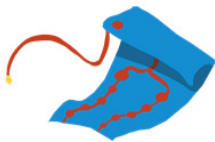




# THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND POLICING



A handbook for police officers  
and other law enforcement officials

**Jim Murdoch**  
**Ralph Roche**

Funded  
by the European Union  
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Council of Europe Publishing

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## Jim Murdoch

Professor Jim Murdoch joined the School of Law at the University of Glasgow after qualifying as a solicitor. He read Law as an undergraduate at Glasgow and has 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. He specialises in domestic and European human rights law. Professor Jim Murdoch is a regular participant in Council of Europe co-operation activities in Central and East European states and has developed a particular interest in non-judicial human rights enforcement mechanisms.

## Ralph Roche

Ralph Roche studied at Trinity College Dublin and University College Dublin in Ireland. He is a solicitor, admitted in Northern Ireland and in England and Wales. He has long experience of working in human rights, including at the Human Rights Chamber for Bosnia and Herzegovina and in Northern Ireland. In 2004, he co-authored a book entitled “Commentary on the European Convention on Human Rights as applied in Bosnia and Herzegovina and at Strasbourg” which was published in English and the languages of Bosnia and Herzegovina. Ralph Roche has worked for many years as a Council of Europe consultant in policing and human rights across the Europe.

■ This handbook was published in the framework of the Joint Programme between the European Union and the Council of Europe entitled “Reinforcing the fight against ill-treatment and impunity”.

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# Introduction

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**T**he handbook “The European Convention on Human Rights and Policing” is published in the framework of the Joint Programme between the European Union and the Council of Europe entitled “Reinforcing the fight against ill-treatment and impunity”, as part of the efforts to enhance the professionalism of police and in view of disseminating Council of Europe standards on policing.

The main purposes of the police in a democratic society governed by the rule of law are:

- ▶ to maintain public tranquillity and law and order in society;
- ▶ to protect and respect the individual’s fundamental rights and freedoms as enshrined, in particular, in the European Convention on Human Rights;
- ▶ to prevent and combat crime;
- ▶ to detect crime;
- ▶ to provide assistance and service functions to the public.<sup>1</sup>

In the interest of independent, impartial and effective delivery of policing services, and to protect against political interference, the police are granted a wide degree of discretion in the performance of their duties. For the purpose of performing their duties, the law provides the police with coercive powers and the police may use reasonable force when lawfully exercising their powers. In recent decades, as scientific and technological knowledge have advanced, the special powers available to the police for the purpose of performing their duties have increased, together with their capacity to intrude in people’s lives and interfere with individual human rights.<sup>2</sup>

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1 Recommendation Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics at Article I.1.

2 Opinion CommDH(2009)4 of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police at paragraphs 15-17.



As a response to the actual abuses of human rights by the police, which have taken place in the past and, unfortunately, continue to occur at present and in different countries, one of the key underlying principles of the Council of Europe in regard to policing is that it should have as its fundamental objective the protection of human rights. There is no conflict between effective policing and human rights protection. On the contrary, the road to one passes through the other. Considering that police activities to a large extent are performed in close contact with the public, police efficiency is dependent on public support. At the same time, public confidence in the police and its support are closely related to the attitude and behaviour of members of the police towards the public, in particular their respect for the human dignity and fundamental rights and freedoms of the individual.

The European Convention on Human Rights sets out a comprehensive framework governing the operational work of police services, compliance with which will ensure that the public supports them. Much of the case law of the European Court of Human Rights can be used in practice to improve the degree of human rights protection in the work of the police. In particular, the Court has constantly reiterated that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. 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. Unlike most clauses of the Convention, Article 3 allows no exception and no derogation from it is permissible, even in the event of a public emergency threatening the life of the nation.<sup>3</sup>

Adherence to the rule of law applies to the police in the same way that it applies to every member of the public. There may be no attempt to conceal, excuse or justify the unlawful exercise of coercive or intrusive powers by a police officer by reference to his or her lawful recourse to coercive and intrusive powers. Police ethics and adherence to professional standards serve to ensure that the delivery of police services is of the highest quality. There can be no police impunity for ill-treatment or misconduct.<sup>4</sup>

The handbook was drawn up bearing in mind the European Convention on Human Rights, in the light of the relevant case law of the European Court of Human Rights, as well as the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

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3 *Chahal v. United Kingdom*, judgment of 15 November 1996.

4 *Ibid.* at paragraph 18.

(CPT) and other relevant standards established within the framework of the Council of Europe. Therefore, it shall become a useful tool in the hands of police and other state authorities in order to prevent and fight police misconduct or impunity and uphold the human rights.

Christos Giakoumopoulos  
Director of Human Rights  
Directorate General of Human Rights and Rule of Law  
Council of Europe

## Chapter 1

# Policing and the European Convention on Human Rights

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**T**he role of the police in protecting the liberties of individuals in the community involves particular challenges. In upholding the rule of law in a democratic society, those entrusted with the task of policing society must themselves be subject to accountability before the law. Police officers are in a real sense the day-to-day defenders of human rights, but in order to discharge that task, they often have to interfere with the rights of those mindful to harm the rights of others.

The problem of achieving an appropriate balance between police powers and individual liberty is not a new one. Often it is expressed in terms of accountability. *Quis custodiet ipsos custodes?* was the question posed in ancient times. Today, in the context of liberal democracies, the answer to this age-old problem is normally expressed in terms of accountability to the law; yet in Europe, compliance is expected not only with domestic arrangements but also with European standards, and in particular with the European Convention on Human Rights.

European citizens – and those living within the borders of European States – expect a great deal from their police services, but also rightly demand that the discharge of policing responsibilities is in accordance with the law, and furthermore, that it respects certain fundamental principles reflecting the nature of a democratic society. This 'law' is not only domestic law, but increasingly also European law which itself expresses certain 'values' on matters such as the importance of democratic protest, respect for the private lives of individuals, and protection against the arbitrary application of police authority.

Such values are expressed in the case law of the Strasbourg-based European Court of Human Rights. The task of the European Court of Human Rights is to give practical guidance through the interpretation of the European Convention on Human Rights as and when cases come before it. These cases will involve specific facts based upon individual systems of domestic law and practice, but underlying this jurisprudence are certain principles of universal application. For example, a case arising in Turkey can have major ramifications for France or for the United Kingdom, as with access to legal representation while in police custody.<sup>5</sup> In the same manner, a judgment involving the policing of street protests in Austria may have important consequences for police officers anywhere in Europe in respect of how the police deal with counter-demonstrators.<sup>6</sup>

The aim of this publication is to help explain to police officers the impact of key standards, and in particular, those legally binding provisions of the European Convention on Human Rights as interpreted by the European Court of Human Rights (the 'Strasbourg Court'). Other European standards stress the importance of selection, training, and the enhancement of a sense of professionalism on the part of police officers.<sup>7</sup> The discussion that follows seeks to help develop that understanding and awareness of the responsibilities of police officers as they protect society. Policing inevitably involves interferences with the human rights of individuals, but whether such interferences will be considered justified or whether they will be condemned as violations of human rights will often turn on the approach taken by the individual police officer on the spot. This manual will assist the police officer in adopting a human rights approach to daily work.

This introductory chapter is designed to help police officers gain an insight into the emergence of European standards of relevance in the discharge of policing. The focus is upon the Council of Europe, the organisation based in Strasbourg, France. The Council of Europe (the Europe of 47 Member States) is distinct from the European Union (which now has 28 Member States). While there are aspects of policing now affected by a State's membership of the European Union, this work is concerned exclusively with the Council of Europe and its institutions, including the European Court of Human Rights.

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5 See *Salduz v Turkey*, judgment of 27 November 2008, discussed at p. 86 below.

6 See *Plattform Ärzte für das Leben v Austria*, judgment of 21 June 1988, discussed at p. 103 below.

7 See pp. 110-116 below.

## **The work of the Council of Europe and the European Convention on Human Rights**

The Council of Europe is an intergovernmental organisation founded upon the principles of pluralist democracy, respect for human rights, and the rule of law. It was one of several European initiatives which sought to bring western liberal democracies closer together on the basis of shared values, whilst also resisting the further spread of totalitarianism. As a result of increasing membership after the fall of communist regimes, the Council of Europe now has 47 member states. The activities of the Council of Europe include the consolidation of democratic stability through legislative and constitutional reform, and the finding of common solutions to contemporary challenges facing the continent in such matters as terrorism, organised crime and trafficking in human beings.

There are three main approaches to its work: first, standard-setting (in particular, by means of securing agreement to international treaties, but also through the making of recommendations and resolutions, and the gradual emergence of standards in the course of the work of monitoring bodies); secondly, monitoring of implementation of state obligations (in particular, through the work of bodies established by treaties such as the European Convention on Human Rights); and thirdly, co-operation with member states and non-governmental organisations (for example, in promoting institutional capacity-building and legislative reform through training and compatibility studies). Each of these has a particular relevance for police services in Europe. The focus here, though, is upon the first, and in particular, on the establishment of binding legal norms following the commitment of States to give effect to the guarantees contained in the European Convention on Human Rights.

The European Convention on Human Rights entered into force in 1953. Its preamble affirms the Council of Europe's aim of achieving greater unity between States *inter alia* through 'the maintenance and further realisation of human rights and fundamental freedoms'. Such rights are considered to be 'the foundation of justice and peace in the world [which] are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend'. While the text of the European Convention on Human Rights was strongly influenced by international law, the case law of the European Court of Human Rights in turn has influenced the jurisprudence of other international and regional tribunals, helping establish the universality of human rights norms. But while the Convention can now be relied upon by some 820 million

Europeans, diversity in local arrangements is still respected. This too is recognised in the composition of the Court when giving judgments, for attempts are made to allocate the judges appointed in respect of each Member State of the Council of Europe to allow for an appropriate geographical balance and representation of the different legal traditions found across the continent.<sup>8</sup> This in turn ensures that a wider perspective is available to the Court than one based largely or exclusively upon one system of criminal procedure.

## **The European Convention on Human Rights – key principles of interpretation**

Significant numbers of judgments are issued annually by the Strasbourg Court. It operates a system of ‘moderated precedent’, a phrase which signifies that it seeks to build upon existing judgments and to apply these wherever similar cases arise, but that from time to time it may find it appropriate to depart from the approach adopted in past judgments. The vital point is that the case law of the Court gives concrete form to the principles and guarantees of the European Convention on Human Rights. The Convention cannot be properly understood without examination of its cases, but the case law is subject to ‘evolutive’ interpretation by the Strasbourg Court. Much of the text that follows involves discussion of cases of relevance to policing in an attempt to help police officers appreciate the importance of the Convention in their work. But before detailed discussion begins, it is helpful to outline some of the key concepts found throughout this jurisprudence by way of introductory explanation.

### **The subsidiary nature of the Strasbourg Court**

The stress in this work is upon the Strasbourg Court’s jurisprudence. However, it is also important to appreciate that the primary guarantor for the rights contained in the European Convention on Human Rights is not the Strasbourg Court but the *domestic* judge, legislature, or official. This has direct relevance for police officers in discharging their responsibilities. States undertake in Article 1 of the European Convention on Human Rights to ‘secure’ to ‘everyone within their jurisdiction’ the range of rights contained in the Convention. Indeed, before an individual or non-governmental organisation can bring a complaint before the Strasbourg Court, it must be shown that any domestic

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<sup>8</sup> Cases are normally heard by one of five Chambers, but where a case raises issues of particular difficulty, or where consistency in determinations is required, the Court may sit in a Grand Chamber.

remedy (such as recourse to domestic law) has been exhausted.<sup>9</sup> In other words, the complaints machinery of the Strasbourg Court is *subsidiary* to national arrangements. Diversity in national legal and administrative arrangements is respected, provided that these arrangements meet the minimum expectations of the European Convention on Human Rights. What the case law of the Court does is to give guidance to the national authorities in the 47 Member States of the Council of Europe on what these minimum expectations entail. In consequence, the principle of subsidiarity emphasises the all-important point that domestic officials such as police officers are in a real sense the front-line defenders of human rights insofar as they are likely to be the first point of interaction between individuals and state power in a number of situations. Protecting human rights by 'securing' these rights often starts with police officers.

