 'morally binding effect', however, does not by itself evoke a legal effect.

By and large, there exists a plethora of sound arguments to reason why international human rights law binds the UN.[168] At least the applicability of customary human rights law, especially *ius cogens* norms, is not seriously disputed. The Universal Declaration of Human Rights serves as a guideline for the specific content since most of the provisions are deemed to reflect customary international law.[169] But still the concrete content of the norms remains to a certain extent unclear.

12.5 Human Rights Violations, Responsibility, and Immunity

12.5.1 Human Rights Violations by UN Police Members and Immunities of UN Police Personnel

Following these findings, the question arises whether the peacekeepers on mission can also violate human rights obligations. The idea of human rights violations by UN police members on the first view seems paradoxical. The UN as a guardian of human rights could not at the same time be a perpetrator of human rights law.[170] But the sad truth is grave human rights violations were committed by peacekeepers, including police members. Even though only a small number committed crimes,[171] the people must be held accountable.[172] Yet still no entirely satisfying answer is found to the question: *quis custodiet ipsos custodes*? (who guards the guardians?).[173]

In Kosovo, for example, 'several documented instances of UN police brutality, including some culminating with the death of suspects'[174] occurred. Accusations of

[167]Reinisch (2001), p. 133. See also Quénivet (2011), p. 122.

[168]Also Quénivet (2011), p. 123.

[169]Kondoch (2011), pp. 83 et seq.

[170]Reinisch (2001), p. 131.

[171]See e.g. UN, 'Small Number' of Officials, Experts on Mission Who Commit Crimes, Damage Organization's Reputation Must Be Held to Account, Sixth Committee Hears, 16 October 2015, GA/L/3500, http://www.un.org/press/en/2015/gal3500.doc.htm. Accessed 29 July 2016.

[172]O'Brien (2012), p. 223.

[173]Decimus Junius Juvenal, Satires VI, p. 347. See also Reinisch (2001), p. 132, with further references.

[174]Mégret and Hoffmann (2003), p. 335, with reference to: Amnesty International (2000) and the US Department of State, Bureau of Democracy, Human Rights and Labor (2001).

'using excessive force and improper behavior in executing weapons searches in private homes, including breaking down doors and destroying personal property',[175] were raised against the United Nations police and KFOR. Due to the tasks of police in peace operations, it is within the realms of possibility that 'UN personnel may destroy or confiscate civilian property in the course of its operations.'[176] Finally, the events of sexual exploitation by peacekeepers should be mentioned[177]; also, other criminal offenses like illegal weapon trading; gold, diamond, or drug smuggling; or forced prostitution cannot be ruled out.[178]

Some authors diagnosed that 'the lack of a legal framework and understanding of how IHRL [International Human Rights Law] applies to UNPKOs [UN Peacekeeping Operations] has resulted in ad-hoc approaches which have led to violations and inconsistent implementation of IHRL by UNPKOs'.[179] Furthermore, it can be criticized that States, which do not have the best human rights records, continue to send a considerable amount of police personnel to UN peacekeeping operations.[180] Even though these are interesting facets, they cannot be discussed in detail. However, the issues concerning the accountability of UN police personnel will be further highlighted.

First of all, it should be made clear that the UN has no legal authority to conduct criminal investigations, to detain people, or 'to prosecute those against whom evidence of wrongdoing is found'.[181,182] The UN at most can repatriate particular persons on disciplinary grounds.[183] Only the respective national authorities of the sending States are 'competent to conduct full-fledged disciplinary or criminal proceedings'.[184,185] Albeit for contributing States, no international obligation to

[175]Mégret and Hoffmann (2003), p. 335, with reference to: Amnesty International (2000) and the US Department of State, Bureau of Democracy, Human Rights and Labor (2001) Country Reports on Human Rights Practices, Yugoslavia, Federal Republic of, § 1.

[176]Reinisch (2001), p. 132, with further references concerning the UN forces in the Congo in the early 1960s and Somalia in 1992.

[177]For a comprehensive and up-to-date overview of allegations and investigations please see the statistics of the UN Conduct and Discipline Unit, https://cdu.unlb.org/AboutCDU.aspx. Accessed 18 July 2016. See also Dannenbaum (2010), pp. 117 et seqq.

[178]See e.g. Defeis (2008), p. 204; O'Brien (2012), p. 224.

[179]Sheeran (2011), p. 10.

[180]Durch (2014), p. 20.

[181]Murphy (2008), p. 76.

[182]Murphy (2008), p. 76; Grenfell (2011), p. 109; Oswald et al. (2011), p. 395; O'Brien (2012), p. 224.

[183]Secretary-General, Comprehensive report of conduct and discipline including full justification of all posts, 20 March 2008, UN Doc. A/62/758, para 14; Klappe (2011), p. 499; Grenfell (2011), p. 105 and Kanetake (2011), pp. 204 et seqq. with further information on the disciplinary procedure.

[184]Klappe (2011), p. 499.

[185]UN Secretary-General, Comprehensive report of conduct and discipline including full justification of all posts, 20. March 2008, UN Doc. A/62/758, para 14; Grenfell (2011), p. 105; Kanetake (2011), pp. 205 et seq.

prosecute the respective individuals exists.[186] Moreover, 'a number of peacekeeping areas may well depend on whether the State of nationality of the suspect has extended its jurisdiction beyond its borders to address such crimes.'[187] Impunity in the sending State therefore is within the realms of possibility.[188] On the other hand, the UN 'retains disciplinary procedure over UN staff'.[189] Individual police are not dispatched like the FPU as a contingent but usually contracted on individual agreements with the UN.[190] The Directive for Disciplinary Measures Involving Civilian Police and Military Observers,[191] however, does envisage a repatriation of IPOs,[192] not a dismissal.[193] This may be referable to the fact that the individual police officers remain enrolled in the particular home countries and cannot be removed from the national services by the UN.[194]

Ultimately, prosecution by the host State seems to be possible. However, the right of the host State to prosecute accused persons is essentially constrained because peace operations as a subsidiary organ of the UN enjoy the status, privileges, and immunities of the organization, which are laid down in Article 105 of the Charter. According to Article 105 UN Charter:

> The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

While members of the military contingent are subject to the exclusive jurisdiction of their sending States,[195] for members of police contingents a differentiated reflection is necessary. The details of the privileges and immunities of UNPOL are primarily governed by the mission-specific SOFA[196] and the Convention on the Privileges and Immunities.[197] The privileges and immunities ensure that the UN can carry out the mandated functions appropriately and without harassment by the

[186] Oswald et al. (2011), p. 36.

[187] Grenfell (2011), p. 110.

[188] Oswald et al. (2011), p. 395: 'possible lacuna in criminal prosecution'. See also O'Brien (2012), pp. 224 et seq.

[189] Kanetake (2011), p. 206.

[190] See also Kanetake (2011), pp. 203 and 206.

[191] UN DPKO (2003) Directives for Disciplinary Measures Involving Civilian Police and Military Observers, UN Doc. DPKO/CPD/DDCPO/2003/001, DPKO/MD/03/00994.

[192] See para 23 UN DPKO (2003) Directives for Disciplinary Measures Involving Civilian Police and Military Observers, UN Doc. DPKO/CPD/DDCPO/2003/001, DPKO/MD/03/00994.

[193] See also Kanetake (2011), p. 206.

[194] Kanetake (2011), p. 206.

[195] Grenfell (2011), p. 109.

[196] Oswald and Bates (2010), p. 401.

[197] Convention on the Privileges and Immunities of the United Nations, 13 February 1946, New York, entered into force 17 September 1946, 1 UNTS 15.

host State.[198] The 'Head of Police Component' is granted diplomatic immunity,[199] albeit this is not the case for the individual police and FPUs.

According to para 27 of the Model Status of Forces Agreement,[200] individual police and FPUs shall be considered as 'experts on mission' within the meaning of Article VI of the Convention on the Privileges and Immunities of the United Nations.[201] This article states:

> Experts [. . .] performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions [. . .].

The immunity of UN police, which includes immunity from personal arrest and detention, thereby must be understood as 'functional immunity'. It is merely granted in the interest of the Organization.[202] Therefore, only acts in the performance of official functions are covered, so-called on-duty acts; not included are so-called off duty acts.[203] The Office of Legal Affairs of the UN summarizes the immunities of police officers in peace operations as such:

> As experts performing missions for the United Nations, civilian police officers enjoy "**functional immunity**", that is, immunity for purposes of the official acts done by them in the course of the **performance of their official functions** their privileges and immunities, which include immunity from personal arrest and detention, are granted solely to enable them to perform their **official functions** these privileges and immunities are granted in the interests of the Organization and are not for the personal benefit of the individuals themselves. United Nations civilian police officers **may therefore be made subject to local civil and criminal jurisdiction** for acts committed by them in the host country that are done by them **otherwise than in the performance of their official functions** (emphasis added).[204]

It is for the Secretary-General to decide whether an act is committed in an official function and if immunity should be waived.[205] This decision 'depends

[198] Oswald and Bates (2010), p. 401.

[199] Oswald et al. (2011), p. 35 with further examples.

[200] UN, Model Status-of-Forces Agreement for Peace-Keeping Operations, 9 October 1990, UN Doc A/45/594.

[201] See also UN DPKO/DFS (2014) Policy on United Nations Police in Peacekeeping Operations and Special Political Missions, Ref. 2014.01, para 22: United Nations police components consist of individual police officers (IPOs), both contracted and seconded, specialized police teams (SPTs), and formed police units (FPUs), who all serve as 'experts on mission'. http://www.un.org/en/peacekeeping/sites/police/documents/Policy.pdf. Accessed 21 July 2016.

[202] See also Oswald et al. (2011), p. 35.

[203] Oswald et al. (2011), p. 35.

[204] UN Office of the Legal Affairs, UN Juridical Yearbook 2004, Letter to the Acting Chair of the Special Committee on Peacekeeping Operations, United Nations, regarding immunities of civilian police and military personnel, pp. 323–325, p. 324.

[205] Section 23 Convention on the Privileges and Immunities of the United Nations, 13 February 1946, New York, entered into force 17 September 1946, 1 UNTS 15. For details see Oswald et al. (2011), pp. 35 et seq. and 314 et seqq.

upon the facts of a particular case'.[206] If the particular act was not carried out in an official capacity and the 'waiver would further the cause of justice and not prejudice the interests of the UN',[207] immunity can be waived.[208] This may not be the case if the host country's system has problems with human rights standards and/or fair trail aspects.[209] In practice, immunity in criminal cases usually is not waived. Immunity consequently prevents the prosecution of a member of the UN police in the host States.

Finally, it should be noted that the SOFAs and the Convention on the Privileges and Immunities[210] differentiate between criminal law procedures on the one hand and private law procedures on the other hand. In case of a private law claim, 'the relevant court must notify the Special Representative of the Secretary General who will certify to the court whether the proceedings relate to the official duties of the members.'[211] The Special Representative of the Secretary-General determines whether the proceedings are linked to official duties.[212] In case of an on-duty act, 'the proceedings are stopped and the settlement of "any dispute of claim of a private law character" is applied.'[213] In practice, private law disputes are settled through UN internal claims procedures.[214]

12.5.2 Responsibility of the United Nations

Besides the question of individual criminal responsibility, the issue of the attribution of the committed human rights violations by police personnel to the sending States or the UN can be raised. The attribution of a specific international wrongful act,[215] namely a breach of an obligation of international law, to a State or the UN

[206]Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion (1999), 19 April 1999, ICJ Rep 1999, 62, 85; see also Rawski (2002), p. 114.

[207]Oswald and Bates (2010), p. 402.

[208]Oswald and Bates (2010), p. 402.

[209]Oswald et al. (2011), p. 36. S.a. Oswald and Bates (2010), p. 395; Miller (2006), p. 92; Grenfell (2011), p. 110.

[210]Convention on the Privileges and Immunities of the United Nations, 13 February 1946, New York, entered into force 17 September 1946, 1 UNTS 15.

[211]Oswald and Bates (2010), pp. 397 et seq.

[212]Oswald and Bates (2010), p. 398.

[213]Oswald and Bates (2010), p. 398 with further references.

[214]Oswald and Bates (2010), p. 398.

[215]According to Art. 2 Draft Articles on Responsibility of States for Internationally Wrongful Acts (Report of the International Law Commission, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10, 43 [2001]), and Art. 4 Draft articles on the responsibility of international organizations (Report of the International Law Commission, UN GAOR 66th Sess., Suppl. No. 10, UN Doc. A/66/10, 54 [2011]) (latter are not yet generally accepted as customary law) 'there is an

is—put in a simplified manner—assessed on the basis of the 'effective control' test.[216] This concept is mostly understood as 'overall operational control'.[217] Therefore, in recent cases, violations have been attributed to the UN, which formally possesses command and control over the troops and the police.[218] As mentioned previously, the UN is granted immunity by Article 105 UN Charter. This attribution, however, could be questioned due to a certain degree of institutional ambiguity.[219] From a formal perspective, the UN does possess command and control but lacks the rights of disciplinary measures, promotion, or the salaries.[220] Furthermore, influences by the sending States on the individual police or military personnel cannot be strictly excluded. The question whether the attribution of wrongful acts to States and/or the UN should be challenged and further developed nevertheless must be left open for discussion.[221]

12.6 Human Rights in 'Policekeeping'[222] Practice

Specific aspects of 'policekeeping' practice have attracted the interest of scholars and practitioners. All in all, the addressed issues of the 'protection of civilians', the 'use of force', as well as 'arrest and detention' suffer from a lack of clear legal guidance, and doctrinal gaps need to be identified and closed.

12.6.1 Protection of Civilians

The protection of civilians today is a crucial element of the functions of the police. The 'Guidelines on Police Operations in United Nations Peacekeeping Operations

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internationally wrongful act of a State/International Organization when conduct consisting of an action or omission:

1. is attributable to that organization/state under international law; and it
2. constitutes a breach of an international obligation of that organization/state.'

[216]The different Courts established different tests like the 'effective control', the 'overall control' or 'overall authority and control' or the 'effective overall control'. This issue cannot be addressed in detail. For further details see Burke (2012), pp. 15 et seqq.; Kondoch and Zwanenburg (2015), pp. 562 et seqq.

[217]Dannenbaum (2010), p. 192; Sheeran (2011), p. 11.

[218]Dannenbaum (2010), pp. 151 et seq.; he criticizes the Courts decisions and evaluates the findings especially regarding to the concepts on the 'chain of command'.

[219]McCoubrey and White (1996), p. 137.

[220]See Dannenbaum (2010), pp. 140 et seqq.

[221]Dannenbaum (2010), p. 192; see also Burke (2012).