### Positive and negative obligations

As noted, Article 1 provides that States undertake to 'secure to everyone within their jurisdiction' the rights and freedoms set out in the European Convention on Human Rights (and its protocols). In consequence, the State is normally under a negative obligation to refrain from interfering with the protected rights; and that negative obligation is reflected, primarily, by the language used in the text of the European Convention on Human Rights: for example 'No-one shall be deprived of his life intentionally ...' (Article 2); 'No-one shall be subjected to torture ...' (Article 3); 'No-one shall be deprived of his liberty except ...' (Article 5); and 'Everyone has the right to freedom of expression ... without interference by public authorities' (Article 10).

But the *securing* of rights is not confined to a requirement that States and state officials refrain from interfering with protected rights, for there may also be obligations to take *positive* steps to protect the rights of individuals. This too is reflected in some of the language in the text of the Convention: for example, 'Everyone's right to life shall be protected by law' (Article 2); and 'Everyone charged with a criminal offence has ... [the right] to be given [legal assistance] free when the interests of justice so require' (Article 6). Further, the case law of the Strasbourg Court indicates a range of situations in which positive obligations can also be implied from the text where it is necessary to do so to ensure that the rights under the European Convention on Human Rights are

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9 The rules governing the admissibility of complaints are complex, and largely fall outside the scope of this work. For further details, see the Court's on-line guide available at: [http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=#n1347458601286\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=#n1347458601286_pointer).

‘practical and effective.’ This again emphasises the idea of the police officer as the protector of human rights, for many of these obligations will have a direct impact upon the discharge of police responsibilities. This can be seen in the imposition of a duty to take some positive step of an executive or operational nature, such as to undertake a criminal investigation,<sup>10</sup> or to intervene in a situation where there is a real risk of domestic violence,<sup>11</sup> or where there is an identifiable risk of violence from another person,<sup>12</sup> or where the rights of protestors are under threat from counter-demonstrators.<sup>13</sup>

### **The idea of ‘autonomous concepts’ in the European Convention on Human Rights**

Across Europe, domestic legal arrangements vary significantly, particularly in respect of criminal procedure. It is important to appreciate that many of the terms contained in the European Convention on Human Rights have been interpreted by the European Court of Human Rights as having a specific meaning in the context of the Convention. This meaning is independent of any meaning which they might have in domestic legal systems and is justified not only to secure uniformity of interpretation across Europe but also to ensure that the effectiveness of the Convention cannot be compromised by restrictive domestic interpretation.

One example of particular importance for police officers is the expression ‘criminal charge’ in Article 6 of the Convention. As will be discussed in chapter 4, a suspect’s entitlement to certain rights is triggered at the stage when a ‘criminal charge’ arises. However, across Europe, the stage in *domestic* law at which an individual can be said to be ‘charged’ varies significantly: in some States, a police officer will ‘charge’ an individual (at the point of entry into formal police custody), in others a prosecutor will do so (after receiving and considering police reports, and often after many hours of police custody), while in other legal systems a judge will formally ‘charge’ an individual (normally some days after the outset of detention). The rights accorded a suspect by Article 6 clearly cannot depend upon such variations in criminal procedure. Indeed, the Court’s interpretation of Article 6 stresses that an individual will be deemed to be ‘charged’ at the point when an official notification is given to him that he is suspected of an offence,

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10 E.g. *Aydin v Turkey*, judgment of 25 September 1997 at paragraphs 103-109: see p. 65 below.

11 See further p. 39 below.

12 E.g. *Osman v the United Kingdom*, judgment of 28 October 1998, discussed at p. 65 below.

13 E.g. *Plattform Ärzte für das Leben v Austria*, judgment of 21 June 1988, discussed at p. 103 below.



a situation that may arise well before the outset of detention (as, for example, with the issue of a search warrant).<sup>14</sup> Similar issues arise with the guarantee against arbitrary deprivation of liberty under Article 5, for whether an individual can be said to be deprived of liberty in terms of the European Convention on Human Rights is not dependent upon domestic status.<sup>15</sup>

### **The idea of the Convention as a ‘living instrument’**

The importance of the case law of the Strasbourg Court in providing direction to domestic officials (such as police officers), courts and legislators has been noted above. However, this interpretation is not static, for the Strasbourg Court has often referred to the European Convention on Human Rights as ‘a living instrument which ... must be interpreted in the light of present-day conditions’.<sup>16</sup> In other words, the text is given a ‘dynamic’ or ‘evolutive’ interpretation as the Court seeks to reflect changes in European society and its prevailing ideas, values and standards. This idea of the case law as ‘moderated precedent’, too, has implications for the police. For example, there is now far less tolerance of the use of physical force that is not warranted by the actions of a detained person, and a readier willingness to label certain action as ‘torture’ (rather than as in the past, merely ‘inhuman’ treatment).<sup>17</sup> While this also emphasises the ‘autonomous nature’ of many of the terms found in the Convention, it also stresses the underlying values and approaches that drive the Court’s judgments in a number of areas. Another example is the expression ‘necessary in a democratic society’ which arises whenever there has been an interference with rights such as respect for private life and the right of assembly in determining whether a State has been able to show that the interference has been justified. Here, ‘evolutive’ interpretation is closely related to the establishment of common European standards and reflects the Court’s conception of the Convention as ‘a constitutional instrument of European public order’.<sup>18</sup> This means, for example, that certain operations involving policing of public protest are likely to be viewed with particular concern if they suggest a narrow and continuing intolerance of the rights of minority groups, for such views are now likely to be considered as populist and uninformed.<sup>19</sup>

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14 See further p. 77 below.

15 See p. 44 below.

16 *Tyrer v the United Kingdom*, judgment of 25 April 1978 at paragraph 31.

17 See p. 36.

18 *Loizidou v Turkey* (preliminary objections), judgment of 23 March 1995 at paragraph 75.

19 See *Alekseyev v Russia*, judgment of 21 October 2010 at paragraphs 68-88 and 106-110, discussed at p. 104 below.

## Legal certainty

Put simply, the idea of legal certainty essentially involves the ability of an individual to act within a settled framework without fear of arbitrary or unforeseeable state interference. As the Strasbourg Court has put it, domestic law is expected 'to be compatible with the rule of law, a concept inherent in all the articles of the Convention'.<sup>20</sup> The consequences for police action involving interferences with the rights of individuals (for example, when effecting an arrest or detention under Article 5, which requires any deprivation of liberty to be 'lawful' and 'in accordance with a procedure prescribed by law', or carrying out a search or using surveillance or taking steps to maintain public order involving an interference with the rights of protestors, when the police action must be 'in accordance with law' or 'prescribed by law') is that any such action must not only have a basis in domestic law, but also that the quality of that domestic law must meet the requirements of accessibility and foreseeability:

” First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>21</sup>

## Necessity and proportionality

There are frequent references in the text of the European Convention on Human Rights to the need to show the 'necessity' of action that has interfered with the rights of an individual. What this concept entails is dependent upon its context. In one case involving free speech, the Court summarised its approach as follows:

'The Court will look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued. In doing so the Court has to satisfy itself that the national authorities did apply standards which were in conformity with the principles embodied in [freedom of expression] and, moreover, that they based themselves on an acceptable assessment of the relevant facts.'<sup>22</sup>

20 *Amuur v France*, judgment of 25 June 1996 at paragraph 50.

21 *Sunday Times v the United Kingdom (No 1)*, judgment of 26 April 1979 at paragraph 49.

22 *Jersild v Denmark*, judgment of 23 September 1994 at paragraph 31.

What this means is that the 'necessity' of State action concerning civil liberties (such as interferences with the rights of protestors) essentially involves the search for an appropriate 'balance' between state action and individual right. The Court has stated that "necessary" ... is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'...'; rather, 'it implies the existence of a 'pressing social need'.<sup>23</sup> However, when applied to domestic decision-making (such as the policing of a public protest), the extent or intensity of international scrutiny by the Strasbourg Court is often dependent upon the specific circumstances of the case. It may be easier, for example, for the police to justify the seizure of publications considered obscene rather than those seeking to convey a political message.<sup>24</sup>

One important point is that reasons for police action giving rise to an interference with a civil or political right need to be both relevant *and* sufficient. The test of 'sufficiency' requires that there be not only 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. In carrying out its assessment, the Court has also identified certain characteristics of a 'democratic society'. This is where it is expected that certain 'values' will guide policing determinations; for example, pluralism, tolerance and broadmindedness have been identified by the Court as the hallmarks of such a European 'democratic society'.<sup>25</sup>

The point about shared European values can be taken further. As has been noted above, deciding whether an interference is 'necessary in a democratic society' may also involve considering whether the law or practice in question is out of line with standards generally prevailing elsewhere in European States as it is more difficult to justify a measure as being 'necessary in a democratic society' if the great majority of other Council of Europe states adopt a different approach.

However, it is also necessary to note that other provisions in the Convention of relevance to policing are subject to qualifications which are more stringently expressed. For example, Article 2 of the Convention guarantees the right to life, subject to an exception where the deprivation of life results from the

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23 *Sunday Times v the United Kingdom (No 1)*, judgment of 26 April 1979 at paragraph 59.

24 See p. 98.

25 *Handyside v the United Kingdom*, judgment of 7 December 1976 at paragraph 49.

use of force which is 'no more than absolutely necessary'. Here, 'a stricter and more compelling test of necessity must be employed'.<sup>26</sup> Article 5, on the other hand, permits the lawful arrest or detention of a person 'when it is *reasonably considered necessary* to prevent his committing an offence'. Here, too, reasons for interferences with the rights of individuals must be both relevant and - in the particular case – also sufficient.<sup>27</sup>

## **The principle of non-discrimination**

The principle of non-discrimination itself reflects an important European value. It gains expression in Article 14 of the European Convention on Human Rights. This provides that:

” The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

However, Article 14 has no independent existence (although Protocol no 12 now provides a separate stand-alone right not to be discriminated against).<sup>28</sup> Article 14 can thus only be considered in conjunction with one or more of the substantive guarantees contained in Articles 2 to 12 of the Convention or in one of the protocols. 'Discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations...'<sup>29</sup> Certain grounds of discriminatory treatment are regarded with particular suspicion, and it may prove highly difficult for a State to persuade the Strasbourg Court that the discriminatory treatment was justified. For example, the European Court of Human Rights has said that where a difference in treatment is based on race or ethnic origin, 'the notion of objective and reasonable justification must be interpreted as strictly as possible'.<sup>30</sup> Attacks upon Roma and destruction of their property have also led to findings of violations.

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26 *McCann and Others v the United Kingdom*, judgment of 27 September 1995 at paragraph 149.

27 See further pp. 46 and 52 below.

28 Protocol No 12 reads as follows: '(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.'

29 *DH and Others v Czech Republic*, judgment of 13 November 2007 at paragraph 175.

30 *DH and Others v Czech Republic*, judgment of 13 November 2007 at paragraph 176.

■ In *Nachova and Others v Bulgaria*, a violation of Article 14 taken together with Article 2 was established in respect of the failure to hold an effective investigation into allegations of racially-motivated killing. While it had not been shown that racist attitudes had played a part in the killings, the failure of the authorities to investigate allegations of racist verbal abuse with a view to uncovering any possible racist motives in the use of force against members of an ethnic or other minority had been 'highly relevant to the question whether or not unlawful, hatred-induced violence has taken place'.<sup>31</sup>

■ In *Moldovan and Others v Romania (no 2)*, attacks by villagers aided by police officers had resulted in the deaths of three individuals and the destruction of 13 homes belonging to Roma families. The applicants had been forced to live in livestock premises, and only ten years later had the domestic courts ordered the payment of compensation. Violations of Article 14 taken with Article 6 and Article 8 were established.<sup>32</sup>

## **The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

In interpreting the European Convention on Human Rights, the Strasbourg Court will also make use of other international standards, such as those relating to the use of firearms by law enforcement officials.<sup>33</sup> Other European initiatives are also of relevance in discussion of policing, including Recommendations of the Committee of Ministers of the Council of Europe.<sup>34</sup> However, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT) has had a particular impact upon the Court's case law, and has led it inter alia to adopt a more critical approach to the assessment of poor material conditions of detention. The CPT is mandated to visit places of detention with a view to strengthening the protection of persons deprived of their liberty. The Committee achieves its goal not through a system of complaint and confrontation but through the process of dialogue and discussion with state officials based upon the information gathered from its visits to places of detention. The work of the Committee is surrounded by a guarantee of confidentiality, but States now invariably request publication of reports and

31 *Nachova and Others v Bulgaria*, judgment of 6 July 2005 at paragraphs 144-168.

32 *Moldovan and Others v Romania (No 2)*, judgment of 12 July 2005 at paragraphs 136-140. See also the similar cases of *Gergely v Romania*, judgment of 26 April 2007, and *Kalanyos and Others v Romania*, judgment of 26 April 2007.

33 See further p. 29 below.

34 For example, Recommendation Rec(2001)10 of the Committee of Ministers to Member states on the European Code of Police Ethics, discussed at pp. 110-112 below.

governmental responses.<sup>35</sup> In its work, the CPT has also developed codes of standards which it employs during visits to help assess existing practices and to encourage states to meet its criteria of acceptable arrangements and conditions. These emerging standards are for the most part more detailed and more demanding than those found in other international obligations, and are now having some impact through the implementation of recommendations for the introduction of legislative, administrative and organisational reforms at domestic level; they address such matters as the use of electrical discharge weapons, investigations into allegations of ill-treatment, deportation of foreign nationals by air and detention by law enforcement agencies.<sup>36</sup> Key extracts from CPT standards appear in the Appendix A, below.

## **Conclusion**

The increasing expectations placed upon police officers are directly prompted by heightened expectations on the part of members of the community that policing will reflect certain fundamental values and respect certain key principles. Such values and principles are contained in the European Convention on Human Rights. While diversity in national police arrangements and in domestic criminal justice systems is respected, the growing sense of minimum European expectations in the delivery of policing need not be seen as a threat to the police service; rather, the discharge of a human rights-compliant approach to policing will help maintain productive police-community relationships. There is a risk that the notion of 'human rights' can be perceived of as a 'charter for the criminal' and a negation of the rights of the victims of crime, but such is to ignore the important developments in human rights jurisprudence from the European Court of Human Rights in Strasbourg. The notion of positive obligations, for example, places heightened responsibilities upon the police to protect victims from exploitation; the increased intolerance of ill-treatment by police officers and the greater readiness to label certain ill-treatment as 'torture' also promotes both professionalism and an understanding of the importance of the rule of law within the police service.

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35 With the exception, to date, of Azerbaijan and the Russian Federation (the recent authorisation to publish the report and response on the visit to the North Caucasus in April/May 2011 hopefully will result in further reports being placed in the public domain). In certain circumstances, the Committee may also issue a public statement on conditions in any particular country, a power exercised on two occasions in respect of Turkey, on three occasions in respect of the Russian Federation and, most recently, in respect of Greece. Reports (and further information on the CPT) are available at <http://www.cpt.coe.int>.

36 'CPT Standards', CPT/Inf/E (2002) 1 - Rev. 2011.

## Chapter 2

# The use of force in policing

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‘The best possible guarantee against ill-treatment is for its use to be unequivocally rejected by police officers themselves.’<sup>37</sup>

### Introduction

**T**he use of force poses significant challenges for police services and for individual police officers. Police services must ensure that police officers have the training and equipment to allow them to discharge their onerous tasks effectively. In addition, Governments must ensure that the legal framework governing the use of force by police officers is sufficiently clear, in order to protect both the public and police officers. Accountability mechanisms, with sufficient resources and powers to make them effective, must be in place. Police officers must be able to have confidence that they will be supported when they act properly, and that they will be guaranteed a fair procedure in any investigation into allegations of improper use of force by them.

The case law of the European Court of Human Rights, as well as reports of bodies such as the European Committee for the Prevention of Torture, demonstrate that the problem of excessive and unjustified use of force by police and other law enforcement agencies throughout Europe is a chronic one.

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<sup>37</sup> Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 22 September 2008 CPT/Inf (2010) 3 at paragraph 16.

In certain European countries there is what has been described as ‘a culture of impunity’, in which state officials may inflict ill-treatment without fear of sanction. This is a consequence of a prevailing attitude, which turns a blind eye to the practice.<sup>38</sup> In consequence, the use of routine and systematic ill-treatment has become engrained in the police service of certain states, condoned (if not implicitly encouraged) by supervisory officers, prosecutors and judges, and even when uncovered, there may be little indication that prosecution of wrongdoers is likely.<sup>39</sup> A lack of impartial and effective investigations into allegations of torture and other ill-treatment can create a climate of impunity<sup>40</sup>.

Treatment in violation of European standards is by no means restricted to certain countries. In a report on a recent visit to Switzerland, the European Committee for the Prevention of Torture found that ‘information gathered suggests that the phenomenon of police brutality witnessed by the CPT in the past’ remained current. Such ill-treatment, which was corroborated by consistent medical evidence, occurred mostly during arrest, or during transport to police stations and during initial interrogation at the police station.<sup>41</sup> Such a climate will have a negative impact upon public support for the police. However, the situation can be improved, through the implementation of legal training and other reforms, as well as through improving conditions of employment for police officers. For example, in its report on a recent visit to Georgia, the CPT stated that the ‘establishment of clear rules (in relation to the use of force) ... has also contributed to improving the professionalism of police officers and, as a consequence, public trust in the police.’<sup>42</sup>

This chapter focuses on the use of force by police. Police use of force primarily occurs during arrests and public assemblies. The Council of Europe Commissioner for Human Rights has recognised that ‘for the purpose of

38 14th General Report, CPT/Inf (2004) 28, paragraph 25.

39 CommDH (2004) 3, ‘Report of the Commissioner for Human Rights on the visit to Latvia, 5-8 October 2003’, paragraphs 10-13 at paragraph 13: ‘In a country where, in civil society, there are serious concerns about the conduct of some members of the police it is particularly hard to understand how no cases can have been brought direct before the courts.’

40 ‘Police Torture and other ill-treatment – It’s ‘just normal’ in Moldova’, Amnesty International, November 2009 available at: <http://www.amnesty.org/en/library/asset/EUR59/009/2009/en/1b2df020-bf3d-4bfb-9bb9-c7ea620d562a/eur590092009eng.pdf>.

41 Rapport au Conseil fédéral suisse relatif à la visite effectuée en Suisse par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 10 au 20 octobre 2011, CPT/Inf (2012) 26 at paragraph 10.

42 Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 15 February 2010, CPT/Inf (2010) 27 at paragraph 15.



performing their duties the law provides the police with coercive powers and (they) may use reasonable force when lawfully exercising their powers.<sup>43</sup> Both of these scenarios present significant challenges. The case law of the European Court of Human Rights demonstrates this. This jurisprudence provides a comprehensive framework, setting out useful guidance for administrations, police services and individual officers that can help them adhere to the standards of the European Convention on Human Rights.

### **Discharging police responsibilities**

The police are the most visible manifestation of government authority. Their main duties are to: (i) maintain the rule of law and public tranquillity; (ii) protect and respect the individual's fundamental rights and freedoms; (iii) prevent and combat crime; (iv) and to provide assistance and services to the public.

Police officers are required, in the performance of their duties, to respect and protect human dignity and uphold the rights of all persons. By virtue of their onerous responsibilities, police officers are sometimes required to use force in the course of their duties. This may occur in a range of contexts: for example, during the arrest of a violent person; if necessary to protect themselves or others; or in order to prevent a crime from being committed. It is extremely important that any use of force by police is the minimum necessary, applied lawfully and can be accounted for. This is the case, both in terms of ensuring compliance with the law and ensuring public confidence in the police.

In recognition of the importance of this issue, the use of force by the police is regulated strictly by national and international law. As stated above, the Strasbourg Court has developed a significant amount of case law concerning the use of force by police. This jurisprudence provides a framework for considering whether a use of force by police is lawful. It also provides very useful guidance to all police officers, whatever their rank.

The primary Articles of the Convention which govern the use of force by police are Articles 2 and 3. Article 2 restricts the use of lethal or potentially lethal force to a very limited set of circumstances (in effect, where such use is absolutely necessary for the protection of life). Article 3 imposes an absolute prohibition on the use of torture or inhuman or degrading treatment or punishment. Both Articles require that national law prevents conduct prohibited by them and require the State to take certain steps to prevent the infliction of conduct in

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43 Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police, CommDH(2009)4, 12 March 2009.

violation of them. In addition, they require that credible allegations of the use of force by agents of the State be the subject of an effective investigation. (In addition, Article 5 may be of relevance, as the use of force often occurs during an arrest: this issue is considered in the chapter that follows.)

The focus here is upon the *use* of force. One of the most effective methods of acting in compliance with the Convention standards is by ensuring that all credible allegations of violations of improper use of force are subjected to an effective investigation. Effective investigations, carried out by independent authorities, will assist in ensuring compliance with the investigative obligations under Articles 2 and 3 of the Convention (discussed in further detail below).<sup>44</sup> In addition, they will provide reassurance to police officers, who will be able to foresee with a degree of accuracy the standards to which they will be held. Officers will also enjoy increased protection from unfounded or malicious allegations, which should be determined to be without basis by the investigative authorities.

## **The right to life: Article 2, European Convention on Human Rights**

Article 2 of the Convention protects the right to life. It comprises three main requirements: (i) a prohibition on unlawful killing by State agents; (ii) a duty to investigate suspicious deaths; and (iii) a positive obligation, in certain circumstances, to take steps to prevent an avoidable loss of life.<sup>45</sup>

The full text of Article 2 is as follows:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

44 See p. 25 (Article 2) and p. 33 (Article 3).

45 Jacobs, White and Ovey, *The European Convention on Human Rights*, 4<sup>th</sup> edition, page 143.

## Use of lethal force

In relation to the use of lethal force, Article 2 imposes a test, which requires that any force deployed by the state must not exceed what is 'absolutely necessary'. This is a test of strict proportionality, so that the force must be strictly proportionate to the achievement of one of the aims set out in Article 2(2)(a) to (c).<sup>46</sup>

Lethal force is defined as: (i) force which is intended to be lethal and which has that effect; (ii) force which results in the death of a person and which could reasonably have been foreseen to have that effect; and (iii) the use of force that results in serious injury to a person, where death could have occurred.

Article 2 'does not primarily define instances where it is permitted intentionally to kill an individual, but [rather] describes the situations where it is permitted to 'use force' which may result, as an unintended outcome, in the deprivation of life'.<sup>47</sup> In other words, the fact that one of the scenarios set out in Article 2(2) (a) to (c) may occur does not mean that lethal force can be used. These are not thresholds that, once met, allow lethal force to be used. Any use of lethal force must be solely for a legitimate purpose. Any other approach would be inconsistent with the requirement that the rights protected by the Convention are real and effective.

Lethal or potentially lethal force may only be used for a lawful purpose. In practice, the only lawful purpose, which may justify the use of such force, is where it is absolutely necessary to protect the life of a person, whether the person using the force, or another.

■ In *McCann and Others v the United Kingdom*, the Strasbourg Court held that 'Article 2, read as a whole, demonstrates that paragraph 2 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. The use of force, however, must be no greater than 'absolutely necessary' for the achievement of one of the purposes set out in that Article'.<sup>48</sup>

It is important to remember that the role of the police is not to punish or otherwise sanction wrongdoing. Police officers, in the course of their duties, may come across individuals who have been engaged in the most reprehensible conduct. However, the role of the police is to investigate crimes and to bring

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46 *McCann and Others v the United Kingdom*, judgment of 27 September 1995 at paragraph 149.

47 *Ibid.* paragraph 148.

48 *McCann and Others v the United Kingdom*, judgment of 27 September 1995 at paragraph 148.

suspects before the appropriate authorities. If the police attempt to punish suspected offenders through the use of force, the very foundation of the rule of law is undermined. This would have an extremely negative impact upon society as a whole, apart from a failure to comply with European standards.