[222]Term by Day and Freeman (2005).

and Special Political Missions',[223] which were adopted in January 2016, state in para 9:

> While the protection of civilians is the primary responsibility of the host State, in most contemporary situations one of the United Nations police's core operational roles may be to support the implementation of the mission's protection of civilians strategy, along with other integrated mission elements, including the military, civilian and human rights components. In a mission with such mandate elements, the United Nations police shall be directly responsible for the physical protection of civilians against imminent threats of physical violence, e.g. through force projection and/or high visibility and increased patrolling.[224]

Many mandates of peace operations authorized by the Security Council today include the element 'protection of civilians'.[225] The UN, furthermore, in 2015 adopted the policy 'The Protection of Civilians in United Nations Peacekeeping'.[226] The policy includes the operational concept and outlines in total three tiers of protection of civilians action:[227] tier I: protection through dialogue and engagement; tier II: provision of physical protection; and tier III: establishment of a protective environment. The second tier seems to be the most demanding for police practice due to the relations to the use of force. Yet 'police components often believe that the only part of the mission mandate that applies to them is the one that refers to support in host-nation police'.[228] The terminology under Chapter VII of the UN Charter concerning the 'protection of civilians' is not 'interpreted by UN police components as having implications for their role.'[229] Furthermore, the understanding can vary immensely due to the actual interpretation by the mission planning team.[230]

Sofía Sebastián evaluated the 'The Role of Police in UN Peace Operations'[231] in depth and identified doctrinal gaps concerning the protection of civilians. These include

1. a lack of conceptual clarity on how to engage in physical protection;
2. confusion about the precise role of the different UN police components;

[223]UN DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15, para 9. http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf.

[224]UN DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15, para 9. http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf.

[225]von Einsiedel (2015), p. 5 with further references.

[226]UN DPKO/DFS (2015) Policy, The Protection of Civilians in United Nations Peacekeeping, Ref. 2015.07.

[227]UN DPKO/DFS (2015) Policy, The Protection of Civilians in United Nations Peacekeeping, Ref. 2015.07, pp. 8 et seq.

[228]Sebastián (2015), p. 14.

[229]Holt and Taylor (2009), p. 127.

[230]Holt and Taylor (2009), p. 126; Sebastián (2015), p. 21.

[231]Sebastián (2015).

3. conceptual ambiguities in relation to the protection of civilians in nonexecutive mandates;
4. misunderstandings about the principles on the use of force; and
5. confusion about the specific tasks to be undertaken by the police and the division of roles between the police and the military.[232]

By and large, she points out that the doctrinal guidance is unclear and additional research and support is needed.[233]

Further issues relating to the concept of the 'protection of civilians' could be added. While it is generally accepted that the protection of civilians has become politically a crucial element,[234] it is not easy to prove a positive legal obligation for the protection of civilians.[235] Some authors argue that a positive obligation exists.[236] But this assessment should be evaluated very critically in the future.

12.6.2 Use of Force and Firearms

Another disputed field is the legal framework governing the 'use of force and firearms'.[237]

As *Christopher Decker* states:

> A recurring problem has arisen in relation to the use of firearms. As mentioned above, CIVPOL [Civilian Police, now UN police] bring their own skills with them from their home country, and each country has differing standards on the use of force; this is particularly true of the use of lethal force. These differences arise not only between African and European States but also amongst European/Western States.[238]

The use of force therefore is a delicate issue. The diversity is challenging for the uniformity of a UN mission. The use of force largely is influenced by the general principles applicable to peace operations. Basically, the 'principle of the minimum use of force'[239] should be respected. On the basis of this principle, only the 'use of

[232]Sebastián (2015), pp. 18 et seqq.

[233]Sebastián (2015), p. 21.

[234]von Einsiedel (2015), p. 5 with further references.

[235]Sheeran (2011), p. 4.

[236]Among others Wills (2006), pp. 29 et seq.; Månsson (2008b) Implementing the Concept of Protection of Civilians, pp. 558 et seq.; see also Kondoch (2011), pp. 87 et seqq. with further references.

[237]For an analysis of the use of force and the guidelines see: Amnesty International (2015).

[238]Decker (2008), p. 53.

[239]The three core principles are: consent, impartiality and the minimum use of force; for an overview see Bellamy and Williams (2010), pp. 173 et seqq.

force in self-defence or defence of the mandate'[240] is permissible. In principle, the use of force therefore must be interpreted narrowly.

However, especially the term 'use of force in defence of the mandate' could provide room for interpretation.[241] The wording of the mandate of the Security Council nevertheless limits the powers of the peacekeeping mission. Otherwise, if the mandate is framed in a 'robust' way, the use of force could even go as far as entrusting the enforcement of the law to UN police.

Especially, Formed Police Units are more likely to get in contact with the rules on 'the use of force'. According to the Policy 'Formed Police Units in United Nations Peacekeeping Operations', which also comprises guidelines on the use of force, the core tasks of FPUs are public order management, protection of UN personnel and facilities, and support of police operations that require a formed response and may involve a higher risk (above the general capability of individual United Nations police).[242] In this context, for example, the question arises if the use of deadly force could go as far as to defend UN property.[243] And how do the protection of civilians and the use of force correlate?[244] Several 'tricky' questions could be added.

The foundations for the use of force for UN police members therefore should be clarified. The use of force by UN police officers is regulated by the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the Code of Conduct for Law Enforcement Officials, and mission-specific guidance material, such as Directives on the Use of Force and Firearms.[245] Anyhow, the permission to carry arms is a mission-specific decision. But if a mission mandate entails the use of force

> [t]he deployment and operations of the United Nations police, including FPUs, shall always be based on the **principles of necessity, proportionality**/minimum/gradual level of force, legality and **accountability** (emphasis added).[246]

[240]UN DPKO/DFS (2008) United Nations Peacekeeping Operations, Principles and Guidelines, pp. 34 et seq. http://www.un.org/en/peacekeeping/documents/capstone_eng.pdf. Accessed 20 July 2016.

[241]On the doctrine of self-defense and the doctrinal challenges see also Penny (2007), pp. 354 et seq. and 357.

[242]UN DPKO/DFS (2010) Policy, Formed Police Units in United Nations Peacekeeping Operations, Ref. 2009.32, Revised, para 12. http://www.un.org/en/peacekeeping/sites/police/documents/formed_police_unit_policy_032010.pdf. Accessed 28 July 2016.

[243]See Penny (2007).

[244]Sebastián (2015), pp. 22, 37.

[245]Also Kondoch (2011), p. 86.

[246]UN DPKO/DFS (2016) Guidelines on Police Operations in United Nations Peacekeeping Operations and Special Political Missions, Ref. 2015.15, para 87. http://www.un.org/en/peacekeeping/sites/police/documents/Guidelines_Operations.pdf. Accessed 28 July 2016; see also Penny (2007), pp. 356 et seqq.

The use of force, thus, 'is the last resort, when all other means of peaceful de-escalation have failed.'[247] The principles should be core to the training of the police since the use of force entails several links to human rights issues.[248] The right to life, liberty, and security of the person and the freedom from torture and cruel, inhuman, or degrading treatment should be emphasized.[249]

12.6.3 Arrest and Detention

Last but not least, 'arrest and detention' should be mentioned. Even though peacekeepers rarely have the power of arrest,[250] and usually have no 'authority or limited capability to maintain law and order',[251] UN missions are increasingly involved in the detention of individuals.[252] This trend gives rise to several complex practical and legal issues.

First of all, the 'UN does not appear to have a formal system of reporting to the public the number of people detained by peacekeepers and the reason for their detention. When practice is recorded, it is by the press and sometimes by the Secretary-General.'[253] *Bruce Oswald* nevertheless expresses the opinion that detention by peacekeepers seems to be much more common than reports by the press and the Secretary-General would suggest.[254]

Police personnel arresting or detaining an individual, as well as detention facilities, clearly must operate in accordance with international human rights law, and 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'[255] The UN in fact elaborated in 2010 the act of the Interim Standard Operating Procedures on Detention in United Nations Peace Operations, but this document is an internal, nonpublic document. Consequently, there still is need to clarify the guiding principles and define key terms such as 'detention', 'arrest', and other forms of deprivation of liberty.[256] A clear understanding of human rights implication related to arrest and detention should be developed.[257] Also, the status of detainees should be

[247]UN DPKO/DFS Policy on Formed Police Units in United Nations Peacekeeping Operations, 1 March 2010, Ref. 2009. 32, para 37. Accessed 28 July 2016.

[248]See also Kondoch (2011), p. 86.

[249]See also Kondoch (2011), p. 86.

[250]See also Oswald (2011), p. 136.

[251]Sebastián (2015), p. 22 makes this statement with a view to the authority of FPUs with non-executive mandates.

[252]International Committee of the Red Cross (2015).

[253]Oswald (2011), p. 124.

[254]Oswald (2011), p. 124.

[255]Kondoch (2011), p. 86.

[256]International Committee of the Red Cross (2015), Oswald (2011), pp. 123 et seqq.

[257]Kondoch (2011), p. 85.

addressed.[258] Are persons detained on criminal or security reasons, and what does this categorization imply for the rights of the detainees?[259] More issues could be added. Just to raise a few: could a UN police member refuse to hand over a detainee if serious doubts about the human rights standards in a detention facility exist? What happens if a host State refuses to take over a person caught by UN police?[260]

Besides, various human rights relate to detention and arrest. Relevant human rights relating to detention and arrest are (a) the right to liberty and security of person; (b) prohibition of arbitrary arrest; (c) right to be informed of reasons at time of arrest; (d) right to be brought promptly before a judge; (e) right to trial within reasonable time, or release; (f) right to prompt access to a lawyer; (g) right to confess or testify against oneself; (h) right to prompt notification of family.[261] Therefore, the police should be familiar with the following documents: the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, the Basic Principles for the Treatment of Prisoners, the Standard Minimum Rules for the Treatment for Prisoners, and the Code of Conduct for Law Enforcement Officials.[262]

12.7 Conclusions

To conclude, UN police today performs a wide range of tasks and functions in peace operations. The work has become more complex and multidimensional. Human rights mainstream through all activities of the UN. UN police officers therefore shall respect internationally recognized human rights law and uphold UN criminal justice standards. But still the human rights framework for police in peace missions in large parts is not sufficiently clear. Especially in the fields of the 'protection of civilians', the 'use of force', and the 'arrest and detention' the UN, the practitioners and the academia need to work closely together to address the legal gaps and provide police women and men with adequate and systematic guidance. Efficient policing cannot be provided if the legal bases are opaque and difficult to capture. Therefore, a systematic analysis on the legal bases of 'Human Rights in Police Missions' must be carried out in the near future.

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[258] Oswald (2011), p. 124.

[259] Oswald (2011), pp. 138 et seqq.

[260] Further examples given by Sebastián (2015), pp. 22 et seq.

[261] Kondoch (2011), pp. 85 et seq.

[262] See also: Kondoch (2011), p. 86.

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Chapter 13
Police Training and International Human Rights Standards

Walter Suntinger

Contents

Abstract Human rights training for police is one of the typical activities proposed for improving the human rights performance of police. This contribution explores basic didactical principles of effective human rights trainings for police, as well as some characteristics of police organizations and police culture that are relevant for understanding how to shape human rights trainings for police. From the practical perspective of a human rights trainer, the author discusses some basic competencies

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that police officers should have, what they should know about human rights, which skills they would need to acquire for successfully handling human rights principles in practical work, and which attitudes should underlie and support police work on the basis of a human rights approach.

13.1 Introduction

Human rights training for police is one of the most commonly proposed and actually employed activities for improving human rights performance of police. Whenever police behave in a way that violates human rights, the call for more and better training of police in human rights is quickly voiced. Often, however, it appears that human rights trainings are conceived as stand-alone activities that are not embedded in an overall strategic approach to improving police performance: they are often dealt with as if they were an end in themselves and not a tool in a broader reform endeavor.[1] An approach to human rights training that aims at having real impact on the ground and produces concrete change in human rights performance would rather recognize that any training effort needs to be designed in a strategic way, placing it into a broader perspective of competence development of police personnel and the characteristics of police organizations.

The aim of this paper is, therefore, to explore such a broad perspective on police training in human rights and to show some basic elements of such an approach, both in terms of didactics and of content.

In a first part, this contribution deals with some basic notions of human rights education and training as they apply to police training. It briefly outlines the international legal framework for police training, proposes some considerations to be taken into account when integrating human rights in police training, and explores basic didactical principles of effective human rights trainings for police. Furthermore, it discusses some characteristics of police organizations and police culture that are relevant for understanding how to shape human rights trainings for police.

The second part presents some major substantive and methodological elements of human rights training in a police context. Using the triangle of human rights education—knowledge, skills and attitudes—as an organizing concept, it discusses some basic competencies that police officers should have, more precisely what they should know about human rights, which skills they would need to acquire for successfully handling human rights principles in practical work, and which attitudes should underlie and support police work on the basis of a human rights approach.

My perspective on this topic is a practical one. I started to get involved in human rights training of police in the 1990s in Austria. Coming from an NGO as well as an academic background, I quickly faced some major challenges in the concrete

[1] Sganga (2006), p. 72.

training setting: how to make a rather theoretical topic accessible to an audience that is practically minded? How can the (cultural) gulf between an outsider's perspective (often seen as moralistic) and the insiders' perspective be bridged so that a meaningful communication process can be constructed? Can human rights be presented as being useful for meeting the specific challenges and problems that police are facing? How can a communication process be organized that makes critical (self-)reflection possible?

I have tried to develop tentative answers to these questions in a practical way, i.e. by testing out different approaches in practical police capacity-building settings and by using interdisciplinary academic insights, in particular from legal sciences, pedagogy, psychology, and sociology, for reflecting upon it. These approaches have then found expression, among others, in a training manual for Austrian police trainers[2] and in a manual of the EU Fundamental Rights Agency for European police trainers.[3] Further insights were gained in two EU Twinning projects with the Turkish National Police and in the context of police monitoring. What follows is, thus, some reflections on my professional experience in doing human rights trainings for police and developing training tools, supported by academic insights that proved to be useful to me as a practitioner. It is thus necessarily a subjective view.[4]

13.2 The Setting: Human Rights Training of Police

13.2.1 What Is Training and What Is Human Rights Training?

At the most general level, the Oxford Dictionary defines training as "the action of teaching a person or animal a particular skill or type of behaviour."[5] More specific to an organizational context, training can be seen as "Organized activity aimed at imparting information and/or instructions to improve the recipient's performance or to help him or her attain a required level of knowledge or skill."[6]

These two definitions highlight important aspects relevant to any training. Firstly, it is about the development of competencies at different levels—knowledge, skills, attitudes—of those participating in it. Secondly, training is about the enhancement of performance so that certain activities are carried out in a better way. One might add that training is also an essential element of any change process

[2] Suntinger (2005).

[3] Fundamental Rights Agency (2013).

[4] It is pertinent to remember that some subjectivity or relativity is inevitable in any, including academic, perspective. "*Relativity ... is by definition inherent in every point of view, as a view taken from a particular point in social space*", Bourdieu (1989), p. 122.

[5] http://www.oxforddictionaries.com/definition/english/training (accessed 5 September 2016).

[6] http://www.businessdictionary.com/definition/training.html, (accessed 5 September 2016).

that organizations undergo in order to adapt to concrete realities and related challenges.

Such an understanding of training in general is useful for approaching the specificities of human rights education and training. A good starting point is the UN Declaration on Human Rights Education and Training, adopted by the UN General Assembly in 2011.[7] According to its Article 2 para.1, "human rights education and training comprises all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms and thus contributing to, inter alia, the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding and developing their attitudes and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights."

Human rights training thus involves (1) different types of educational and training activities[8] that are (2) aimed at implementing human rights, preventing human rights violations, and, ultimately, developing a culture of human rights (3) by steering learning processes at the level of knowledge, skills, and attitudes. (4) These activities should have an empowering effect on duty bearers, as well as right holders.

The UN Declaration goes on to state that human rights education and training is "a. education **about human rights**, which includes providing knowledge and understanding, of human rights norms and principles, the values that underpin them and the mechanisms for their protection, b. education **through human rights**, which includes learning and teaching in a way that respects the rights of both educators and learners; c. education **for human rights**, which includes empowering persons to enjoy and exercise their rights and to respect and uphold the rights of others" (Art 2 para 2, emphasis added).

The Declaration also highlights the fact that "human rights education and training is a lifelong process that concerns all ages," and it gives the didactical instructions that "human rights education and training should use languages and methods suited to target groups, taking into account their specific needs and conditions" (Art 3).

Taking these concepts and principles seriously, human rights training of police should be based on a comprehensive change perspective that has the clear objective of implementing human rights in police practice and that is strategically aware of the different dimensions of learning in response to concrete needs. Police personnel should be equipped with the necessary knowledge, skills, and attitudes, as well as the tools and adequate structures, in order to implement human rights. They should

[7]UN Doc. A/RES/66/137, 19 Dec 2011 http://www2.ohchr.org/english/issues/education/training/UNDHREducationTraining.htm; for a critical review of the UN Declaration on Human Rights Education and Training see Gerber (2011).

[8]This contribution uses education and training in an interchangeable way. Regularly, human rights education (HRE) is used an umbrella term, see Gerber (2011).

be empowered to respect and uphold human rights and also, as right holders, to exercise their own human rights.[9] Furthermore, police training should be shaped in a way that is respectful of human rights and thus contributes to internalizing human rights values.

13.2.2 The International Legal Framework for Human Rights Training of Police

It is well established in international human rights law that States have an obligation to undertake human rights training for police. Article 10 para. 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[10] contains an explicit obligation to include the prohibition of torture in the training of law enforcement personnel,[11] including the police. According to the CAT Committee, this obligation encompasses, i.a., training on the provisions of the Convention, on methods to detect signs of torture, on interrogation techniques; sensitization with regard to the needs of groups in situations of vulnerability; as well as evaluation of training programs.[12] The monitoring bodies of other UN human rights treaties have inferred similar obligations from treaty provisions. More precisely, training of law enforcement officials is required by the positive obligation to fulfill concrete human rights, in particular the prohibition of torture and ill-treatment, the right to personal liberty, as well as the right to nondiscrimination. The Human Rights Committee, established under the International Covenant on Civil and Political Rights (ICCPR),[13] has stated in its General Comment 20 of 1992 with regard to the prohibition of torture and other ill-treatment in Article 7 ICCPR: "Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training. States parties should inform the Committee of the instruction and training given and the way in which the prohibition of article 7 forms an integral part of the operational rules and ethical standards to be followed by such persons."[14] The Committee for the Elimination of Racial Discrimination, the

[9]See Sganga (2006), p. 74.

[10]GA res. 39/46, 10 December 1984, UN Doc. A/39/51 (1984).

[11]International standards regularly use the term "law enforcement officials" as an umbrella term for "all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention." Commentary to Art 1 of the UN Code of Conduct for Law Enforcement Officials. This contribution uses the term "Law Enforcement Official" and "Police" in an interchangeable way.

[12]See e.g. Concluding observation on the second periodic report of Namibia, 1 February 2017, UN Doc. CAT/C/NAM/CO/2, see also Nowak and McArthur (2008), pp. 394–395.

[13]GA res. 2200A (XXI), 16 December 1966, UN Doc. A/6316 (1966).

[14]General Comment 20/1992, United Nations (2008a), p. 201 (para.10).

monitoring body of the International Convention for the Elimination of All Forms of Racial Discrimination,[15] has issued the general recommendation that "[l]aw enforcement officials should receive intensive training to ensure that in the performance of their duties they respect as well as protect human dignity and maintain and uphold the human rights of all persons without distinction as to race, colour or national or ethnic origin."[16] And the Committee monitoring implementation of the UN Convention for the Elimination of Discrimination Against Women[17] has put it in this way: "Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention."[18]

In addition to these obligations following from international treaties, there are soft law instruments that contain explicit obligations regarding the training of law enforcement officials. The UN Declaration on Human Rights Education and Training provides that States should undertake human rights training for all, including State officials (Art 3 para 2) and, more specifically, for law enforcement officials (Art 7 para 4). Other soft law instruments contain more detailed provisions and guidelines for training of law enforcement officials. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF)[19] of 1990 are most explicit. "All law enforcement officials … [shall] receive continuous and thorough professional training" (18) and "those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use" (19). More specifically, Basic Principle 20 stipulates that "Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of

[15]G.A. res. 2106 (XX), 21 December 1965, U.N. Doc. A/6014 (1966).

[16]General Recommendation XIII/1993, United Nations (2008b), p. 276 (para.2).

[17]GA res. 34/180 of 18 December 1979, UN Doc. A/34/46.

[18]General Recommendation 19/1992, United Nations (2008b), p. 334 (para. 24 (b)). The general recommendation Nr. 19 on violence against women is currently in a process of being updated. The new draft circulated by the Committee for the Elimination of Discrimination against Women (2016) goes far beyond the 1992 version and reflects the involvement of thinking. States should "*provide mandatory, recurrent and effective capacity-building, education and training for the judiciary, lawyers and law enforcement officers, including forensic medical personnel, legislators, health-care, education and social personnel, including that working with women in institutions such as residential care homes and prisons, to equip them to address gender-based violence against women adequately*." This should include: "i. *The impact of gender stereotypes and unconscious bias, including their contribution to gender-based violence against women and inadequate responses in front of it, ii. T*he understanding of the situations of women, including those affected by intersectional discrimination, who are victims/survivors of gender-based violence, and ways to address them and eliminate factors, such as secondary victimization, that weaken women's confidence in State institutions, and iii. Domestic legal provisions and institutions on gender-based violence against women, international standards and associated mechanisms and their responsibilities in this context. UN Doc. CEDAW/C/GC/19/Add.1 (para.15. (d)).

[19]Resolution adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990.

conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms." Furthermore, "[l]aw enforcement agencies should review their training programmes and operational procedures in the light of particular incidents" (20).[20]

These UN standards regarding the obligation to training law enforcement officials are supplemented by standards at the regional level. The European Code of Police Ethics, adopted by the Committee of Ministers of the Council of Europe in 2001,[21] states that "[p]olice training, which shall be based on the fundamental values of democracy, the rule of law and the protection of human rights, shall be developed in accordance with the objectives of the police" (26), that "[g]eneral police training shall be as open as possible towards society" (27), and that "[g]eneral initial training should preferably be followed by in-service training at regular intervals, and specialist, management and leadership training, when it is required" (28). Furthermore, "[p]ractical training on the use of force and limits with regard to established human rights principles [...] shall be included in police training at all levels" (29). And finally, "[p]olice training shall take full account of the need to challenge and combat racism and xenophobia" (30).

Furthermore, the recommendations of the European Committee for the Prevention of Torture (CPT), established by the European Convention for the Prevention of Torture and Other Inhuman or Degrading Treatment or Punishment,[22] are relevant. The CPT has put forth a set of substantive standards that should contribute to preventing torture and that also deal with training. In its Second General Report, the CPT emphasizes "the great importance it attaches to the training of law enforcement personnel (which should include education on human rights matters . . .). There is arguably no better guarantee against the ill-treatment of a person deprived of his liberty than a properly trained police or prison officer. Skilled officers will be able to carry out successfully their duties without having recourse to illtreatment and to cope with the presence of fundamental safeguards for detainees and prisoners. [. . .] In this connection, the CPT believes that aptitude for interpersonal communication should be a major factor in the process of recruiting law enforcement personnel and that, during training, considerable emphasis should be placed on developing interpersonal communication skills, based on respect for human dignity. The possession of such skills will often enable a police or prison officer to defuse a situation which could otherwise turn into violence, and more generally, will lead to a lowering of tension, and raising of the quality of life, in police and prison establishments, to the benefit of all concerned."[23] In this connection, the CPT "encourages national authorities to seek to integrate human rights concepts into practical professional training for

[20]For more on the training aspects of the BPUFF see Amnesty International (2015), pp.173 et seq.

[21]Rec(2001)10, 19 September 2001.

[22]26 November 1987, ETS 126.

[23]European Committee for the Prevention of Torture (2015), pp. 20–21 (para. 59, 60).

handling high-risk situations such as the apprehension and interrogation of criminal suspects; this will prove more effective than separate courses on human rights."[24]

In subsequent reports, the CPT has stressed the relevance of professional training in the areas of questioning of criminal suspects[25]; of dealing with irregular migrants, both in detention[26] and during deportation[27]; of juveniles held in police custody[28]; and of combating impunity, which sabotages "[a]ll efforts to promote human rights principles through strict recruitment policies and professional training."[29] Rather, "[p]ositive action is required, through training and by example, to promote a culture where it is regarded as unprofessional – and unsafe from a career path standpoint – to work and associate with colleagues who have resort to ill-treatment, where it is considered as correct and professionally rewarding to belong to a team which abstains from such acts."[30]

What is very clear from the above is the fact that States have far-reaching obligations to provide for appropriate training of law enforcements officials, covering a broad range of issues and targeting the dimensions of knowledge, skills, and attitudes. Partly, international standards are quite clear with regard to the content and the modalities of training. It is interesting to note their strong focus on practical skills, as well as on attitudes, in order to effectively contribute to respecting and upholding human rights.

In addition, there are a series of initiatives within international governmental and nongovernmental organizations that have shaped the contemporary understanding of human rights training of police, in particular in the context of reform of police organizations in countries of transition from authoritarian to democratic rule. Human rights training has been a prominent part of police reform within UN field operations,[31] the Council of Europe is continuously supporting police reform in its member states,[32] and the Organization for Security and Co-operation in Europe has developed tools for police reform, including a "Guidebook on Democratic Policing"[33] and "Guidelines on Human Rights Education for Law Enforcement Officials."[34]

[24]Ibid., p.29 (para. 60, footnote 1).
[25]Ibid., p.9 (para. 34).
[26]Ibid., p.70 (para.77).
[27]Ibid., p.77 (para. 28) and p.81 (para. 42).
[28]Ibid., p.85 (para. 100).
[29]Ibid., p.102, para. 25.
[30]Ibid., p.102, para. 26.
[31]See e.g. O'Neill (2004).
[32]See e.g. Murdoch and Roche (2013).
[33]OSCE (2006).
[34]OSCE (2012)

13.2.3 Integrating Human Rights in Police Training

The impact of human rights training on the ground will depend on the way it is integrated in police training. Thus, careful designing of this process of integration is needed. And, indeed, the above-described international standards regarding human rights training and the accompanying practice of the monitoring bodies have already given indications as to how human rights should be made part of police training. It is the OSCE Guidelines on Human Rights Education for Law Enforcement Personnel where the clearest strategic approach has been developed: "Considering the pivotal role law enforcement officials play in respecting, protecting and fulfilling human rights, human rights should be an integral part of all training for law enforcement officials, such as in investigation and arrest, the use of firearms and force, and reporting and communication with the public. This is necessary in order to ensure human rights-based training does not become dissociated from operational reality. Thus, an integrated holistic approach, rather than just teaching human rights as a separate subject, is encouraged. It is, however, advisable to provide one or more introductory sessions on human rights to present the legal framework and historical background of human rights in order to contribute towards the development of a solid basis for the acquisition of skills, knowledge and values during more in-depth professional training."[35]

Several points are relevant here.

First, human rights should be made an integral part of all training for police. This is in particular so with regard to regular police work and practices, from investigation techniques to arresting persons and dealing with conflicts, including the use of force and firearms. In addition to this being strongly stressed by international standards and the work of international monitoring bodies (see above Sect. 13.2.2), there are further good reasons for such an approach. From a didactical perspective, programs that embed human rights in classical police training have the advantage of making it practically relevant to a police audience that might be hesitant to accept theoretical trainings.[36] Experience in Austria where operational training regarding the use of force explicitly includes human rights, in the particular the principles of necessity and proportionality, is very positive.[37] Attention by operational police trainers to the importance of human rights enhances the perception of legitimacy of human rights as such. From an impact perspective, professional skills development is as regularly seen as most effective. The biggest empirical study on torture prevention says the following: "We found that training in all sectors had a positive impact, on police, prison staff, judges and prosecutors, as well as monitors and complaint handlers. [. . .] the country specific studies appear

[35]OSCE (2012), p. 16.

[36]Chan (2003), p. 304.

[37]Fundamental Rights Agency (2013), pp. 104–105; for an interview with the highest police officer in Austria regarding this approach. http://www.bmi.gv.at/cms/BMI_OeffentlicheSicherheit/2011/03_04/files/POLIZEI_MACHT_MENSCHEN_RECHTE_II.pdf.

to show that training that focuses on developing professional skills is more likely to be effective than training that simply familiarizes trainees with relevant human rights norms."[38] In particular, there is empirical evidence that professional investigation skills reduce the reliance on confession and thus the risk of torture.[39]

Second, an integrated holistic approach does not rule out the need for having a separate subject on human rights. Introducing police to the basic ideas and conceptual framework of human rights—the foundational knowledge (see Sect. 13.3.2)—constitutes the basis for successfully applying it in all activities in a self-assured and professional way. The extent to which human rights is taught as a separate subject will depend on the particular context and target audience.

Third, some areas of necessary change, in particular those areas where prevalent attitudes can be seen as the sources of concrete human rights problems, might need special didactical settings of learning and reflection. Diversity and nondiscrimination trainings are a clear case in point. This is recognized by international human rights monitoring bodies,[40] and it is part of the training landscape in many police training settings.

Fourth, as suggested by the UN Declaration on Human Rights Education and Training, a continual process of learning should be instituted. In the specific context of police, initial training should be followed by in-service training, which geared toward police personnel at large. In addition, human rights should be part of the training of police personnel in the context of career development.[41]

Fifth, like any other professional training, human rights education for police should be evaluated. This is an area that still seems to be widely neglected.[42] Evaluation of human rights training activities is essential in order to gauge what participants have learned, to understand which approaches and methods have been successful and what could be improved in order to reach the objectives of training programs.[43]

Sixth, training should be linked to the broader context of police organizations. Training activities should allow for discussion of follow-up measures at an organizational level that make sure that the lessons learned and competencies gained are fed back into police structures and operation. Conversely, operational practice, challenges on the ground, and ways to handle them in accordance with human rights should inform the choice of topics and methodology of training.[44] (For the broader organizational perspective, see Sect. 13.2.5.)

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[38]Carver and Handley (2016), p. 632.

[39]Ibid., p. 99.

[40]See above under Sect. 13.2.2. and e.g. European Commission on Racism and Intolerance, General Policy Recommendation No.11, 29 June 2007, CRI(2007)39.

[41]Art 28 European Code of Police Ethics (2001), Sganga (2006), p. 80.

[42]It is a regular recommendation of the CAT Committee to states to "*develop and apply a methodology for evaluating the effectiveness of educational and training programmes relating to the Convention and the Istanbul Protocol*." See e.g. UN Doc.CAT/C/LKA/CO/5 27 January 2017; OSCE (2006), p.43 et seq.

[43]Equitas and OHCHR (2011).

[44]See UN Basic Principles on the Use of Force and Firearms, Principle 20.

13.2.4 Didactics:Principles of Effective Human Rights Trainings

Proper attention also needs to be given to the didactical setting for carrying out concrete human rights trainings with a view to achieving impact. There is substantial academic and practical knowledge about adult learning, i.e. the conditions and processes that influence whether and how adults can best learn and the objectives of training activities can be achieved.[45] This section will be limited to some considerations that seem to be particularly relevant in a police context and that have the potential of enhancing the quality of training if systematically taken into account.