Article 2 applies to the conduct of both the officers who actually use lethal force and to the officers who are responsible for the planning and control of police operations where lethal force is a possibility.<sup>49</sup> The police must not choose tactical options which make the use of lethal force inevitable or highly likely. Officers responsible for the planning and control of operations where force may be used are required to ensure that medical assistance is provided.

Police officers must be given clear guidance (in legal terms and training terms) as to how and when they may use their weapons. In the *Makaratzis v Greece* case, the European Court of Human Rights stressed that police officers should not be left in a vacuum when performing their duties, whether in the context of a pre-planned operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect.<sup>50</sup>

■ In *Makaratzis v Greece*, the Court was 'struck by the chaotic way in which the firearms were actually used by the police in the circumstances'. An unspecified number of police officers had fired a hail of shots at the applicant's car with revolvers, pistols and submachine guns.<sup>51</sup> The applicable provisions of Greek law were insufficiently clear. The Court stated that 'as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force.'<sup>52</sup>

■ In *Nachova v Bulgaria*, persons suspected of deserting from military service were pursued by Bulgarian Military Police officers. The suspected deserters were unarmed and had not used violence to resist arrest. However, when they sought to flee over a fence, they were shot dead. The Strasbourg Court examined whether this was a lawful use of force. It held that 'potentially deadly force cannot be considered absolutely necessary where it is known that the

49 See *McCann and Others v the United Kingdom*, judgment of 27 September 2005.

50 *Makaratzis v Greece*, judgment of 20 December 2004.

51 *Makaratzis v Greece*, judgment of 20 December 2004 at paragraph 67.

52 *Makaratzis v Greece* judgment of 20 December 2004 at paragraph 58.

person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence'. This is the case, even if it means that the opportunity to catch the fugitive will be lost.<sup>53</sup>

Any use of lethal force by police will be subjected to the most careful scrutiny.<sup>54</sup> As discussed above, a positive obligation exists to undertake an effective investigation into the taking of life.<sup>55</sup> Police operations, including the policing of demonstrations, must be planned and controlled in such a manner as to minimise any risk to life.<sup>56</sup> A range of equipment must be available to officers, so that they are not forced to have recourse to live ammunition.

■ In *Simsek v Turkey*, the Strasbourg Court held that it was 'unacceptable' that police did not have access to a range of equipment to quell disorder. The lack of such equipment meant that officers were forced to rely on lethal force, with resulting deaths, when other methods (e.g. water cannon or rubber bullets) may have been more appropriate.<sup>57</sup>

■ In *McCann and Others v the United Kingdom*, the United Kingdom authorities implemented an anti-terrorist operation against an active service unit of the Irish Republican Army. Having closely examined the planning and control of the operation, the Court determined that it had not taken adequate account of the possibility of erroneous intelligence assessments, or of the potential opportunities to arrest the terrorists. In addition, the deployment of soldiers from the British Army's Special Air Service ('SAS'), with their militaristic training indicated that the planning and control of the operation lacked 'the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society'.<sup>58</sup>

The requirement that the planning and control of police operations be carried out in such a manner as to minimise the likelihood of recourse to lethal force is of particular importance in public order policing. It requires that police must have a range of less lethal tactical options available to deal with any disorder. For example, rubber bullets, water cannon, personal protective equipment,

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53 *Nachova v Bulgaria*, judgment of 6 July 2005 at paragraph 107.

54 *McCann and others v the United Kingdom*, judgment of 27 September 1995 at paragraph 150.

55 See p. 25 above.

56 *Bubbins v the United Kingdom*, judgment of 17 March 2005 at paragraph 136.

57 *Simsek v Turkey*, judgment of 26 July 2005 at paragraph 111.

58 *McCann and Others v the United Kingdom*, judgment of 27 September 1995, at paragraph 212.

etc., must be available. Any use of such equipment must be subject to appropriate regulation and officers deployed to use such equipment must be suitably trained. Consequently, a command structure, with suitably trained and experienced officers in key roles, should be in place.<sup>59</sup> If a policing operation is anticipated to last a long time, adequate resources should be available to ensure resilience.<sup>60</sup> In addition, recording of the use of any type of force is necessary in order to guarantee transparency.

Police officers must be given clear instructions and training on how and when they may use their weapons. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights<sup>61</sup>. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force.<sup>62</sup>

The rules governing the use of force apply in all situations, even 'at the end of a long day of public-order operations during which the law-enforcement agencies had been confronted with rapidly unfolding and dangerous situations and had been required to make crucial operational decisions.'<sup>63</sup> Internal political stability or other public emergency cannot justify a departure from these standards.<sup>64</sup> Police officers must be assessed as to their suitability to carry weapons. A failure to do so by the State may result in it being held responsible for killings by an officer, even if they were not carried out while on duty.<sup>65</sup>

■ In *Gorovenky and Bugara v Ukraine*, the Court reiterated that 'States are expected to set high professional standards within their law-enforcement systems and ensure that the persons serving in these systems meet the requisite criteria ... In particular, when equipping police forces with firearms, not only must the necessary technical training be given but the selection of agents allowed to carry such firearms must also be subject to particular scrutiny.'<sup>66</sup>

59 *Andronicou and Constantinou v Cyprus*, judgment of 9 October 1997.

60 *Giuliani and Gaggio v Italy*, judgment of 25 August 2009 at paragraph 238.

61 *Giuliani and Gaggio v Italy*, judgment (Grand Chamber) of 24 March 2011 at paragraph 249.

62 *Makaratzis v Greece*, judgment of 20 December 2004 at paragraph 58 and also *Wasilewska and Kalucka v Poland*, judgment of 23 February 2010 at paragraph 45.

63 *Giuliani and Gaggio v Italy*, judgment (Grand Chamber) of 24 March 2011 at paragraph 238.

64 UN Basic Principles on the Use of Force and Firearms Principle 8.

65 *Gorovenky and Bugara v Ukraine*, judgment of 12 January 2012.

66 *Gorovenky and Bugara v Ukraine*, judgment of 12 January 2012 at paragraph 38.

The following questions may be of use to officers who have used lethal (or potentially lethal) force, in assisting them to record the rationale for doing so:

- ▶ Was the use of force in accordance with the law?
- ▶ Was the amount of force used proportionate in the circumstances?
- ▶ Were other options considered? If so, what were they?
- ▶ Why were those options discounted?
- ▶ Was the method of applying force in accordance with police procedures and training?

In the specific context of police operations where firearms may be used, the Strasbourg Court has highlighted the importance of the following:

- ▶ record-keeping: the keeping of full records by police is extremely important, as it facilitates accountability;
- ▶ chain of command: there should be a clear chain of command, with clearly defined roles and responsibilities;<sup>67</sup>
- ▶ officers should have training and experience relevant to their roles;<sup>68</sup>
- ▶ a range of tactical options should be available (e.g. less-lethal weapons; protective equipment);<sup>69</sup>
- ▶ appropriate technical equipment should be available (e.g. lighting for siege situations);
- ▶ specialist advisers (e.g. firearms specialists, negotiators) should be available to provide advice and to facilitate consistency of decision-making;<sup>70</sup>
- ▶ warnings should be given unless clearly useless or inappropriate;<sup>71</sup> and
- ▶ administrative framework: the internal policy framework within the police should be clear so that officers know their roles and responsibilities.<sup>72</sup>

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67 *Andronicou and Constantinou v Cyprus*, judgment of 9 October 1997, *Makaratzis v Greece*, judgment of 20 December 2004, *Huohvanainen v Finland*, judgment of 13 March 2007.

68 *Bubbins v the United Kingdom*, judgment of 17 March 2005.

69 *Simsek v Turkey*, judgment of 26 July 2005 and *Gulec v Turkey*, judgment of 27 July 1998.

70 *Andronicou and Constantinou v Cyprus*, judgment of 9 October 1997 and *Bubbins v the United Kingdom*, judgment of 17 March 2005.

71 *Ramsahai v the Netherlands*, judgment of 15 May 2007 and *Huohvanainen v Finland*, judgment of 13 March 2007.

72 *Bubbins v the United Kingdom*, judgment of 17 March 2005 and *Makaratzis v Greece*, judgment of 20 December 2004.

## The positive obligation to protect life

One of the elements of the right to life includes a positive obligation on the police to seek to protect life. The duty to protect life does not impose an absolute obligation on the State to prevent all loss of life. It is not an obligation of result, but of means.

Article 2 of the Convention requires that the police take feasible operational steps within their power to avert a real and immediate threat to life that they are, or should be, aware of.<sup>73</sup> This is a two-stage test: (i) is there a real and immediate threat to life that the police are or should be aware of? (ii) if yes, did they take feasible operational steps to avert it? The obligation is to be applied subject to (i) the unpredictability of human conduct and (ii) the need for the police to act within the confines of Article 5 (right to liberty and security of person) and Article 6 of the Convention (right to a fair trial).

This obligation can arise in the context of any police activity. For example, if a public event is known to police to be at risk of attack from others, the police are under an obligation to take feasible steps to prevent such an attack. If, during a public event, persons are being attacked by others, police must take feasible steps to stop this. This may require that the police use force, even lethal force, if this is absolutely necessary.

■ In *Van Colle v the United Kingdom*, the European Court of Human Rights clarified that the protective obligation is not lower or different in the event that the risk was as a result of action taken by the State. The applicants' son had been asked by police to give evidence against a suspect in a criminal case. The suspect subsequently murdered him. The applicants claimed that, as any threat to their son's life was a consequence of his agreeing to be a witness in criminal proceedings, the threshold for the applicability of the protective obligation was lower than the usual 'real and immediate' one. The Court disagreed, stating that 'in other cases concerning prior threats by third parties ending in the killing of another individual, the fact that the deceased may have been in a category of person who may have been particularly vulnerable was but one of the relevant circumstances of the case to be assessed, in the light of all the circumstances, in order to assess whether there is a real and immediate threat.'<sup>74</sup>

73 *Osman v the United Kingdom*, judgment of 28 October 1998.

74 *Van Colle v the United Kingdom*, judgment of 13 November 2012 at paragraph 91.



A key issue is what exactly is a public authority required to do, if there is a real and immediate threat. There is no definitive answer, and the issues to be considered include: (i) the options available; (ii) the legal framework in the country concerned; (iii) the internal regulations and policies of the police and other relevant agencies; (iv) the conduct of the individual concerned; (v) the resource implications of the available courses of action; and (vi) the role and profile of the individual.

### **The positive obligation to carry out an effective investigation into the loss of life**

In the event that a use of force by police or other agents of the State results in death to any person, Article 2 requires that there be an independent and effective investigation. This requirement has five separate components: independence, effectiveness, promptness, public scrutiny and family involvement.<sup>75</sup>

‘The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility ...’<sup>76</sup> In addition, the ‘investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible (...).’<sup>77</sup>

Where a death results from use of force by police, the investigation must be carried out by someone independent of the police.<sup>78</sup> This is necessary in order to maintain ‘public confidence in the state’s monopoly on the use of force.’<sup>79</sup> Police may only take any investigative steps that are immediately necessary to preserve evidence. For example, if a person has been killed as a result of use of force by police, police officers may only take steps to preserve the scene, etc., so that evidential opportunities are not lost. The investigation must be prompt, effective, transparent and must involve the family of the deceased to the extent necessary for its members to protect their interests. The requirement of promptness does not mean that there is a defined timescale, but that the investigation must be carried out as quickly as is feasible. The requirement

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75 See, for example, Jacobs, White and Ovey, *The European Convention on Human Rights*, OUP 2010, 5<sup>th</sup> edition at pages 156 to 162.

76 *Nachova and Others v Bulgaria*, judgment of 6 July 2005 at paragraph 110.

77 *Nachova and Others v Bulgaria*, judgment of 6 July 2005 at paragraph 113.

78 *Ramsahai v the Netherlands*, judgment of 15 May 2007.

79 *Ramsahai v the Netherlands*, judgment of 15 May 2007 at paragraph 325.

of effectiveness means that the investigating body must have the powers to seize evidence, carry out searches as necessary, arrest, etc.

If details of the events leading to a person's death lie wholly, or mainly, within the knowledge of the State or its agents, strong presumptions of fact will arise regarding such events. The burden of proof, as to explaining those events, can lie with the State.<sup>80</sup> In particular, any injuries to a deceased's body will require detailed explanation.<sup>81</sup>

The Council of Europe Commissioner for Human Rights has placed the significance of the investigative obligations under Articles 2 and 3 for police in context. In an Opinion concerning Independent and Effective Determination of Complaints against the police<sup>82</sup>, he stated that there 'are two principal purposes of the five [European Convention on Human Rights] effective police complaints investigation principles. On the one hand, they have been developed to ensure that an individual has an effective remedy for an alleged violation of Article 2 or 3 of the Convention. On the other hand, the principles are intended to protect against violation of these fundamental rights by providing for an investigative framework that is effective and capable of bringing offenders to justice.'

### **The prohibition of torture and inhuman or degrading treatment: Article 3, European Convention on Human Rights**

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 inhuman or degrading treatment or punishment.

The guarantee is expressed in absolute terms. The Court has consistently reiterated that Article 3 enshrines one of the most fundamental values of democratic societies. Article 3 prohibits torture and inhuman and degrading treatment and punishment in all circumstances. As noted in respect of Article 2 above, even the taking of life can be justified in certain, very limited, circumstances: in contrast, there are no circumstances in which conduct prohibited by Article 3 can be tolerated, even in the context of the fight against terrorism<sup>83</sup>

80 *Salman v Turkey*, judgment of 27 June 2000 at paragraph 100.

81 *Velikova v Bulgaria*, judgment of 18 May 2000.

82 CommDH(2009)4, 12 March 2009 at paragraph 31.

83 *Tomasi v France*, judgment of 27 August 1992.

or organised crime.<sup>84</sup> This is regardless of the conduct of the person. Unlike most provisions of the Convention, Article 3 includes no exceptions and no derogation from it is permissible, even in the event of a public emergency threatening the life of the nation.<sup>85</sup> In *Gäfgen v Germany*, the Strasbourg Court said that the 'philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.'<sup>86</sup>

There are clear implications for police in the context of the use of force. The European Court of Human Rights has made it clear that, in relation to any person, 'any recourse to 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.'<sup>87</sup> As interpreted by the Court, this provision involves (as with Article 2) not only obligations upon States to refrain from infliction of ill-treatment but also positive duties to protect persons and to investigate effectively allegations of breach of the guarantee. Ill-treatment by police is, regrettably, a common feature of life in many European countries. As noted in the introduction to this chapter, it occurs in wealthy and poor countries, and new as well as established democracies. One interesting feature of the phenomenon is that it displays similar features, regardless of the country where it occurs. In Albania, allegations of ill-treatment received by the CPT 'consisted essentially of slaps, punches, kicks and truncheon blows, and related mainly to ... the time of questioning....'<sup>88</sup> In respect of Ireland, the CPT found that 'alleged ill-treatment consisted mostly of kicks, punches and blows with batons to various parts of the body.'<sup>89</sup>

### When does Article 3 apply?

In order for conduct to come within the scope of Article 3, it must 'attain a minimum level of severity.'<sup>90</sup> This is entirely dependent upon the individual facts and circumstances of each case (for example, forcing a detainee to stand for three hours may not be inhuman treatment if the person concerned is a fit and healthy person even although there would need to be a good reason

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84 *Selmouni v France*, judgment of 28 July 1999.

85 *Chahal v the United Kingdom*, judgment of 15 November 1996.

86 *Gäfgen v Germany*, judgment of 1 June 2010 at paragraph 107.

87 *Ribitsch v Austria*, judgment of 4 December 1995 at paragraph 38.

88 CPT/Inf (2012) 11 at paragraph 13.

89 CPT/Inf (2011) 3 at paragraph 14.

90 *Ireland v the United Kingdom*, judgment of 18 January 1978 at paragraph 162.

for requiring any person to stand for this length of time; but if the person is old, or suffering from any illness, standing for three hours may well constitute inhuman treatment). In addition, the motive for the treatment is important. The unnecessary use of handcuffs or other physical restraints can, under certain conditions, amount to inhuman or degrading treatment.<sup>91</sup> An example is where an elderly or ill person, who clearly poses no threat of violence or fleeing, is handcuffed because of a blanket policy.

The prohibition of torture or ill-treatment can also extend to threats. In *Gäfgen v Germany*, a person in police custody was threatened with 'intolerable pain' if he did not reveal the whereabouts of a missing child. The Court held that this threat, although not carried out, constituted inhuman treatment.<sup>92</sup>

The application of Article 3 to any specific scenario involves two specific questions. The first question is whether the treatment or punishment in question meets the minimum level of suffering required to come within the scope of Article 3. If it does, the second is what is the appropriate label to be applied to the treatment or punishment?

The first question needs to be considered with care. The punishment or treatment complained of must constitute a minimum level of severity. This is assessed by reference to all of the circumstances of the 'treatment' or punishment in question, including its duration and its physical and mental effects, as well as the sex, age and health of the victim.<sup>93</sup> This threshold test must be exceeded, and whether this has been done is assessed in the light of the prevailing circumstances.<sup>94</sup> Evidence of a positive intention to humiliate or to debase an individual is not strictly required for a finding of a violation of Article 3.<sup>95</sup>

'Torture' is reserved for the most serious forms of Article 3 violations. The European Court of Human Rights has defined it as 'deliberate inhuman treatment causing very serious and cruel suffering'.<sup>96</sup> In contrast, 'inhuman' treatment or punishment involves the infliction of intense physical and mental suffering. Excessive force during arrest or questioning may constitute inhuman treatment,<sup>97</sup> or even torture.

91 *Henaf v France*, judgment of 27 November 2003.

92 *Gäfgen v Germany*, judgment of 1 June 2010 at paragraphs 107 and 108.

93 *Jalloh v Germany*, judgment of 11 July 2006 at paragraph 95.

94 *Tyrer v the United Kingdom*, judgment of 25 April 1978 at paragraphs 31 and 38.

95 *Peers v Greece*, judgment of 19 April 2001 at paragraph 74.

96 *Ireland v the United Kingdom*, judgment of 18 January 1978 at paragraph 167.

97 *Ribitsch v Austria*, judgment of 4 December 1995.

■ *Aksoy v Turkey* was the first case involving a finding by the European Court of Human Rights that a person had been subjected to 'torture'. The applicant was stripped naked by police officers. He was suspended by his arms, which had been tied behind his back. This resulted in the applicant suffering severe pain and temporary paralysis of both arms. The Court found that the deliberate infliction of the treatment had also required 'a certain amount of preparation and exertion' by state officials and its purpose appeared to have been to extract information or a confession from the applicant.<sup>98</sup>

The infliction of ill-treatment in a premeditated manner or for a particular purpose, such as to extract a confession or information, will be considered to be an aggravating factor. Thus in determining whether treatment is 'degrading', the Court will 'have regard to whether its object 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'.<sup>99</sup>

” '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'.<sup>100</sup>

Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention.<sup>101</sup> In short, where a person is taken into police custody in good health and suffers injuries, there is an onus on the State to explain these injuries.<sup>102</sup> In addition, where it is alleged that a detained person received injuries before his detention, the police should ensure that he is medically examined upon or soon after his arrival at the police station. In a case against Moldova<sup>103</sup>, a detainee was held to have suffered a violation of Article 3 when he was not medically examined or provided with medical treatment for his injuries, while in police detention.

98 *Aksoy v Turkey*, judgment of 18 December 1996 at paragraph 64.

99 *Keenan v the United Kingdom*, judgment of 3 April 2001 at paragraph 111; see also *Raninen v Finland*, judgment of 16 December 1997 at paragraph 55.

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

101 See *Tomasi v France*, judgment of 27 August 1992, and the *Ribitsch v Austria* judgment of 4 December 1995.

102 *Ciorap v Moldova*, judgment of 19 June 2007 at paragraphs 60-71 and *Istratii and others v Moldova*, judgment of 27 March 2007 at paragraphs 68-72.

103 *Lipencov v Moldova*, judgment of 25 January 2011.

The use of any force against a person by police which is not necessitated by their conduct will raise an issue under Article 3. When police are planning an arrest operation, they are required to evaluate the possible risks and take all necessary measures for the proper carrying out of the arrest. This includes an obligation to minimise the likelihood of the recourse to the use of force. Adequate planning must be undertaken, and procedures must be in place, to comply with this obligation.

■ In *Rehbock v Slovenia*, police officers wished to arrest a German body-builder, suspected of illegally importing drugs into Slovenia. He resisted arrest, and during a struggle he incurred a serious injury to his jaw. The Court held that in such a pre-planned operation, the standards required of the police were higher than in a spontaneous situation. In the absence of credible arguments justifying the police's conduct, the Court found that Mr Rehbock had been a victim of a violation of Article 3, as he had suffered inhuman treatment.<sup>104</sup>

If discriminatory considerations have played a part in the treatment of detainees by State officials, Article 14 taken in conjunction with Article 3 will be of relevance. The phenomenon is, regrettably, common across Europe and has recently been documented by the Council of Europe Commissioner for Human Rights. In a report on a visit to Slovakia, he referred to a case where police officers forced a group of Roma boys to 'take off their clothes, stand naked against a wall and hit and kiss each other while the officers shouted anti-Roma statements at them.' They filmed the incident and posted the video on the internet. It was also alleged that the boys were threatened with loaded guns.<sup>105</sup> That racism can influence the discharge of policing through, for example, excessive use of force or the ill-treatment of detainees, or through the use of arbitrary deprivation of liberty, has also been recognised by the Commissioner for Human Rights<sup>106</sup> and by the European Commission against Racism and Intolerance.<sup>107</sup> However, there must be some evidence to support an allegation that there has been discrimination.

104 *Rehbock v Slovenia*, judgment of 28 November 2000.

105 Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Slovakia, from 26 to 27 September 2011. Strasbourg, 20 December 2011 CommDH(2011)4 at paragraph 37.

106 See for example CommDH (2004) 2, 'Report of the Commissioner for Human Rights on the visit to Cyprus, June 2003' at paragraph 34.

107 See for example, European Commission against Racism and Intolerance, *ECRI's Country-by-Country Approach: Compilation of Second Round Reports 1999-2003*, Council of Europe, Strasbourg, 2004: such issues were identified, inter alia, in Albania (p. 4), Austria (p. 30), Belgium (p. 48), Bulgaria (p. 56), Georgia (p. 130), Hungary (pp. 155-156), Italy (p. 183),

■ In *Balogh v Hungary*, while the Court found violations of Article 3 in respect of the infliction of ill-treatment of a Roma during police interrogation and the inadequacy of the investigation, it determined that there had been no substantiation of the applicant's allegation that he had been subjected to discriminatory treatment.<sup>108</sup>

The problem in such instances is clear: it is often easier to establish actual ill-treatment than it is to show that this was inflicted on account of the individual's membership of a minority group, even though it may be recognised that discriminatory treatment reflects ingrained attitudes prevalent in a police service.

An issue of serious concern is the phenomenon of abductions and disappearances, perpetrated by police or military officials. These are primarily now associated with the conflicts in South East Turkey and Chechnya in Russia. The Council of Europe Commissioner for Human Rights, in a report concerning Russia, stated that he:

” [W]ould like to underline once again that a person's disappearance is a grave human rights violation. Moreover, the deleterious effects of such a tragedy are far-reaching. Disappearances have a profound effect on the whole of society, starting from the individual's close family and friends, all of whom suffer from not knowing and from a sense that their plight is being ignored by the authorities. The lack of knowledge can cast those concerned in a state of perpetual distress, depriving them of the possibility to lead a normal life.<sup>109</sup>

As noted above, ill-treatment is common during the arrest and initial investigation phases of police detention. One reason for this may be that many police services rely heavily on confessions to prevent and detect crime. Consistent and full application of the procedural rights of detainees<sup>110</sup> will help reduce ill-treatment. In addition, 'greater emphasis should be given to modern sci-

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Portugal (p. 273), 'the former Yugoslav Republic of Macedonia' (p.359), Turkey (p. 366) and Ukraine (p.376). The majority of these references regard the treatment of Roma/Gypsies. During the third round of country visits focusing upon implementation, ECRI again found it necessary to report continuing ill-treatment of minority groups such as Roma and non-citizens: see *Third Report on Greece*, CRI (2004) 24, paragraph 105; and *Third Report on Hungary*, CRI (2004) 25, paragraph 88.