Contextualization: training programs for police need to be developed in light of the specific context in which they take place. This refers to the main human-rights-related problems that are caused by the way policing in a specific country is done, as well as to the structure of police, its operational style, and its place within the overall setting of the criminal justice system.[46]

Audience specificity and needs orientation: like any training, police training should be specifically addressed to the particular audience and should take the needs of participants as the point of departure. It will make a difference whether training is designed for police recruits or for police leadership, both in terms of content and in the choice of methods. Tailor-made needs assessments are important tools for being as close and relevant to participants as possible.[47]

Clarity about the objectives of training and the desired outcomes: when the concrete target audience is defined and their needs are known, it is important to clearly determine what you want to achieve—what is the desired outcome of a training; which change, at which dimension, is envisaged? Determining the objectives of a training program is a crucial element, "the single most important ingredient for designing active training programs."[48] Directing the design process toward a desired outcome or objective greatly helps to figure out the steps that are needed to reach it, in particular which topics need to be dealt with by which methodologies. It is current state of the art of police training tools to explicitly state the objectives or expected outcomes both of training programs as well as of particular parts or elements of it.[49]

Real-life problem solving: participants in adult trainings regularly want to see the practicality of the topics addressed. This is clearly the case in police context. Focus on actual practical problems that police officers face in the real world helps not to "lose" them. It ensures that conceptual and theoretical notions are in fact

[45]For a classic book on adult learning see Knowles (1998), for an adult training handbook, Silberman (2006).

[46]Sganga (2006), p. 81.

[47]Silberman (2006), p. 21 et seq.

[48]Silberman (2006), p. 41.

[49]e.g. OSCE (2006), Fundamental Rights Agency (2013), United Nations (2000).

applied to the concrete situations from their experience and are thus considered to be relevant and useful.

Furthermore, the following principles of adult learning are worth keeping in mind: the level of content should be moderate and should ensure that concentration on the most critical learning areas is possible. It is useful to distinguish clearly between what is essential (need to know) and what is desirable (nice to know). Also, any professional training should strive to achieve a balance between affective, behavioral, and cognitive learning: training is not only about gaining knowledge and understanding of relevant concepts and facts (cognitive), but it is also about fostering attitudes (affective) and developing and practicing skills (behavioral). And lastly, a variety of learning techniques should be used as this contributes to a helpful learning environment. It does so by keeping interest alive and by managing the consequences of fluctuating energy levels. Furthermore, as humans learn in different ways (auditory, visual, kinaesthetic learners), a variety of techniques is indispensable for meeting the different learning needs of participants.

A further crucial issue concerns the selection of trainers as this determines the general atmosphere of a training to a considerable extent. In a police context in which human rights are regularly an emotionally charged topic and where a certain resistance to a human rights approach might be expected, this is particularly relevant. A tandem of trainers, one internal and one external, has proved to be very helpful. A trainer from within the police is culturally close enough to the audience so as to have the insider knowledge and to earn the trust of participants. An external trainer can be useful in bringing a perspective from outside. Again, this will depend on the target audience and on the learning objectives of the particular training.

Finally, the social setting and group dynamics of the training must be considered carefully. The UN Declaration on Human Rights Education and Training insists that human rights education is also *through* human rights, which includes "learning and teaching in a way that respects the rights of both educators and learners" (Art 2 para 2). Trainers need to develop sensitivity toward situations in training settings that raise human rights issues, including when human dignity might be taken lightly. Questions of freedom of expression and the right to participation, as well as nondiscrimination issues, regularly pop up in training dynamics. Being sensitive to them not only helps living up to one's own responsibility regarding human rights; concrete situations can also be used as didactical tools for highlighting the relevance of human rights to all human interaction.

Furthermore, I have found the approach developed by Carl Rogers regarding the "necessary and sufficient conditions"[50] of any helping relationships (which include education and training) particularly helpful. Rogers' basic assumption is that if certain conditions are present, then personal development and learning will happen. Central among these conditions are the following three: firstly, the trainer should be a congruent, genuine, integrated person, with a clear sense of his or her own

[50]Rogers (1992).

position. Secondly, the trainer should have an essentially nonjudgmental attitude toward the other persons, accepting the experience of others as it is. Thirdly, the trainer should show an empathic understanding of the other person, his or her internal frame of reference. Empathetic understanding means to sense the other person's private world as if it was your own, but without losing the "as if" quality.[51]

In my experience, these three attitudinal competencies are highly beneficial and useful in the sensitive context of human rights training for police where fundamental questions regarding one's identity and self-understanding come up and one's deepest moral convictions are touched upon. These three competencies are also clearly in line with the basic attitudes and values that undergird human rights.

13.2.5 Human Rights Training in the Broader Context of Police Organizations

Contemporary thinking about human rights education and training stresses that educational activities should not take place in isolation but that the organizational environment and other possible measures and interventions to address existing human rights problems need to be taken into account.[52] This is certainly highly relevant to the context of human rights training for police.

Several issues merit consideration when approaching human rights training for police in a systematic and comprehensive way so as to enhance its impact on the concrete human rights situation.

As mentioned above, training activities should be linked to practical police work in two ways: processes should exist for supporting transfer of training content back into police structures and operations, and lessons from operational practice should inform the choice of topics and methodology of training. More generally, insights from organizational theory need to be taken into account: the effect of training will be limited if it is not supported by organizational structures and a conducive work environment.[53] Human rights need to be visibly acknowledged within the organization by internal decision-making processes like selection of personnel, advancement, communication and information strategies, management and leadership functions, disciplinary procedures, etc.[54] Put differently, prevailing organizational realities can undermine the objectives of human rights training. In particular, "the idea of a recalcitrant police culture being an impediment to reforms is one that has general currency"[55] in social scientific research of police.

[51]Ibid., p. 829.

[52]Equitas and OHCHR (2011), p. 2.

[53]Tracey et al. (1995).

[54]Suntinger (2012), p. 622.

[55]Chan (2007), p. 324.

Police culture is not a clearly defined concept. Most often it refers to the way police officers on the street perceive and evaluate the social world and concrete situations and take action accordingly. This "street cop culture"[56] can be very different from the "management cop culture," which rather finds expression in official statements regarding its mission, strategies, etc. Organizational research shows that it is the peer group, and thus cop culture, and not so much the larger organization that influences individual behavior.[57]

A recent ethnographic study on police culture in the UK has summarized the main findings of police research regarding the core characteristics of police culture in the following way: "Police [. . .] have an exaggerated sense of mission towards their role and crave work that is crime oriented and promises excitement. They celebrate masculine exploits, show willingness to use force and engage in informal working practices. Officers are continually suspicious, lead socially isolated lives and display defensive solidarity with colleague. They are mainly conservative in politics and morality, and their culture is marked by cynicism and pessimism. The police world view includes a simplistic, decontextualised understanding of criminality and officers are intolerant towards those who challenge the status quo."[58]

These cultural characteristics are reproduced through on-the-job socialization as officers try to adapt to the demands of the police vocation. A study of a class of police recruits in New South Wales, Australia, has shed an interesting light on this socialization process. Using the theoretical concepts of Pierre Bourdieu, Janet Chan has shown how this interplay between the police environment and individual recruits works.[59] The habitus (dispositions, schemes of perception, and appreciation)[60] of young recruits is strongly influenced by his or her interaction with the structures of the police field. This field is seen to exert a magnetic force on those who find themselves in it and who internalize the characteristics of the prevailing structures. Police recruits, who enter the field of police as new participants in a weak position of power (of different forms of capital[61]), undergo a process of learning and of adjustment of their habitus. "The metamorphosis from a new recruit to a police constable involved some major shifts in attitudes and values – changes in the habitus. By the end of their field training, most probationers felt that they had changed as a person. [...] Not surprisingly, the cohort had picked up some typical elements of the occupational habitus of street-level policing: cynicism, dislike of paperwork, and distrust of management and outsiders, including the general public."[62] However, this process of adaptation is not a uniform process, and the field of policing is susceptible to change, including in sensitive areas, such as willingness to

[56]Ruess-Ianni and Ianni (2005), p. 297.
[57]Ibidem.
[58]Loftus (2010), p. 1.
[59]Chan (2003).
[60]Bourdieu (1989), p. 19.
[61]Ibid., p. 17.
[62]Chan (2003), p. 305.

report misconduct by colleagues.[63] Still "aspects of the habitus can be quite recalcitrant."[64] The above-quoted more recent study of police culture in the UK reaches the following conclusion: "In the context of the reform, it is significant that the renowned features remain virtually untouched by initiatives aimed at changing everyday assumptions and behaviour."[65]

Such knowledge is highly relevant for shaping training programs as it helps to put training and its potential for contributing to change into a realistic perspective.[66] Two issues seem relevant. First, it is important to recognize that police culture is quite stable, and police habitus, including attitudes toward others, cannot be easily changed. Second, if real change is to be achieved, the broader context needs to be taken into account. This would include intertwining of training and early practice so that experience and its effect on recruits' habitus can be adequately reflected upon; recruitment processes of police, including screening in the light of attitudes toward human rights; attention to the role that human rights play in promotion within and dismissal from the police organizations; as well as the messages regarding human rights that come from leadership. Furthermore, broader societal developments, such as a greater willingness toward questioning authority or, conversely, greater acceptance of harsh stances toward crime, might be relevant.

13.3 Dimensions and Elements of Human Rights Training

13.3.1 Introduction: The Triangle of Human Rights Education

The purpose of this section is to present and discuss some main areas and issues of human rights training for police in the light of the considerations and principles outlined above. Again, it needs to be stressed that the approach reflects my own experience of what might be helpful ways of shaping human rights trainings.

The following presentation is structured along the triangle of human rights education, which is nowadays commonly used as an organizing principle and device for designing human rights training programs. Learning objectives (see above Sect. 13.2.4) can be formulated along the three dimensions of the competencies that police officers should acquire: knowledge and understanding, skills, attitudes, and values. As will be seen in the discussion below, these dimensions

[63] Chan (2007), p. 343.

[64] Ibid., p. 324.

[65] Loftus (2010), p. 17.

[66] For more on this see the very interesting study of human rights education for police in Germany of Günther Schicht, who explicitly situates human rights education in the context of a detailed description of police culture, Schicht (2007), pp. 29–46.

cannot be neatly separated from each other. Certain topics will be relevant for more than one dimension of learning.

High-quality training will find a proper balance among these dimensions in line with the particular objectives of the training program. This balance is related to the desirability of having a good mix of cognitive, behavioral, and affective learning techniques (see Sect. 13.2.4).

Human rights trainings pose specific challenges with regard to finding the right balance between these dimensions. First, as human rights come primarily in the form of legal standards, there is a danger to focus strongly on presentations of the law of human rights in the form of lecturing and presentations. And in the light of the vastness of relevant legal knowledge—the contributions in this book are telling proof of this—it is easy to succumb to the temptation to deal with it comprehensively. Second, cognitive learning techniques are often preferred because they are easier to use than more challenging didactical techniques. There might even be a (culture-specific) reluctance to get involved in participatory techniques of learning. Depending on the context, such reluctance might be a very legitimate consideration because of the sensitive nature of discussions about human rights. Lectures might be the only option in more formal settings, e.g. involving higher-rank police officials.

As a result, this can lead to an overrepresentation of the knowledge part to the detriment of the development of skills and, in particular, of attitudes, what can be called the "knowledge fallacy" of human rights training. It is fundamental to remember that human rights trainings that stay at the cognitive level will only have limited effects and will not be able to address the full range of human rights issues. Human rights raise basic moral questions and cannot be reduced to legal standards only, despite the fundamental importance of the legal aspects of human rights. Furthermore, human rights touch upon the fundamental attitudes of human beings, e.g. how they see the world, themselves, and others. The relevance of attitudes becomes apparent when one starts looking at root causes of human rights violations, e.g. excessive stereotyping, in-group/out-group categorization.

Structuring trainings in a thoughtful manner around the three dimensions of learning, having clear objectives in mind, goes a long way toward avoiding the knowledge fallacy and achieving a proper balance between these dimensions. Furthermore, it is essential to select content strategically, being aware of the limitation of the human mind to digest information. The art of training is about finding the right measure in this regard. Simple prioritization devices ("need to know" versus "nice to know") can be helpful for steering the way.

The following sections give an overview of what these dimensions contain. As the nature and scope of this paper does not allow for going into a detailed discussion, only selected issues will be dealt with. More can be found in other documents, in particular the Police Training Manual of the EU Fundamental Rights Agency and the OSCE Guidelines on Human Rights Education for Law Enforcement Officials.

13.3.2 Knowledge and Understanding About Human Rights

Knowledge and understanding is the first part of the three dimensions of learning. In the light of the above considerations regarding the knowledge fallacy, I have found it helpful to differentiate between what could be called foundational knowledge on the one hand and more specialized knowledge on the other hand.

Foundational knowledge and understanding refers to some key concepts with regard to human rights and policing that all participants in police trainings should fully grasp. The Manual of the Fundamental Rights Agency follows such an approach by proposing two initial modules that deal with these basic issues, which can be said to constitute the core ideas of a human rights perspective to policing.[67]

13.3.2.1 Foundational Knowledge 1: Human Dignity, Human Rights, and Corresponding Obligations

The first point concerns the idea of human rights and their functions in a democratic society. "The idea of human rights is as simple as it is powerful: treating people with dignity."[68] The human rights edifice can be seen as standing on two basic pillars: (1) the central idea of human dignity of every human being that is concretized in specific human rights, (2) the corresponding obligations to respect and ensure human dignity and human rights.

Human dignity is a good starting point of all discussion about human rights. Human dignity as inherent in every human being is a powerful idea, not only because it is firmly enshrined in international and national legal documents but also—and probably more importantly—because people relate to it emotionally; they feel when human dignity is violated, when their worth as a human being is diminished.[69] Thus, as human beings, we seem to have a tendency to be sensitive toward violations of dignity, and we have a moral compass and empathy, which allow us to feel with and act for those whose dignity is violated. The central idea of human dignity is concretized in specific human rights norms and standards, laid down in a vast array of legally binding and nonbinding international instruments. These human rights are universal, indivisible, and interdependent. They pertain to

[67] Fundamental Rights Agency (2013).

[68] John Ruggie, former UN Special Rapporteur on Business and Human Rights, UN Doc A/HRC (Draft Guiding Principles).

[69] It is interesting to note that this central importance of the concept of human dignity and, more generally, of humanistic principles is increasingly supported by empirical research. The work that prison researcher Alison Liebling has carried out on the quality of life in prison is one of the most advanced ones in this regard. She has made clear that values such as humane treatment, fairness and legitimacy among interviewed prisoners and staff are rated highly for assessing quality of life in prison, positively influencing the overall well-being and creating better and safer prison climate. Liebling (2011).

all human beings, without any distinction made on the basis of certain characteristics. Obviously—and this is regularly an important part of human rights training—police officers have human rights.