108 *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).

109 Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to the Russian Federation from 12 to 21 May 2011 Strasbourg, 6 September 2011, CommDH(2011)21.

110 See chapter 4 of this Handbook.

entific methods of criminal investigation, through appropriate investment in equipment and skilled human resources, so as to reduce the reliance on confessions to secure convictions.' In addition, 'electronic recording of police interviews is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment.'<sup>111</sup>

Conditions of detention may also result in violations of Article 3. Availability of food, water, privacy, space, medical assistance and recreation facilities may raise issues in this regard.<sup>112</sup>

### Positive obligations

Article 3 also includes a positive obligation on the police to take steps to seek to prevent the infliction of torture or ill-treatment by private persons or groups.<sup>113</sup> In the event that the police have information which indicates that a person is being, or is to be, subjected to treatment in violation of Article 3, it must take feasible operational steps within its power to prevent this. Examples of such steps include investigating such claims and arresting suspects where there are grounds to do so. For example, the Strasbourg Court has ruled that there is a positive obligation to investigate allegations of rape. The obligation on the State in this context is to have a legal framework, which provides appropriate protection for victims of sexual offences, including rape.<sup>114</sup>

This protection thus requires that reasonable and effective measures be taken by the authorities, including with regard to children and other vulnerable individuals, in order to prevent ill-treatment of which the authorities were or ought to have been aware.<sup>115</sup> Particular care must be taken to ensure that victims of domestic violence have their allegations properly investigated and that steps are taken to protect them from further threats.<sup>116</sup>

■ In *Gldani v Georgia*, the Strasbourg Court considered whether the response of the Georgian police to ill-treatment inflicted on a congregation of Jehovah's witnesses by a group of Orthodox Christian extremists complied with the

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

112 *Ciorap v Moldova*, judgment of 19 June 2007 at paragraphs 60 to 71.

113 Note that the State will be held directly responsible for rapes committed by State agents: *Maslova and Nalbandov v Russia*, judgment of 24 January 2008.

114 *MC v Bulgaria*, judgment of 4 December 2003, paragraphs 148-187 (in terms of Articles 3 and 8).

115 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, judgment of 12 October 2006.

116 See *Opuz v Turkey*, judgment of 9 June 2009, discussed at p. 66 below.



positive obligation. This ill-treatment included beating them with sticks and crosses, cutting their hair and the infliction of serious bodily injuries. The police, when approached by some of the victims, did not provide any assistance. The head of the local station reportedly stated that he would have inflicted a worse beating on the congregation. The police took no steps to prevent further ill-treatment and no effective investigation or preventive measures were taken against the extremist group responsible. The Strasbourg Court found that the police and other relevant authorities had failed to comply with their positive obligations under Article 3.<sup>117</sup>

### Investigating credible allegations of ill-treatment

Furthermore, Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation into credible allegations of ill-treatment.<sup>118</sup> This obligation is not, in principle, limited solely to cases of ill-treatment by State agents.<sup>119</sup> Accordingly, the authorities have an obligation to take action as soon as an official complaint has been lodged.<sup>120</sup> Even in the absence of a specific complaint, an investigation should be undertaken if there are other sufficiently clear indications that torture or ill-treatment might have occurred. A requirement of promptness and reasonable expedition is implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in, or tolerance of, unlawful acts. Tolerance by the authorities towards such acts cannot but undermine public confidence in the principle of lawfulness and the State's maintenance of the rule of law.

In the event that a police officer or other State official has been found to have caused treatment in violation of Article 3, he must be sanctioned. The precise nature of the sanctions is a matter for national law, but they must reflect the seriousness of the matter.

■ In *Paduret v Moldova*, a police officer was found to have seriously assaulted a member of the public. However, the treatment of the applicant was severe and should, according to the Strasbourg Court, have been classified as torture. The officer should, it said, have been charged with the more serious offence of

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117 *Gldani v Georgia*, judgment of 3 May 2007.

118 *Assenov and Others v Bulgaria*, judgment of 28 October 1998.

119 *MC v Bulgaria*, judgment of 4 December 2003 at paragraph 151.

120 *Lipencov v Moldova*, judgment of 25 January 2011.

torture, under Article 101 paragraph 1 of the Criminal Code. The failure to do so, and the fact that the officer was allowed to continue working as a police officer even after his conviction, meant that there had been a violation of Article 3. The Strasbourg Court was particularly concerned by the Moldovan Government's assertion that torture was 'considered an 'average-level crime', to be distinguished from more serious forms of crime and thus warranting reduced sentences'. It said that '(s)uch a position is absolutely incompatible with the obligations resulting from Article 3 of the Convention, given the extreme seriousness of the crime of torture'.<sup>121</sup>

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121 *Paduret v Moldova*, judgment of 5 January 2010 at paragraphs 58 and 77.

## Chapter 3

# Deprivation of liberty

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### **Deprivation of liberty and the European Convention on Human Rights**

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**A**rticle 5 of the European Convention on Human Rights ('the Convention') regulates the circumstances in which a person may be deprived of their liberty, the minimum rights to which they are entitled when deprived of their liberty, grants a right of judicial review of detention and creates a right to compensation for unlawful deprivation of liberty.

Police officers are given significant amounts of discretionary power to prevent and to investigate crime. This is only proper, for in order to protect the rights of others to live in a community free from the threat of intimidation, violence or theft of property, police officers must of necessity interfere with the rights of those suspected of posing such risks. Yet untrammelled authority sits uneasily alongside the notion of the rule of law. Democratic society calls for limitations upon such discretionary authority, and for accountability for its exercise. Herein lays the core of the task of the European Court of Human Rights: to provide an appropriate balance between State power and individual rights to ensure that police officers use their powers in a manner that is not arbitrary.

Arguably, the most significant form of interference with the rights of individuals (short of death or torture) is the power to deprive an individual of his liberty. Loss of liberty carries with it significant implications for individuals. Indeed, the European Committee for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment ('the CPT') considers that the period immediately after deprivation of liberty is when an individual is most vulnerable.<sup>122</sup> This is self-evident. Communication with the outside world is at a stroke significantly restricted (and may indeed involve only the rights to have notification of the loss of liberty made to others, or to a consultation with a legal representative). This sense of vulnerability is exacerbated by the possibility of prolonged detention with the consequential impact upon reputation, family life, and even financial interests.

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122 See 6th General Report [CPT/Inf (96) 21], paragraph 15. Relevant extracts are reproduced in Appendix A, below.

Deprivation of liberty is thus an important tool for police officers seeking to address the perceived risks posed by individuals to the community. In times of severe threat to the life of the community, it may indeed become the principal means of first response.<sup>123</sup> Those encouraging others to engage in riot or serious disorder may be dispersed but are likely to seek to regroup. But each deprivation of liberty needs to be judged upon its own merits. Not all cases of police detention, of course, involve suspicion of commission of an offence under criminal or administrative codes. Police officers may be required to act to safeguard the interests of the person being deprived of their liberty. A young child found wandering the streets alone, or a drunk person at risk to himself through his intoxication, also call for intervention on the part of police officers.

This chapter examines the leading cases of the Strasbourg Court and associated European standards set by the CPT in respect of the use of detention and the associated rights that individuals who have been deprived of their liberty should enjoy. The chapter focuses upon the power to deprive an individual of his liberty, but other issues (covered in other chapters) also arise: for example, conditions of detention in police cells or the use of threats or unwarranted force (chapter 2) or the manner in which a suspect is questioned (chapter 4). Here, the discussion that follows focuses upon the use of deprivation of liberty, and thus considers the general structure and principles of interpretation applied by the European Court of Human Rights in interpreting Article 5 of the Convention.

### **Protecting liberty and security of person: Article 5, European Convention on Human Rights**

The first substantive guarantees of the European Convention on Human Rights provide for the protection of physical and psychological integrity of the individual. The right to life (Article 2), the prohibition of ill-treatment (Article 3), and the safeguard against slavery or servitude (including human trafficking) (Article 4) are followed by a more detailed textual framework for the regulation of deprivation of liberty in Article 5 which recognises that police officers must have the power to detain individuals, but that this power must be exercised with restraint.

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123 When there is a serious threat to the community's well-being 'in time of war or other public emergency threatening the life of the nation', a State has the right to suspend temporarily (by way of 'derogation') certain individual rights under the European Convention on Human Rights by virtue of Article 15. Instances of use of the power of derogation inevitably have involved derogation of obligations under Article 5, and that the case law has examined whether such a situation existed, and whether any exercise of the right of derogation met the test of being 'to the extent strictly required by the exigencies of the situation'.

The text of Article 5 is as follows:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - (a) the lawful detention of a person after conviction by a competent court;
  - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. 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.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

The key question posed by Article 5 can be succinctly stated: is the loss of liberty authorised by law? But this is not only a matter for domestic law, for the question also arises whether the detention is also authorised by Article 5 which in essence is concerned with the question whether the detention is *arbitrary* in all the circumstances. Put simply, can it be shown that there are

no less onerous alternatives (that is, not involving loss of liberty) available? Furthermore, this question requires to be asked periodically, for the original justification may soon cease to exist.

Article 5 thus imposes accountability for actions of police officers who have deprived an individual of his liberty through scrutinising the lawfulness both of the initial decision to detain and of the continuance of deprivation of liberty.

Article 5 refers to 'liberty and security of person'. But the words 'and security' are essentially superfluous, as Article 5 is concerned with loss of personal freedom through detention, that is, 'freedom from arbitrary arrest or detention'.<sup>124</sup> (The notion of personal 'security', though, is not entirely absent, for certain recognised grounds for deprivation of liberty indeed specifically involve detention justified for the benefit of the individual as with detention of the mentally ill, or of alcoholics, or of drug addicts, while other guarantees call upon police officers to take reasonable steps to provide protection against real and imminent threats posed<sup>125</sup> by individuals<sup>125</sup> or counter-demonstrators,<sup>126</sup> or to ensure the effective operation of criminal sanctions to deter assaults.<sup>127</sup>)

Article 5 both specifies the circumstances in which deprivation of liberty can take place, and also provides complementary rights to ensure by means of independent judicial scrutiny that the detention is indeed justified.

■ First, any deprivation of liberty must be lawful or in accordance with the law, and further fall within one of the circumstances prescribed in the six sub-paragraphs of paragraph 1. These make provision for some 15 separate grounds justifying detention, grounds which the text 'save in the following circumstances' makes clear are exhaustive.<sup>128</sup> Not all of the grounds will be of relevance to police officers as the text is designed to cover the whole range of circumstances in which State officials may feel compelled to deprive an individual of his liberty. As discussed, certain provisions allow loss of liberty with the aim of protecting the public and at the same time furthering the interests of vulnerable individuals (including detention for the educational supervision of minors, for the prevention of the spread of infectious diseases,

124 See *Menteş and Others v Turkey*, judgment of 28 November 1997, at paragraphs 78-82 (the applicants withdrew their complaints that the right to security had been violated on account of state action necessitating their leaving their homes after it was established that they had not been deprived of their liberty).

125 For example, *Osman v the United Kingdom*, judgment of 28 October 1998 at paragraphs 116-121.

126 *Plattform Ärzte für das Leben v Austria*, judgment of 21 June 1988 at paragraphs 32-34.

127 See for example, *A v the United Kingdom*, judgment of 18 September 1997 at paragraphs 20-24.

128 *Ireland v the United Kingdom*, judgment of 18 January 1978 at paragraph 194.

and of detention of vagrants or persons of unsound mind or of alcoholics or drug addicts). One sub-paragraph recognises the use of detention to give effect to immigration controls. But from the perspective of police officers, the most relevant on a day-by-day basis will be powers to detain an individual who is suspected of having committed an offence or to prevent a breach of the criminal law.