The second pillar brings into focus the ethical and legal implications of the idea of human dignity and human rights. Human rights carry responsibilities and obligations. At the ethical level, this brings the responsibility of human beings to act toward each other in a particular way. The well-known Golden Rule—as an ethical principle, found in religious and nonreligious ethical systems worldwide—is regularly an excellent starting point for this discussion. *"Do not do unto others what you do not want others do to you*" (the negative version), or "Do unto to others *what you would like them do to you*."[70] (the positive version). Human rights can be seen as a modern expression of this principle. Ethically, this could read: act in a way that you respect and promote human dignity of yourself and others. Translated into the technical language of international human rights law, State officials have the obligation to respect, protect, and fulfill these human rights:[71]

- Negative obligation to respect human rights: the State must not take action that restricts human rights unduly. State organs, including the police, have to refrain from actions that are not based on law or are not necessary to achieve a legitimate aim. Unjustified interferences with human rights constitute human rights violations.
- Positive obligation to protect human rights: the State is obliged to take positive measures to protect human rights of one person against human rights abuses by another person (at the horizontal level). Failure by State organs, including the police, to take reasonable and appropriate steps to protect constitutes a human rights violation.
- Positive obligation to fulfill human rights: the State is obliged to take positive measures to ensure that human rights are implemented. This includes legislative, administrative, judicial measures. Failure to take reasonable and appropriate steps constitutes a human rights violation.

States thus have comprehensive negative and positive obligations so that every person under their jurisdiction can enjoy his or her human rights.

Linked to this, it is useful to discuss the specific functions that human rights serve in a democratic society based on the rule of law. As a fundamental part of State constitutions, human rights provide the ground rules for the exercise of State functions, and they contribute to creating an environment in which human beings "can shape their lives in accordance with liberty, equality and respect for human dignity."[72] More specifically, human rights help satisfy the needs of human beings

[70]For different versions of the Golden Rule see Fundamental Rights Agency (2013), p. 35.

[71]It has become standard to understanding obligations regarding human rights, using the trias of obligations: respect—protect—fulfill, in particular in the context of UN human rights treaties, notwithstanding the fact that the texts of the treaties might use different language; see Nowak (2003), pp. 48–51.

[72]Nowak (2003), p. 1.

by securing the conditions for their fulfillment, they protect core human values (like life, physical and psychological integrity, freedom, security, dignity, equality) against abuse by the State (respect) and against abuse by other people (protect), and they help remedy situations of exclusion and marginalization. Finally, they provide a mechanism for balancing out the different legitimate interests that exist in society and thus serve as a kind of conflict resolution device.

13.3.2.2 Foundational Knowledge 2: The Double Role of Police with Regard to Human Rights

The second key concept in the context of police training refers to the self-understanding and perceived role of the police within the State structure and the wider society. Which role do police have on the basis of a human rights approach?

The starting point for discussing this issue is the abovementioned types of State obligations that result from human rights law: police have a negative obligation to respect human rights, as well as a positive obligation to protect human rights.[73] Regularly, police officers know about and focus on the negative obligation to respect human rights, i.e. the limits that human rights set to police powers and actions. Thus, they might see them primarily or even exclusively as an obstacle and a potential threat to effective police work. On the other hand, they are much less aware of the positive role of police with regard to human rights, i.e. the fact that their daily work actually serves to protect human rights. This broader perspective on human rights often comes as a real surprise to those who encounter it for the first time, although it can squarely be based on international human rights law. The consequence of such an approach is that a positive image of police as a "social service of great importance"[74] can be constructed: as an institution that is fundamentally concerned with protecting human rights. So the fundamental dichotomy is not anymore police effectiveness versus human rights or security versus human rights but rather how the different human rights and interests involved can be balanced with each other in an adequate way, guided by the underlying principles of human rights.

Obviously, such an image of a police comprehensively based on human rights is one that might be difficult to reconcile with the reality of policing and the public image of police in many countries. So its concrete usefulness will depend on the context. However, this positive framing[75] of police as an organization protecting human rights has major advantages for dealing with the challenges of human rights implementation in a training setting, but also beyond. The creation of a positive

[73]For reasons of simplicity and concrete relevance in a police context, the discussion here only deals with the positive obligation to protect.

[74]Basic Principles of the Use of Force and Firemarms, preambular paragraph 1.

[75]Regarding the importance of framing of issues for decision making see Tversky and Kahneman (1981).

self-understanding and police identity with regard to human rights[76] tends to develop greater openness to engage with the more critical issues of human rights as well, including the ever-present risks of abuse that is linked to their special position as having the monopoly on the use of force. It also helps to initiate and maintain dialog with external stakeholders, including with nongovernmental human rights organizations.

As a further element contributing to self-understanding, it is important to discuss the relationship between professionalism and human rights. Several points are relevant. First, the practically most relevant human rights principles of necessity and proportionality of means are also principles of professional policing and have been developed independently of and prior to human rights.[77] Applying them requires highly developed professional skills (see below Sect. 13.3.3). Second, acting in accordance with human rights will contribute to guaranteeing the professional quality of police work so that, i.a., its results can be used in court proceedings. Third, there is empirical evidence that better developed professional skills, in particular with regard to investigation techniques (including interviewing and the use of technical means), reduce the risks of human rights violations, in particular ill-treatment and torture.[78] It is thus no exaggeration to state that professional policing is in most cases tantamount to acting in line with human rights.

13.3.2.3 Specialized Knowledge: Human Rights Norms and Procedures

Several other more specific areas of knowledge will supplement these basic points of foundational knowledge and should be integrated into training programs according to the needs and interests of participants and in light of the learning objectives. These include the historical development of human rights; basic elements of the system of (international) human rights protection; important international human rights documents; specific contents of human rights norms relevant to police work, including the prohibition of torture and ill-treatment and the principle of nondiscrimination; State institutions that protect human rights, such as courts, national human rights institutions, national preventive mechanisms, as well as social movements and organizations that work for human rights.[79]

As one can see from this enumeration, much of this knowledge on human rights is related to the law. Human rights law can come from national law, in particular State constitutions, as well as from international law. National laws normally figure

[76]On the importance of sense-making in an organizational perspective, as applied to police, see Chan (2007).

[77]A good example for this is the development of German police law, see Schröder (2015), pp. 330–331.

[78]Carver and Handley (2016), pp. 78–81 and 99.

[79]For more on possible knowledge content see OSCE (2012), pp. 24 et seq., Fundamental Rights Agency (2013), p. 14, Crawshaw (2008).

prominently in any discussion of human rights related to police practice, and this is obviously useful for being close to the reality of police. It is advisable, however, to also deal with international human rights law as many innovative normative developments come from this international level.[80]

13.3.3 Skills and Human Rights

In order for human rights to become a living reality, a certain set of skills, i.e. "the ability to do something well,"[81] are essential. It is through these skills and supporting attitudes (see Sect. 13.3.4) that human rights principles can be internalized, which is probably the only sustainable way of respecting and protecting them.

13.3.3.1 Operational Skills

As mentioned already, the principles of necessity and proportionality are central to human rights; they run like a red thread through human rights law and also police law. While having a sound knowledge about the principles of necessity and proportionality is important, any police training must be geared toward developing the skills to apply these principles in practice. Police officers need to be able to assess potential risks, think of different options of action, and identify the least intrusive measures in order to achieve a legitimate aim, balance out the different interests involved, etc. And they should be able to do all this in stressful or even dangerous situations where everything passes very quickly, in the "heat of the moment."

Operational skills encompass situation and risk assessment skills; communication skills, including intercultural communication; skills of peaceful settlement of conflicts; the understanding of crowd behavior; the methods of persuasion, negotiation, and mediation' tension-defusing skills; physical skills; use of firearms in line with necessity and proportionality; interviewing of suspects and witnesses; skills for dialoguing with the community and external stakeholders, including with minority communities.

In terms of training programs, an adequate amount of time should be dedicated to the developing and maintaining of these skills, and suitable didactical forms should be used, primarily experiential training formats, such as scenario training. From a human rights perspective, it would be advisable to include human rights considerations explicitly in the reflection and analysis of practical training.

[80] Sganga (2006), pp. 82–83; Schicht (2007), p. 51, whose research found that international human rights law was practically absent in police training in Germany.

[81] http://www.oxfordlearnersdictionaries.com/definition/english/skill?q=skill, (accessed 28 February 2017).

13.3.3.2 Analytical and Reflection Skills

In addition to operational skills for applying human rights in concrete settings, any self-assured way of using a human rights perspective requires a set of analytical skills. These skills allow to assess concrete situations in the light of human rights and to decide whether a certain behavior is in compliance with human rights or not. In other words, these skills help answer the question "what is a human rights violation?"—a question frequently raised in human rights trainings.

This analytical process is based on human rights law and is typically applied in the case law of human rights courts.[82] In a simplified version, this analysis involves two basic steps:

- In a first step, the concrete human rights applicable to a concrete situation are identified, and it is asked whether the State has taken an action that interferes with the human rights identified or whether the State is obliged to take an action to protect/fulfill the human rights identified.
- In a second step, the State's interference with a human right or the omission of a required measure is analyzed with regard to its possible justification. Regularly, a central element of this analytical process is the test of necessity and proportionality. Interferences with human rights that are not based on the law, do not pursue a legitimate aim, or are not in line with the principles of necessity and proportionality constitute a human rights violation (obligation to respect). The omission of appropriate measures that States can be reasonably be expected to take constitutes a human rights violation (obligation to protect/fulfill).[83]

Applying this analytical process to concrete case scenarios of police action or omission has proved to be very helpful and has been appreciated by participants in trainings, for several reasons.[84] Firstly, it helps police trainees to arrive at well-founded human rights assessment of a situation or action, including of their own actions. Secondly, it helps to understand and discuss the decisions of international and national human rights bodies. Thirdly, possessing these analytical skills also serves as a basis for professional communication with relevant stakeholders, including nongovernmental human rights organizations. Lastly, this analytical process empowers police officers as right holders to claim their own human rights within the police organizational structures.[85]

[82]Nowak (2003), pp. 56–61.

[83]For a detailed presentation of this approach, including case studies, see Fundamental Rights Agency (2013), Module 3, p. 69 et seq.

[84]On the basis of experience in human rights education for police in Austria where this approach is systematically used for more than a decade, see Suntinger (2005).

[85]Fundamental Rights Agency (2013), Module 6, p.161 et seq.

13.3.4 Attitude and Human Rights

The causes and sources of human rights violations often lie at the level of the attitude, e.g. discriminatory patterns of thinking, lack of respect toward certain groups of people. Attitudes are "the way that you think and feel about somebody/something; the way that you behave towards somebody/something that shows how you think and feel."[86]

Recommendations of international human bodies often ask States to initiate training or other measures to tackle the attitude dimension of human rights implementation. This dimension is also firmly integrated in modern training approaches, as found, e.g., in the OSCE Guidelines on human rights education for law enforcement officials and in the Police Training Manual of the Fundamental Rights Agency. The latter proposes the following list of attitudes to be given attention to in trainings: "respect for oneself and for others based on the dignity of all persons; valuing and commitment to equality; equality with respect to sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation; confidence in considering human rights as a goal and basis of police work; awareness of one's own responsibility; empathy towards others, including for non-dominant parts of society; open mindedness; valuing of and willing to engage with external stakeholders, including communities and monitoring institutions; openness to reflection; readiness to learn from mistakes; preparedness to deal with criticism; acceptance of diversity in society and its implication for policing."[87]

It is obvious that this is the most difficult dimension of any training, certainly the one where it is most difficult to know whether concrete results are achieved. Also, as discussed above (Sect. 13.2.5), social science research suggests that attitudes are strongly shaped by the environment and the prevailing police culture, with consequences for what training programs can achieve. Furthermore, change in attitudes might take place over time and cannot be measured easily.

As it is beyond this contribution to discuss this part in any detailed way, I will only mention some considerations. First, a comprehensive understanding of the role of police with regard to human rights, in particular their positive role in protecting human rights, has the potential of translating into and fostering of a positive attitude toward the values underpinning human rights. Reframing of police as an agent for human rights protection allows positive self-identification with human rights and makes it easier to create openness toward considering problematic police behavior and to initiative process of critical self-reflection. Also, a plausibly argued link between professionalism and human rights opens the space for a sober and nuanced discussion of the dilemmas involved in police work, as well as self-reflection.

[86] http://www.oxfordlearnersdictionaries.com/definition/english/attitude (accessed on 24 February 2017).

[87] Fundamental Rights Agency (2013), p. 15.

Finally, the notion that human rights might benefit police officers as right holders helps break the widespread notion that human rights are only for those affected by police action.

Second, several of the characteristics of police culture, as described above, are located at the attitudinal level, and these attitudes might run counter to those that undergird human rights. It is helpful in a training setting to be aware of these characteristics, in particular those related to cynicism about and stereotyping toward certain segments of society, as well as those leading to mutual protection and solidarity even in case of serious misconduct. Any police trainer will come across these discussions, obviously when questions regarding the investigation of allegation of ill-treatment and related human rights come up.

Third, there is a growing trend to create specific trainings programmes with tackle attitudinal issues around discrimination and policing in increasingly diverse societies a subject matter of specific training programs. Diversity and nondiscrimination trainings, intercultural communication, countering hate crimes, including of a homophobic and transphobic nature are nowadays widely found in police training settings.[88] These initiatives are partly a reaction to particularly grave human rights violations, partly to a more general trend toward greater societal awareness of discrimination and successful campaigning by social movements. The evolution of this trend is clearly visible, e.g., in the new draft General Recommendations 19 of the CEDAW committee (see FN 18 above). However, trainings attempting to mold participants' attitudes are particularly challenging and need to be carefully conceived in order to reach the target audience and not be derided by participants as overly moralizing and missionary or, in the words of participants in a police study in Australia, as "warm and fuzzy stuff"[89] that is not relevant to police practice. There is, however, clearly positive experience with diversity trainings for police, e.g. in Austria, carried out in cooperation with the Anti-Defamation League and using well-tried methods of awareness raising.

13.4 Conclusions

This contribution has tried to present a somehow tentative but still coherent picture of what I have found useful to take into account when developing human rights education programs for police. My overall conclusions are as follows.

First, it is of fundamental importance to take a strategic approach to human rights education for the police. This includes thinking through the following questions thoroughly: what is the context in which a particular police organization operates, and what are its characteristics? Who is the target audience? What are the concrete needs of participants? Which change should be achieved and by which

[88] See Module 5 of Fundamental Rights Agency (2013), p. 133 and Annex 4.

[89] Chan (2003), p. 303.

didactical choices and methods? And how does the training link to other human-rights-related initiatives involving the police?

Second, taking a strategic and impact-oriented outlook at training involves finding the right measure with regard to three basic challenges: balancing the relevant learning dimensions of knowledge, skills, attitude; balancing theoretical and practical training; and balancing the need for reduction on the one the one hand and the need for keeping the required complexity.

Third, training needs to be understood as one of many measures to achieve human rights change within the police and cannot be seen as panacea or an end in itself. It is necessary to develop a realistic understanding of training in the broader organizational context based on relevant social scientific research. Such an understanding should be present in police training institutions, but also with police management and also external stakeholders.