■ Secondly, the remainder of the text of Article 5 thereafter provides opportunities and techniques for the testing of whether there is sufficient reason for loss of liberty. Thus paragraphs 2 to 4 call for judicial determination of the lawfulness of the deprivation of liberty to ensure the detention is – and remains – justified in terms of at least one of these grounds: paragraph 2 requires the giving of reasons upon deprivation of liberty, paragraph 3 provides certain additional protection (including prompt appearance before a judicial authority) for persons detained on suspicion of the commission of an offence or who are thought likely to commit an offence or abscond, and paragraph 4 directs that individuals shall have the right to take proceedings ‘speedily’ to determine whether detention continues to be justified. Again, much of this will be of relevance to police officers: here, the primary issues are likely to be the giving of reasons for loss of liberty, and the question whether detention *remains* justified even if it was so at the outset of detention.

■ There is also a third and subsidiary aspect of the guarantee, for paragraph 5 provides that in the event of unlawful detention or failure to accord a detainee these procedural rights, an individual must enjoy an enforceable right to compensation in domestic law.

From the perspective of the police officer, Article 5 thus calls for consideration of four separate questions:

- First, do the facts show there to have been a ‘deprivation of liberty’?
- Secondly, was that deprivation of liberty, ‘in accordance with a procedure prescribed by law’, based on a legal provision, and free from arbitrariness?
- Thirdly, does the detention fall within one (or more) of the six permissible categories listed in Article 5?
- Fourthly, have the procedural safeguards provided by paragraphs 2 to 4 been provided (and specifically, has the reason for the loss of liberty been notified)?

The Strasbourg Court has generated a considerable amount of case law, and thus it is possible to discuss the implications of Article 5 for police officers with some confidence. This is so, even although specific cases may be based upon very different criminal justice systems, for it is possible to extract certain principles of general applicability.

### **Question 1: do the facts show that there has been a 'deprivation of liberty'?**

The text of Article 5 not only refers to 'deprivation of liberty' but subsequently to 'arrest' and to 'detention'. It is at the outset important to note that such words or phrases in the Convention are so-called *autonomous concepts*, that is, that their interpretation is based not upon domestic law but upon a Strasbourg reading: they do not depend upon domestic legal classification, and nuances of whether a domestic legal system considers an individual under arrest or merely detained or even technically at liberty are not decisive for Article 5. There is thus no meaningful distinction between each of these concepts.

On the other hand, Article 5 is not concerned with mere restrictions of movement. In short, before the guarantees of Article 5 come into play, the facts must support a finding that there has been an actual 'deprivation of liberty'. This must be stressed. Whether an individual has been deprived of his liberty and thus may rely upon the guarantees of Article 5 is dependent upon the facts of each case. In certain instances, this may be self-evident. An individual who is placed in a locked police cell and told he is suspected of committing a criminal offence will clearly have been deprived of his liberty. However, there will be many situations in which the distinction between liberty and detention is not a clear-cut one. Police officers invariably enjoy certain rights incidental to their responsibilities for the detection of crime such as the power to stop and search suspects or to require a witness to remain with an officer while personal details are ascertained; while there may also be situations where a suspect agrees to accompany police officers to a police establishment to help with the investigation of an offence and where the suspect is thus technically a volunteer (even although he in reality acts under a mistaken belief as to his rights or under some feeling of compulsion). Thus whether there has been a deprivation of liberty within the meaning of Article 5 is not always straightforward.

The Strasbourg Court has attempted to tease out certain principles, even though there are inherent difficulties in establishing a dividing line between deprivation of liberty and mere interference with freedom of movement as 'the



difference between deprivation of and restriction upon liberty is ... merely one of degree or intensity, and not one of nature or substance.<sup>129</sup> In each instance, the starting point is the applicant's '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.'<sup>130</sup> In short, the extent of any compulsion or duress will be of considerable relevance,<sup>131</sup> and thus an individual's own assessment of whether he or she is deprived of liberty may not be decisive.

■ In *X v Federal Republic of Germany*, a 10-year-old girl had been taken from her school with two other friends to a police station for questioning about some thefts and kept there for two hours, part of which time had been spent in an unlocked cell. Since the object of the police action was clearly not to deprive the young girl of her liberty but simply to obtain information from her, it was decided that there had been no deprivation of liberty.<sup>132</sup>

■ In *Raninen v Finland*, the question arose as to what the individual's legal status had been in the period between the time of his arrival at a military hospital where he had been taken in handcuffs and before his re-arrest at the hospital the following morning. It was argued that the individual had consented to having being brought to the hospital, but the individual asserted that during this time he had been detained against his will and that he had not been free to leave. The Court declined to find that it had been established that there had been a 'deprivation of liberty'.<sup>133</sup> This case also illustrates that an individual may regain his liberty for a short time after one period of detention and before another.

Consequently, a number of discrete elements call for assessment, such as the amount of space in which an individual is confined, the length of such confinement, and the degree of coercion involved, while the nature, length, effects and legal basis of the loss of liberty are also relevant. Temporary detention in order to search an individual will not involve a 'deprivation of liberty'. But if an individual is handcuffed, placed in a police vehicle and then taken to a police station, there will have been a 'deprivation of liberty'.

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129 *Guzzardi v Italy*, judgment of 6 November 1980 at paragraph 93.

130 *Ibid.* at paragraph 92.

131 *Riera Blume and Others v Spain*, judgment of 14 October 1999 at paragraph 30.

132 Application No. 8819/79, *X v Federal Republic of Germany*, Commission decision of 19 March 1981. In dealing with the question whether any issue arose under Article 3, the Commission stressed that the applicant was in the station for only a short period, it was not shown that she was affected in any way by the experience, there was no irregularity in the police practice, and she was in the company of two friends.

133 *Raninen v Finland*, judgment of 16 December 1997 at paragraph 47.

The problems of deciding what is meant by 'deprivation of liberty' in the context of policing *not* involving the detention of suspects but other aspects of policing can be illustrated by three cases in which the circumstances were atypical, but in which the underlying approach to interpretation is easily discerned.

■ In *Riera Blume and Others v Spain*, the involvement of police officers in the detention of young adults effected with a view to 'de-programming' them after they had spent time living as members of a religious sect was considered to have involved a 'deprivation of liberty'. Applying a test of whether State involvement had been 'so decisive that without it the deprivation of liberty would not have occurred', the Court considered that while the 'direct and immediate' responsibility for the detention to 'de-programme' was borne by the families of the young adults, it was 'equally true that without the active co-operation of the [national] authorities the deprivation of liberty could not have taken place'. Police officers had first taken the young adults to a hotel, and had subsequently questioned the applicants in the presence of their lawyers. The officers had been aware that the individuals were being held against their will (rather than being subjected to 'de-programming' on a voluntary basis as had been suggested by a judge) and had done nothing to assist their release. Accordingly, 'the ultimate responsibility for the matter complained of thus lay with the authorities in question' (and since there had been no lawful basis for the detention, the Court concluded that there had been a violation of Article 5).<sup>134</sup>

■ In *Nielsen v Denmark*, on the other hand, the Strasbourg Court ruled there had been no 'deprivation of liberty' within the meaning of Article 5. A 12-year-old boy had been admitted to a psychiatric hospital for treatment of neurosis on the decision of his mother. While the boy had been found and returned to the hospital by police officers on one occasion when he had disappeared, this was not such as to fall within the scope of Article 5 as the crucial point was that hospitalisation had taken place under an exercise of parental authority.<sup>135</sup>

■ In *Guenat v Switzerland*, police officers had invited an individual who had been thought to be acting abnormally to accompany them from his home to a police station. After various unsuccessful attempts to contact doctors at the clinic where the applicant had been receiving treatment, a psychiatrist had arranged for his compulsory detention in a mental health hospital. The applicant claimed that he had been arrested arbitrarily and detained for some

134 *Riera Blume and Others v Spain*, judgment of 14 October 1999 at paragraphs 31-35.

135 *Nielsen v Denmark* judgment of 28 November 1988 at paragraphs 58-73.

three hours in the police station without being given any explanation for his arrest, but the majority of the Commission considered that there had been no deprivation of liberty since the police action had been prompted by humanitarian considerations, no physical force had been used, and the applicant had remained free to walk about the police station.<sup>136</sup>

### **Question 2: was the deprivation of liberty ‘lawful’ and ‘in accordance with a procedure prescribed by law’?**

Any deprivation of liberty must comply with the law. The text of Article 5 makes this clear, first by requiring that any detention must be ‘in accordance with a procedure prescribed by law’, and secondly, by qualifying each of the six sub-paragraphs in paragraph 1 outlining the justifiable grounds for deprivation of liberty to the effect that any arrest or detention must be ‘lawful’.

It is vital to appreciate that the lawfulness of any deprivation of liberty is tested both in respect of domestic law and also against European expectations that require that domestic law has not been applied in an arbitrary manner, for ‘the very purpose of Article 5 [is] to protect the individual from arbitrary detention.’<sup>137</sup> There must also have been compliance with procedures laid down by domestic law, for failure to adhere to procedural steps or safeguards laid down in national law will result in a finding of a breach of Article 5, and it will not be possible retroactively to rectify procedural improprieties in the deprivation of liberty. As far as domestic procedures are concerned, the importance of properly maintained custody records is crucial. Police officers must be able to show through documentary or other means that that an apprehension and subsequent detention were in accordance with domestic procedures.<sup>138</sup>

Some further discussion of the ‘lawfulness’ of a deprivation of liberty is helpful.<sup>139</sup> As noted, domestic law will inevitably confer wide authority upon police officers,

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136 *Guenat v Switzerland*, Commission decision of 10 April 1995 ((1995) DR 81, 130 at 134).

137 *Akdeniz and Others v Turkey*, judgment of 31 May 2001 at paragraph 106.

138 Thus Article 5 imposes a duty upon states to ensure the accurate administrative recording of the details of and grounds for detention: *Çakıcı v Turkey*, judgment of 8 July 1999 at paragraph 105. See also *Timurtaş v Turkey*, judgment of 13 June 2000 at paragraphs 99-106 (the disappearance of the applicant’s son during an unacknowledged detention disclosed a particularly grave violation of Article 5 in particular because of the lack of a prompt and effective inquiry into the circumstances of the disappearance and the lack of accurate and reliable records of detention of persons taken into custody by police officers).

139 The question of ‘lawfulness’ of a deprivation of liberty may also involve scrutiny of the issue of whether a suspect brought to a country from another was done so in circumstances suggesting the use of irregular procedures, but this falls outside the scope of this discussion.

but the European Convention on Human Rights requires that such powers are consciously exercised upon a case-by-case basis in order to protect against arbitrariness in the application of the law. Therefore domestic law must itself be defined with sufficient precision to protect against arbitrary application of detention powers by the police, and thus substantive provisions of domestic law must not only be 'adequately accessible', but also 'formulated with sufficient precision' to permit individuals to regulate their behaviour accordingly.<sup>140</sup> The particular relevance for police officers is that any deprivation of liberty must be shown to be strictly justified in the particular circumstances and to have been made in good faith.

First, and most obviously, there will be a breach of Article 5 where a detention has taken place without legal foundation in domestic law, for example, where police officers have failed to respect the limits of their authority to detain an individual (but minor clerical flaws in a detention order will not necessarily render the period of detention unlawful as long as the detention is based upon a judicial authorisation).<sup>141</sup>

■ In *K.-F. v Germany*, the maximum period that police officers could detain an individual to check his identity was twelve hours. However, the individual had not been released for some forty-five minutes after the expiry of this period. This had resulted in a breach of Article 5: the Strasbourg Court considered that the absolute nature of the permissible length of detention had placed police officers under a duty to take all necessary precautions to ensure compliance with the law.<sup>142</sup>

Secondly, police officers may not seek to deprive a person of his liberty purportedly for one purpose when the real purpose is different and improper.

■ In *Bozano v France*, the applicant had been sentenced in his absence to life imprisonment in Italy on kidnapping and murder charges. He had been subsequently arrested in France on unconnected matters. An extradition request had been turned down by the French courts since trial *in absentia* was regarded as contrary to the rules of French public policy. A month or so after

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See *Sanchez Ramirez v France* Commission decision of 24 June 1996 (concerning 'Carlos the Jackal') and *Öcalan v Turkey*, judgment of 12 May 2005 (concerning the leader of the PKK).

140 *Steel and Others v the United Kingdom*, judgment of 23 September 1998 at paragraph 75.