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Chapter 14
The European Committee for the Prevention of Torture and Its Work with the Police

Wolfgang S. Heinz

Contents

Abstract Police forces in European countries face more and more diverse challenges in their work, including fighting ordinary crime, organized crime, human trafficking, terrorism, and other problem areas. In another vain, they encounter protest movements, demonstrations, and sometimes violent action, which need to be managed. At the same time, in many countries, high expectations in the population about proper conduct and responsible action by police officers prevail, notably respect for human rights. Therefore, transparency, accountability, and action against illegal action by police officers is paramount for creating and strengthening trust in a police force, and a state, respectful of the rule of law. The European Committee on the Prevention of Torture and Inhuman or Degrading Treatment (CPT) of the Council of Europe visits for 28 years, among other

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institutions, establishments of Ministries of the Interior. The contribution offers a brief overview on legal standards and working methods used by the CPT. It looks at issues of CPT's practical work regarding the police. Another section tentatively addresses the impact of the Committee's work, a particular challenging issue since there exists very little of what could be called an evaluation of the impact of its work on the European or national level. A concluding section brings together some key issues.

Police forces in European countries are facing clearly increasing and more and more diverse challenges in their work, including fighting ordinary crime, organized crime, human trafficking, terrorism, and other problem areas. In another vain, there are protest movements, demonstrations, and sometimes violent action, which need to be managed. At the same time, in many countries, high expectations in the population about proper conduct and responsible action by police officers prevail. Therefore, transparency, accountability, and action against illegal action by police officers is paramount for creating and strengthening trust in a police force, and a state, respectful of the rule of law.

The contribution starts with brief remarks about the origin of the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment (CPT), the legal standards used by the Committee, and its working methods. The next section looks at issues of practical work of the CPT regarding the police, which is based on publicly accessible materials. It is pertinent here to recall that the cooperation of the CPT with member states of the Council of Europe takes place under the rule of confidentiality; only the visit reports, the annual General Report, and a number of working papers have been published apart from the CPT standards.[1] In Sect. 14.3, I respond to an invitation by editors to address the impact of the Committee's work, a particular challenging issue since to my knowledge there has been very little of what can be called a review or an evaluation of the impact of its work on the European level or a national level. A concluding section brings together some key issues.

14.1 The CPT[2]

The CPT works on the basis of the European Convention Against Torture (ECPT),[3] which has been ratified by all member states of the Council of Europe. The Convention is based on Article 3 of the European Convention on Human Rights (ECHR) of 1950, which states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[1] See http://www.cpt.coe.int/en/docspublic.htm.

[2] This section borrows from Heinz (2016).

[3] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT, 1987).

ECPT governs the organization and powers of the CPT. It speaks not only of torture but also of inhuman or degrading treatment or punishment. In a wider sense, the Committee not only is interested in the three situations mentioned but covers in addition situations of neglect such as underfunding and lack of trained staff, which also can lead to threats to security, as well as to human rights violations, such as unjustified threats or use of force by staff toward prisoners and lack of effective control over (threats of) violence between inmates.

For each state party, the Committee of Ministers of the Council of Europe elects one member from a list of three candidates for a term of 4 years. Members do not represent the country from which they were elected and should act independently. They come from the legal profession (judges, state attorneys, defense lawyers, etc.), medical profession (general practitioners, forensic doctors, psychiatrists, etc.), the police, and other professions. The Committee is supported by a Secretariat with ca. 25 staff.

After the visits, the CPT reports are being published by an invitation by the government concerned, together with the government response to the findings and recommendations, as stipulated in the ECPT—if there is such an invitation. Almost all member states of the Council of Europe have accepted publication except two countries, which have not permitted to date the publication of the majority of visit reports, the Russian Federation and Azerbaijan (and more recently Turkey, with two reports not published). Reports on country visits and government responses on all states parties can be found on the CPT website.[4]

In its work, the Committee uses international legal norms and recommendations as a yardstick for its own assessment of the conditions at the local level. It refers predominantly to recommendations of the Council of Europe, particularly the Committee of Ministers and judgments of the European Court of Human Rights. It also quotes from standards of the United Nations and other relevant bodies. The Committee updates its own general standards every 1 to 2 years. The last edition came out in 2015, again with a special section on the police.[5]

The CPT is an investigative authority, not a court like the European Court on Human Rights. It focuses on the monitoring of general dimensions of detention or similar institutional arrangements, i.e. patterns, dynamics, and trends; it does not take up individual cases.[6]

With 47 countries to visit, it is difficult to generalize when it comes to visiting police establishments. The focus is always on police establishments that can hold detainees ranging from smaller to bigger police stations and occasionally a police prison like the one in Zurich, Switzerland, which can hold up to 158 detainees. Another important aspect is whether legislation empowers the police to control a

[4] http://www.cpt.coe.int/en/states.htm. Permission is necessary under the ECPT, article 11, para 2.

[5] CPT (2015).

[6] See generally Kicker (2009), Murdoch (2006), Morgan and Evans (2001). A comparison of Council of Europe monitoring bodies is undertaken by Kicker and Möstl (2012).

number of cells in a remand prison, so that the police are in charge in this prison and not the management of that prison.

Generally, CPT focuses on three fundamental rights of the person detained or imprisoned: "The CPT advocates a trinity of rights for persons detained by the police: the rights of access to a lawyer and to a doctor and the right to have the fact of one's detention notified to a relative or another third party of one's choice."[7]

14.2 Visiting a Police Station

The Committee usually does not publish materials on how it works in detail. Other actors in the area of prevention of torture have published practical guides. There is a guide on how to visit police stations by the Swiss NGO Association for the Prevention of Torture (APT).[8] Another guide, by APT and UNHCR, offers advice on how to visit immigration detention centers.[9] It describes in realistic detail important practical steps to take and how to do things.

The major difference of visiting a police station as compared to many prisons and also psychiatric hospitals is that the time period is relatively short. In other words, interviewing detainees, looking at the material conditions, relevant documentation, and talk with staff.

Apart from legal documents and organizational information, CPT has published a number of working documents addressing a variety of different issues.[10] Michael Kellet, a long-term British police officer who has repeatedly worked for the Committee, starts his presentation on how to monitor police custody in the following way:

> Identity of detained person; Time, date & place of deprivation of liberty & identity of arresting authority; Identity of body authorising detention; Authority responsible for supervising detention; Place of detention & date & time of admission; Detainee's state of health; Date & time of release or transfer, destination of transfer and authority. Furthermore one should look at contact with the outside world, oversight, custody records, incident logs, police procedures.[11]

Other issues are complaints and complaint procedure and use of force registers by category, including use of electrical discharge weapons/Taser.

Regarding interviews, it is recommended that, if possible, everyone should be interviewed, and different categories of inmates should be taken into account such

[7] CPT (2015), para 40.

[8] APT (2013).

[9] APT/UNHCR (2014).

[10] See http://wayback.archive-it.org/1365/20170227105941/http:/www.cpt.coe.int/en/workingdocs.htm.

[11] Taken from Kellet (2014). A special chapter on Tasers was included in the CPT (2010), pp. 33–39.

as women, juveniles, foreigners, etc. Different categories of offenses can be important. Moreover, how to interview "dangerous" detainees can be an issue because CPT interviews detainees without the staff of the institution being present in the room and without detainees being handcuffed. Interviews in remand prisons are of high value, especially when detainees have recently arrived from police stations and their experience with the police during apprehension and interrogation is fresh. Moreover, there should be a medical checkup of every detainee on arrival, which should document possible injuries and narratives by the detainee on what caused them.

Before visiting, the delegation would study relevant legislation, administrative decrees, and all types of documentation relating to criminal law, code of criminal procedure, police law, internal instructions, etc. Given that often not all members of the delegation speak the language of the country, they are supported by experienced translators.

During the visit of a police institution, the Committee seeks to understand all steps from the apprehension of a person to the transport to a police station and the treatment at the police station, including interrogation (see below). The legal justification of detention would be reviewed. The Committee interviews detainees and talks with staff as to whether there are any allegations, especially regarding credible allegations of a disproportionate use of force, threat to use force, and/or verbal abuse in the entire process. It would look at complaint and investigation avenues during detention, both disciplinary and criminal law investigations.

Delegation members review detention, use of force, and complaint registers, including relevant documentation (reports, investigations, actual complaints, medical records) and seek to understand how cases of police (or other) violence are being received, investigated, and decided by the police, prosecutors, courts, and other institutions that receive complaints.[12] This includes increasingly looking at electronic documentation.

14.2.1 Interrogation

In the light of the need to prevent ill-treatment, the CPT has described the adequate interrogation standards as follows:

> Access to a lawyer for persons in police custody should include the right to contact and to be visited by the lawyer (in both cases under conditions guaranteeing the confidentiality of their discussions) as well as, in principle, the right for the person concerned to have the lawyer present during interrogation.[13]

> . . .the CPT considers that clear rules or guidelines should exist on the way in which police interviews are to be conducted. They should address inter alia the following matters: the

[12]National Prevention Mechanism under the UN Optional Protocol to the UN Convention against Torture, police complaint bodies, Ombudsman institution(s) etc.

[13]CPT (2015), p. 6, para 38.

> informing of the detainee of the identity (name and/or number) of those present at the interview; the permissible length of an interview; rest periods between interviews and breaks during an interview; places in which interviews may take place; whether the detainee may be required to stand while being questioned; the interviewing of persons who are under the influence of drugs, alcohol, etc. It should also be required that a record be systematically kept of the time at which interviews start and end, of any request made by a detainee during an interview, and of the persons present during each interview. The CPT would add that the electronic recording of police interviews is another useful safeguard against the ill-treatment of detainees (as well as having significant advantages for the police).[14]

> . . .fundamental safeguards granted to persons in police custody would be reinforced (and the work of police officers quite possibly facilitated) if a single and comprehensive custody record were to exist for each person detained, on which would be recorded all aspects of his custody and action taken regarding them (when deprived of liberty and reasons for that measure; when told of rights; signs of injury, mental illness, etc; when next of kin/consulate and lawyer contacted and when visited by them; when offered food; when interrogated; when transferred or released, etc.). For various matters (for example, items in the person's possession, the fact of being told of one's rights and of invoking or waiving them), the signature of the detainee should be obtained and, if necessary, the absence of a signature explained. Further, the detainee's lawyer should have access to such a custody record.
>
> Further, the existence of an independent mechanism for examining complaints about treatment whilst in police custody is an essential safeguard.[15]

> The CPT has on more than one occasion, in more than one country, discovered interrogation rooms of a highly intimidating nature: for example, rooms entirely decorated in black and equipped with spotlights directed at the seat used by the person undergoing interrogation. Facilities of this kind have no place in a police service. In addition to being adequately lit, heated and ventilated, interview rooms should allow for all participants in the interview process to be seated on chairs of a similar style and standard of comfort. The interviewing officer should not be placed in a dominating (e.g. elevated) or remote position vis-à-vis the suspect. Further, colour schemes should be neutral.[16]

> In certain countries, the CPT has encountered the practice of blindfolding persons in police custody, in particular during periods of questioning. CPT delegations have received various - and often contradictory - explanations from police officers as regards the purpose of this practice. From the information gathered over the years, it is clear to the CPT that in many if not most cases, persons are blindfolded in order to prevent them from being able to identify law enforcement officials who inflict ill-treatment upon them. Even in cases when no physical ill-treatment occurs, to blindfold a person in custody - and in particular someone undergoing questioning - is a form of oppressive conduct, the effect of which on the person concerned will frequently amount to psychological ill-treatment. The CPT recommends that the blindfolding of persons who are in police custody be expressly prohibited.[17]

There are many other standards for law enforcement agencies, which can be found in the CPT Standards published on the CPT website.

[14] Ibid., p. 7, para 39.

[15] Ibid., p. 7, paras 40–41.

[16] Ibid., p. 10, para 37.

[17] Ibid., p. 10, para 38.

14.2.2 Use of Force

The Committee would look at the legal provisions of use of force by the police and internal orders, including which type of weapons, such as truncheons, gas or pepper spray, firearms, Taser, etc., exist, and the use of which would have to be registered separately by the police; what law and internal instructions say regarding the right to use them; and whether there were cases about disproportionate use of force in the recent past, including complaints received, investigations undertaken, outcome, and consequences for training.

14.2.3 The Example of Electrical Discharge Weapons (EDW), Taser

There has been a long public discussion about advantages, risks, and impact of the use of EDW, especially Taser, on the police. In 2010, the Committee included a special chapter on EDW in its 10th General Report. According to the introduction, it was "becoming increasingly common in countries visited by the CPT for police officers and other law enforcement officials to be issued with electrical discharge weapons (EDW), and the presence of such devices in places of detention (in particular prisons) has also been observed by the Committee in certain countries. There are various types of EDW, ranging from electric shock batons and other hand-held weapons requiring direct contact with the person who is the intended target to weapons capable of delivering dart-like projectiles which administer an electric shock to a person located at some distance."[18]

The use of EDW by law enforcement and other public officials is referred to as a controversial subject, pointing to conflicting views as regards both the specific circumstances in which resort to such weapons can be justified and the potential negative effects on health that the weapons can cause. The CPT stated that it had on several occasions gathered credible evidence that such weapons had been exploited to inflict severe ill-treatment on persons deprived of their liberty, and it had frequently received allegations that detained persons have been threatened with ill-treatment via the use of EDW.

While understanding the wish of national authorities to provide their law enforcement officials with means enabling them to give a more graduated response to dangerous situations, in the CPT's view there was no doubt that the possession of less lethal weapons such as EDW might in some cases make it possible to avoid recourse to firearms. However, since electrical discharge weapons can cause acute pain and are open to abuse, any decision to issue law enforcement officials or other public servants with EDW should be the result of a thorough debate at the level of

[18]CPT (2015), para 67.

the country's national executive and legislature. Further, the criteria for deploying EDW should be both defined by law and spelled out in specific regulations.[19]

The CPT considered "that the use of electric discharge weapons should be subject to the principles of necessity, subsidiarity, proportionality, advance warning (where feasible) and precaution. These principles entail, inter alia, that public officials to whom such weapons are issued must receive adequate training in their use. As regards more specifically EDW capable of discharging projectiles, the criteria governing their use should be directly inspired by those applicable to firearms."[20]

The Committee recommended that "the use of EDW should be limited to situations where there is a real and immediate threat to life or risk of serious injury. Recourse to such weapons for the sole purpose of securing compliance with an order is inadmissible. Furthermore, recourse to such weapons should only be authorised when other less coercive methods (negotiation and persuasion, manual control techniques, etc.) have failed or are impracticable and where it is the only possible alternative to the use of a method presenting a greater risk of injury or death."[21]

Regarding the application of these principles to specific situations, the CPT came out clearly against the issuing of EDW to members of units responsible for deportation operations vis-à-vis immigration detainees, expressed strong reservations about the use of electric discharge weapons in prison (and *a fortiori* closed psychiatric) settings. Only very exceptional circumstances (e.g., a hostage-taking situation) might justify the resort to EDW in such a secure setting, and this is subject to the strict condition that the weapons concerned are used only by specially trained staff.[22]

14.3 Impact of the Work of the CPT: Some Cautious Observations

CPT publishes reports about its visits, an annual General Report, and working documents but not evaluation or impact reports.[23]

This section brings together information on factual changes in police, remand and foreign immigration establishments collected by the CPT Secretariat.[24] Examples refer to positive developments mentioned in CPT visit reports and government

[19] See note 16, para 68.

[20] See note 16, para 69.

[21] See note 16, para 70.

[22] See note 17, para 71.

[23] For CPT General Reports, see http://www.cpt.coe.int/en/docsannual.htm.

[24] I am very grateful to Patrick Müller at the CPT Secretariat (Research, information strategies and media contacts) for the information that follows.

responses, without a claim to undertake causal analysis and to explain internal decision making within governments and parliaments at a certain point of time, given the lack of research referred to earlier. In the second subsection, references to the CPT in policy papers and academic research are being reviewed. As far as this author is aware, few works have looked in detail at the recommendations of the Committee over a given period of time, the real situation in the country concerned, and possible or even likely factors that influenced decision making at the level of government to take reform action, let alone look at the role/impact of academia and civil society groups and the media, as well as regional and international organizations. To do this more seriously, one would have to devise a research methodology that in social science is a major challenge for the researcher concerned. I am aware of only a few works who undertook such an effort.[25]

14.3.1 Changes in Police, Remand and Foreign Immigration Establishments

In Albania, the CPT called upon the Albanian authorities to take all necessary measures to ensure that all prisoners in pretrial detention centers are granted at least one hour of outdoor exercise per day, including on Sundays. In response, the Albanian authorities confirmed that this recommendation would be implemented in the entire prison system.[26]

Moreover, the CPT severely criticized the poor quality of the health care provided to prisoners at Korca Pre-Trial Detention Centre and requested that the Albanian authorities carry out a comprehensive review of the health-care service in the establishment. In response, the Albanian authorities indicated that, following a review of the health-care service at Korca, a disciplinary procedure had been initiated against the establishment's doctor, which resulted in his dismissal. Subsequently, a new doctor was recruited on a full-time basis.[27]

In Bulgaria, the CPT called upon the authorities to transfer without delay the investigation detention facility in Plovdiv—in which the conditions could be fairly described as inhuman and degrading—to an appropriate building. In response, the Bulgarian authorities indicated that a new investigation detention facility was opened in Plovdiv subsequently and that conditions in it complied with international standards.[28]

In Cyprus, after recommendations by the CPT to establish an independent and effective law enforcement accountability mechanism, the authorities set up an Independent Authority for the Investigation of Allegations and Complaints Against

[25]See for example regarding the prison system in Germany, Cernko (2014).

[26]Visit 2005, CPT/Inf (2006) 24, par. 68. Government response CPT/Inf (2006) 25, p. 9.

[27]Visit 2008, CPT/Inf (2009) 6, par. 32.

[28]Visit 2008, CPT/Inf (2010) 29, par. 50, Government response CPT/inf (2010) 30, p. 17.

the Police vested with responsibility for investigating police misbehavior of any kind.[29] Unfortunately, problems continued.

In France, the Minister of Interior issued in 2003 a detailed instruction on the "human dignity of persons in police custody,"[30] referring directly to the conditions found by the CPT during its previous visits. It deals with a wide range of topics, including material conditions, handcuffing, body searches, etc.

During its 2012 visit in Italy, material conditions were found to be poor in the cells at the Florence and Palermo State Police Headquarters (Questura). In their response, the Italian authorities stated that these cells had been taken out of service and that alternative—more suitable—places of detention had been found.

The male unit at the Bologna Identification and Expulsion Centre (CIE) was found to be in a poor state of repair, apparently due to repeated acts of vandalism by detainees. In their response, the Italian authorities informed the Committee about the temporary closure of the CIE in Bologna in order to carry out renovation work.[31]

The CPT recommended to the Liechtenstein government that persons detained by the police have the—formally recognized—right to inform a relative of their situation from the very outset of their deprivation of liberty. In their response, the Liechtenstein authorities indicated that the adoption of a new legal provision on this subject was foreseen. Article 128a of the Code of Criminal Procedure, under which persons apprehended must be informed, from the moment of their apprehension or immediately afterward, of their right to notify a relative or other trusted person, as well as their lawyer, came into force on 1 January 2008.[32]

During its 2011 visit to Malta, the CPT noted that at both Lyster and Safi Detention Centres for foreigners, material conditions have improved since the previous visit. In particular, at Lyster Barracks, these improvements are significant: the Hermes Block, which had been in a very poor state of repair at the time of the 2008 visit, had been completely refurbished, and the Tent Compound, which had also been criticized by the Committee in the report on the 2008 visit, had been dismantled. It is noteworthy that all foreign nationals received personal hygiene products on a regular basis and were also supplied with clothes and footwear.[33]

In the Republic of Moldova, the CPT made recommendations aimed at improving the effectiveness of the investigations into allegations of police ill-treatment in the context of the postelection events of April 2009. After the Committee's visit, a number of criminal proceedings have been opened against police officers, including members of the "Fulger" special police force. Further, a criminal investigation has

[29]Visit 2008, CPT/Inf (2012) 34, par. 25.

[30]Circulaire du 11 mars 2003 du ministre de l'intérieur relative à la garantie de la dignité des personnes placées en garde à vue. See "M. Sarkozy veut une garde à vue conforme à la "dignité humaine", Le Monde, 12 March 2003, http://www.lemonde.fr/societe/article/2003/03/12/m-sarkozy-veut-une-garde-a-vue-conforme-a-la-dignite-humaine_312672_3224.html.

[31]Visit 2012, CPT/Inf (2013) 32, paras 21, 22, 29.

[32]Visit 2007, CPT/Inf (2008) 20, para 19.

[33]Visit 2011, CPT/Inf (2013) 12, para 55.

been initiated against the persons who served as Minister of Internal Affairs and Head of the Chişinău General Police Directorate at the time of the events. Moreover, in order to ensure better identification, members of the "Fulger" special police force have been instructed to wear badges and an individual identification number during operations.[34]

The CPT recommended to the Dutch authorities to cease using the boats/barges "Kalmar," "Rotterdam," and "Stockholm" for the detention of irregular migrants as they provided unsuitable conditions. In their response, the Dutch authorities indicated that the "Stockholm" boat had already been taken out of service and that the "Kalmar" boat would have to remain open until the middle of 2011, when a new detention center on the grounds of Rotterdam Airport was scheduled to open. During its subsequent visit, the CPT noted that these boats used as facilities for holding immigration detainees had been taken out of service.[35]

In the United Kingdom, in 1997, the CPT criticized the then Police Complaints Authority. During 1996/97 as a result of complaints, only one conviction of a Metropolitan Police officer had occurred. Around 2000 complaints for assault were received per year by that body. It was closed down and replaced by the "Independent Police Complaints Commission."[36]

In response to the CPT's recommendation that the necessary steps be taken to ensure that all 17-year-olds detained by the police are treated as juveniles and not as adults, the United Kingdom authorities responded that as part of the review of the Police and Criminal Evidence Act 1984, the government proposed to extend the definition of "juvenile" to under 18.[37]

14.3.2 Conference Reports and Academic Papers

As mentioned earlier, there are not many investigations into the recommendations and impact of the CPT work from social science and law. From a review undertaken by the author, the following sources discuss the impact of the CPT work.

The two NGOs Redress and the European Center for Constitutional and Human Rights reported in a conference report in 2012 that "following the CPT visit to Cyprus in 2004 and the subsequent 2008 report, the Government of Cyprus approved a budget for the improvement of existing police cells and the construction of new ones. A number of other recommendations were also acted on, including the creation of an Independent Authority for the Investigation of Complaints against

[34]Visit 2009, CPT/Inf (2009) 37, para 67.

[35]Visit 2007, CPT/Inf (2008) 2, para 58, Government response CPT/Inf (2009)7, p. 18., Visit 2011, CPT/Inf (2012) 21, para 55.

[36]See the report of the CPT on its 2001 visit to the United Kingdom (CPT/Inf (2002) 6), para 19–22 and 1997 visit (CPT/Inf (2000) 1), para 28.

[37]Visit 2008, CPT/Inf (2009) 30, para 19.

the Police and the passing of the Law of the Rights of Arrested and Detained Persons of 2005."[38]

A study by the NGO Association for the Prevention of Torture (APT) from 1999 concluded that "in 1994 the European Committee for the Prevention of Torture (CPT) visited Hungarian places of detention, and as a consequence of its report another 23 police jails were closed down. The CPT's visit had a considerable impact on the democratic transformation and humanisation of the Hungarian criminal justice system, particularly on the way pre-trial detention is implemented."[39]

A study from 2009 reported that the CPT has had some positive impact on the treatment of illegal immigrants in Italy held in temporary detention centers: "The results of visits conducted by the CPT reveal deficiencies in the entire system, even though the situation seems to have improved since the CPT's first visit."[40] This appeared to contrast with Spain in the early 2000s. Morentin et al. compared the treatment of Basque prisoners arrested under antiterrorist legislation in the early 1990s and early 2000s. They concluded that only little improvements have taken place during that time period despite several visits by the CPT and the United Nations Special Rapporteur on the question of torture, which formulated clear recommendations to improve human rights: "The overwhelming number of allegations must be seen as a problem itself, indicating that the internal and international measures of control of torture have failed."[41]

A new comprehensive investigation of prevention of torture strategies was published in 2016, which certainly will enrich the debate. It offers 14 case studies on countries.[42]

14.4 Conclusions

For many citizens, police officers represent the link of society with the state. Errors and mistakes can easily happen. It is not necessarily known or clear for the average citizen when and to what degree police can use coercion legitimately, especially during apprehension. In serious crime cases, police might be placed under considerable pressure by politicians, the public and especially the media to come up quickly with results of investigations, identify potential culprits. State prosecutors should bring them very quickly to trial, a situation where the use of psychological

[38]Redress/European Center for Constitutional and Human Rights, Torture in Europe (2012), p. 43.

[39]APT (1999), p. 53, referring to Kover, Agnes Dr : CPT Standards in Action – A Critical Review of the CPT's Visit to Hungary, paper presented at the joint APT/COLPI "Central European Seminar on Prevention of Torture", 18–19 June 1998.

[40]Danisi (2009), p. 115.

[41]Morentin et al. (2008), pp. 88, 94.

[42]See Carver and Handley (2016).

pressure, coercion, and threat of or use of violence might be seen as an option to get quick results.

The role of the CPT and other bodies in torture prevention should not be seen as posing an obstacle to the important and necessary work of the police. Rather, they assist in helping to safeguard fundamental rights, which every person should be able to enjoy according to the constitution and national laws of the country concerned, as well as respecting legal obligations under European and international human rights treaties. CPT works to verify what really happens on the ground in different categories of institutions. Therefore, its regular and ad hoc visits to 47 countries on a regular basis with wide-ranging powers allow a rather precise reading of a local situation at a specific point in time.

Clearly, the CPT is not a social science research project or a human rights organization doing national human rights studies or reports. But it looks at the country situation in great detail; studies relevant documentation, public or confidential; and arrives well prepared at a country visit, formulating findings, analysis, and recommendations for now 28 years.

Visits might be occasionally a bit difficult or intriguing for police officers on the ground, with little knowledge of the Council of Europe and/or the CPT. After all, foreigners arrive suddenly, often unannounced, at the police station in a given country, with considerable powers of access and interviewing people concerned—usually a rare experience for police staff. At times, there is a natural tendency of security institutions not to be as open as wished for by the visiting experts monitoring the situation. However, in the great majority of cases, irritations can be solved, sometimes with the help of the liaison officer in the relevant ministry.

In terms of the dimension of the problem of torture and ill-treatment, the CPT comes across quite a number of situations where allegations of ill-treatment are being made and avenues of investigating procedures do not function well, whether disciplinary or criminal law avenues are pursued. In a number of countries, it is confronted with prima facie torture/serious ill-treatment cases, often in the context of fighting organized crime, terrorism, sometimes lesser crimes, which might affect traditionally vulnerable groups that have very little possibilities to complain, let alone be taken seriously when complaining—such as the Roma.

The emergence of National Preventive Mechanisms under the Optional Protocol to the United Nations Convention Against Torture has helped to have now frequent national visits that are particularly effective if NPMs receive sufficient resources and have a full mandate, including powers to undertake visits. To do this properly, there needs to be a good preparation and training on how to do visits, a good documentation, and reporting process to the relevant political bodies, parliament, and the public.

In some countries that traditionally did not lean toward having additional bodies to deal with complaints against the police beyond the courts, complaints bodies have been established recently, with different designs, which offer an additional opportunity for prompt and fair investigations into complaints.[43]

All these traditional and more recent developments toward monitoring police behavior in a more regular, continuous manner should help to protect the individual against unnecessary and disproportionate use of force or coercion—and the police against unjustified allegations. They help to foster an identity of the police as a protector of the rule of law and fundamental human rights even in sometimes challenging circumstances and thereby assist in strengthening, sometimes reestablishing, trust between society and state.

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Chapter 15
The Police and the Subcommittee on Prevention of Torture of the United Nations. National Preventive Mechanisms

Aneta Stanchevska

Contents

Abstract Despite their absolute prohibition, acts of police torture or other ill-treatment persist in many countries. More than one decade ago, the Subcommittee on Prevention of Torture (SPT) has been created, which has the power to visit police stations and other institutions all over the world, in order to support governments in fighting and preventing police abuse. In addition, the Optional Protocol to the Convention Against Torture also introduces National Preventive Mechanisms. In this chapter, the author describes the work of the SPT and shares some experiences regarding torture prevention activities in the Republic of Macedonia.

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15.1 Introduction

One of the primary responsibilities of the police in a democratic society is to protect and respect the fundamental rights and freedoms of the individual. The police, in exercising their main function as protector of the rights and freedoms of citizens, may at times, while applying police powers, appear to also be violating and restricting human rights and freedoms. For these reasons, police officers need to strictly respect the right of life and act humanely toward any person while undertaking measures and activities within their powers. There should not be any difference in behavior toward a person who is seeking protection by the police or a person who violates the law and has perpetrated a crime. While fulfilling their duties, police officers have the obligation to comply with the criteria of legality, proportionality, and nondiscrimination. It furthermore is necessary that every police officer is assuming his/her individual responsibility for his/her actions during the execution of police duties.

Basically, in any democratic society, the police are a public service for citizens and are accountable to them. Therefore, they are often exposed to criticism coming from the public, the media, or the defenders of human rights related to inadequate conduct or violations of human rights.

In the past, the police used to protect mainly the state's interests; nowadays its main function is service for the citizens and their rights. In a democratic country, the police protect the fundamental rights of its citizens, maintain public peace and order, take care of state security, detect and prevent criminal activities, and at the same time represent a service to every individual.

All of this is based on domestic legislation and according to ratified international agreements. The role of the police is to conduct and respect the laws, especially ones that protect and maintain human rights.

Based on this assumption, Article 8 of Macedonia's highest state act, the Constitution of the Republic of Macedonia, can be emphasized—within it, it is clearly stated that human rights and freedoms of citizens are one of the basic fundamental values of the constitutional order of the Republic of Macedonia.

Thus, Article 142 of the Criminal Code of the Republic of Macedonia defines what can be classified as torture and other cruel, inhuman, or degrading treatment and punishment and which repressive measures are to be applied for perpetrators. The penalties for this offense range from one to five years in prison. However, if committing the violation results in serious physical injury or other especially severe consequences for the victim, the offender shall be punished with imprisonment from one up to 10 years.

Additionally, Article 143 of the same Code stipulates that harassment while performing one's duty shall be punished with imprisonment from 6 months up to 5 years for the one who, while performing his duty, mistreats another, frightens and insults him/her, or generally treats another in a way that humiliates human dignity.

15.2 The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and Its Instruments

The prohibition of torture, according to international law, is an imperative norm. The absolute prohibition of torture is provided in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as in Article 3 of the European Convention on Human Rights (ECHR).

The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) is a new kind of treaty body in the United Nations human rights system. It has a preventive mandate focused on an innovative, sustained, and proactive approach toward the prevention of torture and ill-treatment. The SPT started its work in February 2007.

15.2.1 The Adoption of the Optional Protocol to the Convention Against Torture (OPCAT) and Its Application in Macedonia

The SPT was established according to the provisions of a treaty, the Optional Protocol to the Convention Against Torture (OPCAT). The OPCAT was adopted on December 2002 by the General Assembly of the United Nations and entered into force in June 2006.

The Optional Protocol is a revolutionary step and represents significant progress in the fight against torture on an international level. By this step, not only will a new international body gain access to all places of detention in order to be able to timely detect risks, gaps, and deficiencies that might hinder the prevention of acts of torture, but it also strengthens the role of the state in the area of prevention of torture by inserting an obligation to establish national preventive mechanisms.

The Optional Protocol also obliges each state party to form an independent national body for the prevention of torture and ill-treatment on a national level. Each state party must establish these national preventive mechanisms within one year after OPCAT's entry into force. On the 30th of December 2008, the Macedonian Assembly ratified the Optional Protocol, and in accordance with it, the Ombudsman of the Republic of Macedonia was appointed to act as the National Preventive Mechanism in the Republic of Macedonia.

According to the Optional Protocol, the SPT has unrestricted access to all places of detention, their installations and facilities and to all relevant information relating to the treatment of persons and to conditions of detention. It has a preventive mandate focused on an innovative, sustained, and proactive approach toward the prevention of torture and ill-treatment. The SPT must also be able to undertake

private and confidential interviews with persons deprived of their liberty and any other person who, in the SPT's opinion, may supply it with relevant information.

The goal is a timely indication of the risks, gaps, and deficiencies aimed at preventing acts of torture and imposes an obligation that each state establishes its own National Preventive Mechanism (NPM). Therefore, the SPT also assists NPMs in strengthening their power, independence, and capacities and strengthening safeguards against ill-treatment of persons deprived of their liberty.

The Optional Protocol is very important because within it, the definition of "place of detention" is very broadly set. This approach allows SPT experts to conduct visits and check the conditions and treatment of persons in so-called less traditional institutions, where there are restrictions on freedom of movement, such as detention centers (e.g., pretrial detention centers, immigration detention centers, juvenile justice establishments, etc.), mental health and social care institutions, and any other places where people are or may be deprived of their liberty. This widely set jurisdiction requires from the state signatory of the Optional Protocol to provide appropriate conditions and guarantee unrestricted access to all places of detention, according to the assessment and to the free choice of the members of the SPT.

15.2.2 The SPT's State Visits

The SPT is guided by five core principles: confidentiality, impartiality, nonselectivity, universality, and objectivity. The OPCAT is based on the principle of cooperation between the SPT, each state party, and the NPMs. During its visits, the SPT's members meet state officials, NPMs, representatives of national human rights institutions, nongovernmental organizations, as well as any other person who can provide information relevant to its work.

The SPT undertakes country visits during which a delegation of its members visits places where persons may be deprived of their liberty. During its visits, the SPT checks the conditions of detention; the detainees' daily life, including the manner in which they are treated; the relevant legal and institutional framework; and other questions that may be related to the prevention of torture and ill-treatment. At the end of each visit, the SPT draws up a written report with recommendations and observations for the respective state, requesting a written response within 6 months of its receipt. This then triggers a further round of discussion regarding the implementation of the SPT's recommendations and thus begins the process of continuous dialog. The SPT visit reports are confidential, though states parties are encouraged to make them public documents, as is permitted by the OPCAT.

During the visit, the SPT delegation has meetings with senior officials of the ministry responsible for law enforcement (police) and with senior officials of the ministries responsible for the custody of persons held in pretrial detention, prison, military detention, immigration detention, psychiatric or social care institutions, or any other place of deprivation of liberty.

At the end of the visit, the SPT delegation has a final meeting with senior officials of the relevant ministries and bodies. The meeting is an opportunity for the SPT delegation to present its preliminary observations and for a confidential discussion concerning the visit, including issues related to national preventive mechanism(s) and to the treatment of persons deprived of their liberty in the places visited. This meeting is an opportunity to identify issues and situations requiring immediate action, as well as other elements of national law and common national practice requiring improvement in order to strengthen the safeguards against ill-treatment for persons deprived of their liberty. The authorities may wish to provide immediate feedback on some issues.

After the visit, but before the adoption of the visit report, the authorities will be invited to provide information about progress made after the visit, related to some of the issues raised during the final talks.

15.2.3 The Application of the SPT's Visit Report's Recommendations on a National Level

As aforementioned, a confidential report on the visit is drawn up and adopted by the SPT for transmission to the state party after the visit. The state party is requested to respond to the recommendations made in the report and to any requests for further information within a time frame specified in the letter, which was submitted together with the report. The SPT visit report remains confidential until the state party requests its publication, together with any comments the state party might wish to add.

During the implementation of obligations under OPCAT at the national level, special focus should be placed on the monitoring of the implementation of recommendations, which would contribute to achieving the objective of the Optional Protocol—preventing torture and other inhuman or degrading treatment or punishment.

The NPM in the Republic of Macedonia, according to the competencies arising from the OPCAT, has access to all information concerning the number of persons deprived of their liberty in places of detention, as well as the number of places and their location. It furthermore has access to all information regarding the treatment of those persons, as well as their conditions of detention. It has access to all places of detention and their installations and facilities and has the possibility to conduct private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the NPM believes may supply relevant information. Additionally, its members have the liberty to choose the places they want to visit and the persons they want to interview and have the right to maintain contacts with the Subcommittee on Prevention of Torture (SPT) to provide the SPT with relevant information and to meet with it.

15.2.4 The Adaptation of a Standard Operational Procedure (SOP) in Macedonia

On the 14th of May 2014, the Ombudsman National Preventive Mechanism (NPM), in accordance with the competences arising from the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Law on the Ombudsman and the Rules of Procedure of the Ombudsman, and on request of the Ministry of Internal Affairs, submitted an opinion regarding the proposed standard operative procedure for treatment of persons whose right to freedom of movement is limited.

In the opinion, it was stressed that the proposal for standard operative procedures, prepared by the responsible ministry, defines the standards and procedures during detention and at the same time includes the recommendations of the National Preventive Mechanism.

The basic goal of this SOP is to harmonize and unify the procedures for police officers who work with detained persons, from the moment a person is arrested, deprived of liberty, i.e. detained in a police station, until the time his/her case is handed to the competent court, i.e. the release of such a person from the police station, by legal acts and bylaws.

The proper application of the guidelines provided in this SOP will reduce or eliminate possibilities for abuse of police powers during the arrest, deprivation of liberty, and detaining of citizens and will thus contribute to reducing the concerns of the National Prevention Mechanism and the Committee for the Prevention of Torture of the Council of Europe related to the legal provisions on treatment of detainees.

15.3 Macedonia's Progress Toward Full Respect of Human Rights

In the Republic of Macedonia, under the Law on the Police (LoP), "the main function of the Police is to protect and respect the fundamental human rights and freedoms of citizens, guaranteed within the Constitution, laws and ratified international treaties. It is to protect the legal order, prevent and disclose criminal acts, undertake prosecution measures for these acts, and maintain the public peace and order in society" (Art. 3, LoP).

Since its independence, the Republic of Macedonia has made significant progress toward guaranteeing fundamental human rights and freedoms for its citizens, and the Ministry of Internal Affairs has played a key role in this development. However, it is necessary to continuously work on the harmonization and improvement of standards in order to provide for an improvement and further alignment with international and domestic human rights standards.

In this context, the Republic of Macedonia, as a signatory of the European Convention on Human Rights and its Article 2, which stipulates the inviolable "right to life," and Article 3, which explicitly prohibits anyone to be subjected to torture or to inhuman or degrading treatment or punishment, has harmonized its national legislation with the European Convention on Human Rights and provides for strict sanctions for such offenses.

15.3.1 Police Powers and Their Usage in Actual Police Work

Despite the abovementioned legal framework for the application of police powers, it needs to be emphasized that in all stages of the procedure for restricting the right of freedom of movement of individuals, there is a danger of police officers exceeding their police powers in a way that could be specified as ill-treatment or deprivation of liberties of arrested and detained persons.

Practical experiences show that, in certain situations, police officers are forced to use means of coercion that sometimes exceed legal limits. Most often, the abuse of power happens in cases where a person is deprived of liberty or at the moment when the person is brought to a police station, before being allowed access to a lawyer and before he/she is brought in front of the competent judicial authority. Furthermore, abuses are possible during the process of collecting information from citizens, especially during the interrogation of suspects who may be subjected to various forms of psychological and physical pressures from police officers. If police officers, in the undertaking of measures and actions, use unlawful or excessive use of force, it directly violates human dignity and the physical and mental integrity of the person.

Here, some observations about police powers are warranted. Police powers allow for persons empowered by law to take action with the use of measures, methods, and means to prevent the committing of offenses or to detect the perpetrators of such acts.

Police officers independently evaluate which means will be used in each case. During the procedure, in order to accomplish their official duty, police officers must use the most moderate means possible to ensure that the consequences of the use of police powers will be minimal.

Making the decision when, where, and to what extent police powers will be used is not an easy one, and often, in different circumstances in actual police work, there is a risk of wrong assessment or breach of power by police officers.

Protecting the life and personal safety of citizens, i.e. providing a high level of safety in the community, is a task that requires the police organization and police officers to use special powers.

Police powers are used in situations when a norm of conduct stipulated by law is disturbed. By doing so, there is a rule for applying the most moderate means possible to achieve the needed outcome. With the establishment of police powers and when specifying the grounds for their application, the legislator has not defined

the cases in which certain powers are to be applied since this would not be possible. However, based on professional knowledge, the legal grounds have authorized law enforcement officers to be able to evaluate in which particular case certain means will be used. This right is also an obligation for police officers to properly assess the situation and use the most appropriate police power.

Making the decision is not an easy one to make. Sometimes, police officers might make a decision to use means of coercion due to the absence of time, in circumstances where there was no opportunity for advanced preparation or evaluation of the situation, or because of the inevitable risk of underestimation or overestimation of the situation or when there is a misconception of the individual case's conditions.

The methods of police work include not only a threat of force but also the direct application of force or usage of means of coercion, for example physical force, the baton, etc., including firearms. The usage of such means is part of the working methods of police forces worldwide, and without them performing police tasks is difficult.

Due to such usage of means of coercion in the activities of the police or the forceful character of parts of the police's functions, it is important for the legislator to precisely regulate the situations in which coercion may be applied, as well as other issues related to the application of means of coercion by the police. The precise regulation of these issues will narrow the discretionary power of police officers, which in the field of police powers is the most sensitive issue in police operations. The highest amounts of complaints against the police are linked to accusations of the abuse of police powers. Stipulating precise standards for the application of powers by the police agencies is significant due to the abovementioned legal security of citizens and also because of the actual need to implement effective control over the use of force by the police, as well as the legal safety of law enforcement officers who are authorized to use these assets.

A democratic society is sensitive to the use of powers given to their representatives in the government. The nature of functions aimed at the implementation of the law to defend public peace and order and the manner in which those functions are carried out have a direct impact on the quality of life for the individual and for society as a whole. Any abuse of power causes a direct public response. Hence, these relations require the authorities to deserve public support and also require the use of powers to be directly proportional to the degree of the need of their application.

Therefore, the use of power should be viewed from two aspects:

- first, how and within what limits can the use of power be placed in the legal system, how to determine the margins of these powers' organization, and
- second, which is the limit of legally based, socially justified, and permissible use of force and, in defining this limit, how to avoid endangering the freedom, rights, and other social and individual values and goods.

To resolve this issue, we need to start from the rule of law and the principles that govern it. The principle of legality should ensure protection of citizens and their

freedom and rights from excessive, unnecessary, or unlawful repression by the state bodies and strict application of the rules protecting freedom and rights of the individual, one's social, political, legal, and other positions in society.

The second important principle for the use of police force is the legitimacy of repression. While exercising their responsibilities, the police may use force in a type and volume that is necessary to overcome resistance and to reestablish the disturbed peace and order, and nothing more.

If repression is necessary, it should be regulated by the legal standards and laws concerning persons entitled to the use of power.

Furthermore, an unsuitable application of force by police officers must be perceived as a form of misconduct and render negative consequences. Hence, it follows that coercion as a method and means applied by the police is not a rule but an exception, not a system or style of work but a necessity in some specific cases that otherwise cannot be resolved.

Criticism addressed at the police related to the abuse of power and violations of human rights during police procedure has proven correct in many cases. In democratic societies, such problems are overcome with the establishment of institutions/bodies, which carry out internal and external oversight and control of the police.

15.3.2 Oversight of Police Powers in Macedonia

International human rights law requires from the state to establish institutions that deal with the complaints of individuals in regard to violations of human rights in police procedure and provide a solution for them. The states now have established a variety of mechanisms, internal and external, that carry out oversight and control of the police in terms of respect for human rights.

In order to protect human freedom and rights and the overall integrity of individuals whose right to freedom of movement is limited, within the Ministry of Internal Affairs of the Republic of Macedonia there operates the Department for Internal Control, Criminal Investigation and Professional Standards, which is organized according to international standards, separated from the police, and reports directly to the Minister of Interior.

This positioning of the Department enables it to conduct independent checks of the work of all organizational units of the Ministry. In all cases, where a notice or a complaint is submitted to the Department, or if the Department independently detects excessive use of force, it explores all allegations against police officers for unfounded use of means of coercion and will take appropriate measures of a disciplinary kind or demand the assuming of responsibility by the perpetrators and prosecutes them accordingly.

Within its competencies, the Department carries out controls at police stations in the premises for the detention of persons and examines the records of detainees, which are kept in police stations. The department continuously carries out controls

regarding the respect and protection of freedom and rights of persons deprived of their liberty and controls the conditions in detention facilities.

Furthermore, in order to strengthen the capacities of the Department to deal with unprofessional behavior of police officers, together with the experts engaged by the Office of the Council of Europe, the following procedures have been prepared and adopted: the Standard Operational Procedure for carrying out controls in a police station in relation to the treatment of arrested and detained persons and persons deprived of their liberty and a standard operating procedure for action in cases of improper behavior, use of force, and other means of coercion by the police.

For the Ministry of Interior, it is crucial that, at each stage of police procedure, human rights and the dignity of persons are guaranteed to those who have been temporarily deprived of their right to free movement.

Additionally, the Ministry of Interior, in cooperation with experts engaged by the Council of Europe, has developed and promoted the concept of human rights, which determines the Ministry's strategic direction in terms of improving the already achieved level of respect and protection of human rights. This concept is designed to be a basic document for the Ministry and the police regarding the policy and procedures in terms of human rights.

15.4 Conclusions

It is an obligation of any society to mobilize all institutional capacities to protect human rights and freedoms, including the rights of citizens who have a limited right of freedom and movement.

It would be ideal if the police succeeded in achieving their goals without any use of force. But when power must be used, it should be proportional and adequate to solve the problem.

Nowadays, the world wants to minimize repressive police measures and to increase the police force's preventive role in order to respect human rights during police procedures.

It stands to hope that the experiences, considerations, and observations of international dialogs will additionally contribute to increasing the level of respect for human rights and freedom of individuals who have limited freedom of movement and will be appropriately applied to enhance the responsible and professional conduct and performance in police institutions.