141 *Ječius v Lithuania*, judgment of 31 July 2000 at paragraphs 65-69 (regardless of the possible flaws in the wording of the order, its meaning must have been clear to the applicant). But minor clerical errors in detention orders, etc., may in certain circumstances be overlooked: *Douiyeb v the Netherlands*, judgment of 4 August 1999 at paragraphs 39-55.

142 *K.-F. v Germany*, judgment of 27 November 1997 at paragraphs 71-73.

being released on bail in respect of the other charges, he had been arrested by French police purporting to execute a deportation order and taken to a pre-arranged rendezvous with Swiss police at the border. The Swiss courts thereafter had extradited him to Italy where he began serving his sentence. The Court ruled that the actions of the French authorities in detaining the applicant could not be brought within Article 5 in view of the secrecy surrounding, and the manner of, the arrest. 'Lawfulness', said the Court, implies a lack of arbitrariness. Here, the detention was 'a disguised form of extradition' designed to get around the adverse court decision, and was not therefore detention 'in the ordinary course of action ... taken with a view to deportation'.<sup>143</sup>

Thirdly, a police officer must show that not only was the deprivation of liberty authorised by, and in accordance with, domestic law, but that it was also necessary in the particular circumstances. 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'.<sup>144</sup> This is of fundamental importance to ensure that there is no appearance of arbitrariness in the application of the law.

■ In *Witold Litwa v Poland*, the detention of the applicant in a 'sobering-up' centre had been in accordance with Polish domestic procedures. However, the Strasbourg Court nevertheless found a violation of Article 5 on account of considerable doubts that the applicant had been posing a danger to himself or to others. In any event, no adequate consideration had been given to making use of other available alternatives, and the police could have taken the applicant either to a public care establishment or even back to his home. In other words, while detention was authorised by domestic law, it had been the most extreme of the measures available to deal with an intoxicated person.<sup>145</sup>

### **Question 3: does the deprivation of liberty fall within one of the recognised grounds justifying loss of liberty?**

Article 5 recognises a number of grounds that may justify the use of deprivation of liberty. Several of these grounds are of relevance to police officers, and are discussed here. Many permit the use of detention with a view to securing

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143 *Bozano v France*, judgment of 18 December 1986 at paragraph 60.

144 *Witold Litwa v Poland*, judgment of 4 April 2000 paragraph 78; see also *Varbanov v Bulgaria*, judgment of 5 October 2000 at paragraph 46.

145 *Witold Litwa v Poland*, judgment of 4 April 2000 at paragraphs 72-80.

an individual's compliance with legal obligations, and in particular, in respect of observance of the criminal law. However, detention may also promote the interests of individuals who are vulnerable or at risk, as with detention for the educational supervision of minors or of vagrants, persons of unsound mind, alcoholics and drug addicts.

**In order to secure the fulfilment of a prescribed legal obligation  
(Article 5(1)(b))**

This provision is likely to be of relevance in cases where police officers are required to deprive individuals of their liberty for short periods of time in order to carry out, for example, a personal search or to check their identities.<sup>146</sup> But this ground cannot be given too loose an interpretation as this could undermine the aim of the Convention in protecting against arbitrary loss of liberty, and thus any such obligation must be of a 'specific and concrete nature'.<sup>147</sup>

■ In *Novotka v Slovakia*, the detention of the applicant for one hour following his refusal to show police officers his citizen's card (which would have allowed his identity to be checked) was not considered to have given rise to any issue which could raise a violation of Article 5, even though he alleged that his identity had been confirmed by two neighbours.<sup>148</sup>

■ In *McVeigh, O'Neill and Evans v the United Kingdom*, it was accepted that the duty imposed by British anti-terrorist legislation to 'submit to further examination' was a specific and concrete obligation to provide information for the purpose of permitting officials to establish status at the point of entry into the United Kingdom and not (as claimed by the applicants) in substance merely an obligation to submit to detention.<sup>149</sup>

However, the imposition of a deprivation of liberty must also be a proportionate response to the situation. For example, while detention to ascertain an individual's identity may fall within the scope of this heading where domestic law imposes an obligation to carry an identification card and to produce this

146 But note Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (2nd ed., 2009), at p 142: '[This limb] provides a means of justifying various powers of temporary detention exercisable by the police (e.g. random breath tests, road blocks, powers of stopping and searching), to enforce obligations of the criminal law to which Article 5(1)(c) would not extend'.

147 *Lawless v Ireland (No 3)*, judgment of 1 July 1961 at paragraph 9.

148 *Novotka v Slovakia*, Court decision of 4 November 2003.

149 *McVeigh and Others v the United Kingdom*, Commission decision of 18 March 1981 at paragraphs 168-175.

when requested, the prolonged detention of an individual is likely to constitute arbitrary deprivation of liberty.

■ In *Vasileva v Denmark*, the detention in a police station of an elderly bus passenger for over 13 hours after she had refused to disclose her identity to a ticket inspector during the course of a dispute as to the validity of a ticket was seen as a disproportionate response to the situation.<sup>150</sup>

### **Arrest or detention of a person suspected of breaching the criminal law: Article 5(1)(c)**

This ground for deprivation is of obvious importance to police officers. The text provides that a police officer may deprive an individual of his liberty ‘for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence.’ This provision is thus of relevance in the initial stage of a criminal process, and must be read alongside the entitlement in Article 5(3) to ‘be brought promptly before a judge or other officer authorised by law to exercise judicial power and ... to trial within a reasonable time or to release pending trial’.

The key issues of interpretation are as follows:

- the detention may be based upon judicial authorisation, but a police officer is also likely to have powers to arrest and detain an individual without judicial warrant. The offence may be an offence under the criminal law or the administrative code.
- the ‘offence’ must have constituted a crime at the time when the offence was alleged to have occurred.
- the purpose of detention in such cases is to help confirm or dispel the suspicion that an individual has committed a crime or offence, and thus the detention must be for this sole purpose and not for any extraneous aim (such as to exert moral pressure upon a detainee).<sup>151</sup>
- a police officer must always be able to show there has been ‘reasonable suspicion.’ This presupposes the existence of facts or information which would satisfy an objective observer that the arrested person may have committed an offence.<sup>152</sup>

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150 *Vasileva v Denmark*, judgment of 25 September 2003 at paragraphs 32-43.

151 *Giorgi Nikolaishvili v Georgia*, judgment of 13 January 2009 at paragraphs 60-67.

152 *Fox, Campbell and Hartley v the United Kingdom*, judgment of 30 August 1990 at paragraphs 32-36.

- ▶ what may be regarded as ‘reasonable suspicion’ will depend upon all the circumstances. ‘There may thus be a fine line between those cases where the suspicion grounding the arrest is not sufficiently founded on objective facts and those which are.’<sup>153</sup> That a suspicion is *honestly* held is insufficient to satisfy the standard: the suspicion must be ‘reasonable’, but need not be any higher at this stage of the investigation: ‘facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation.’<sup>154</sup>
- ▶ detention should cease as soon as the suspicion ceases to be ‘reasonable.’<sup>155</sup> This is to ensure that the *continuation* of the deprivation of liberty is not arbitrary. It follows that the fact that a person detained ‘on reasonable suspicion’ is not ultimately brought before a judge or is not subjected to criminal charges does not bring the detention beyond the scope of the sub-paragraph as long as the relevant level of suspicion existed at the outset of detention.

### **Arrest or detention of a person to prevent the commission of an offence: Article 5(1)(c)**

This purpose is interpreted restrictively and only applies to detention to prevent the commission of a ‘concrete and specific offence’<sup>156</sup> for too broad an interpretation would mean that ‘anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision.’<sup>157</sup>

■ In *Ječius v Lithuania*, domestic law permitted detention with a view to preventing the commission of offences. The applicant had been taken into custody to prevent his involvement in three specific offences of ‘banditism’, criminal association and terrorising a person. A month later, he was again charged with murder, a charge which had earlier been dropped. The Strasbourg

153 *O’Hara v the United Kingdom*, judgment of 16 October 2001 at paragraph 41.

154 *Murray v the United Kingdom*, judgment of 28 October 1994 at paragraph 55.

155 *Stögmüller v Austria*, judgment of 10 November 1969 at paragraph 4; cf *De Jong, Baljet and Van den Brink v the Netherlands*, judgment of 22 May 1984 at paragraph 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 ...’

156 *Guzzardi v Italy*, judgment of 6 November 1980 at paragraph 102.

157 *Lawless v Ireland (No 3)*, judgment of 1 July 1961 at paragraph 14.



Court observed that detention under the sub-paragraph could only take place within the context of criminal proceedings for alleged past offences, and thus preventive detention of the nature applied to the applicant was incompatible with Article 5.<sup>158</sup>

■ In *Eriksen v Norway*, the applicant had developed a tendency to become aggressive after suffering brain damage, and over a period of years had been detained in prison or in mental hospitals. Shortly before the expiry of authorisation granted by a trial court to use ‘security measures’ to detain the applicant, the police sought and were given approval to keep him in detention for several additional weeks to allow an up-to-date medical report to be obtained. The Court accepted that this period of detention fell within the scope of both sub-paragraphs (a) and (c). The former heading applied since the extension was directly linked to the initial conviction and imposition of ‘security measures’ on account of the applicant’s likely risk of re-offending even though the authority for these had expired. Sub-paragraph (c) also justified detention because of the applicant’s previous mental history and record of assaults, which had provided substantial reasons for believing he would commit further offences if released.<sup>159</sup>

### **Arrest or detention of a person to prevent the fleeing of a criminal suspect Article 5(1)(c)**

A police officer may also detain an individual to prevent him absconding after having committed an offence. The danger of flight must be considered carefully in each case: such factors as the ease of leaving the jurisdiction, the possibility of a heavy sentence and the lack of domestic ties will all be relevant in assessing its likelihood and thus the ‘reasonableness’ of any State detention.<sup>160</sup>

### **Detention of minors for educational supervision or for bringing minors before competent legal authorities: Article 5(1)(d)**

These grounds for detention have generated little case law. These are two distinct purposes, and the reference to detention of a minor ‘by lawful order

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158 *Ječius v Lithuania*, judgment of 31 July 2000 at paragraphs 50-52.

159 *Eriksen v Norway*, judgment of 27 May 1997 at paragraphs 78-87.

160 Cf *Wemhoff v Germany*, judgment of 27 June 1968 at paragraphs 13-15. But see Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights* (2nd ed., 2009), at p 147: ‘the third ground of Article 5(1)(c) appears redundant since a person who is ‘fleeing after having’ committed an offence can in any event be arrested under the first limb.

... for the purpose of bringing him before the competent legal authority' suggests approval of domestic schemes to divert minors from the ordinary criminal process.<sup>161</sup>

### **Detention of persons of unsound mind, vagrants, alcoholics, drug addicts, etc.: Article 5(1)(e)**

This heading justifies a deprivation of liberty both on public safety grounds as well as to further the well-being of the individual who is detained. Yet certain safeguards against arbitrary detention are implicit. For example, the definition of 'vagrant' is primarily a matter of domestic law, as long as this reflects the generally accepted meaning of the term for the purposes of the Convention.<sup>162</sup> Mental health detention cannot be considered as justified if the opinion of a medical expert has not been sought, although in cases of urgency such an opinion may be obtained after the start of the loss of liberty.<sup>163</sup> In relation to policing, the detention of 'alcoholics' and 'drug addicts' may give rise to particular considerations.

■ In *Witold Litwa v Poland*, the applicant, who had been behaving offensively while drunk, had been taken to a 'sobering up' centre where he had been detained for six-and-a-half-hours. While the normal meaning of an 'alcoholic' implied addiction to alcohol, the Court clarified that the term was used in Article 5(1)(e) in a context which includes reference to other categories of individuals who may be deprived of their liberty both to protect public safety and for their own interests, and thus the detention of 'alcoholics' could not be restricted merely to persons medically so diagnosed, but had to include detention of individuals 'whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves', and where detention is 'for the protection of the public or their own interests, such as their health or personal safety'.<sup>164</sup>

■ In *Hilda Hafsteinsdóttir v Iceland*, the applicant had been arrested and held overnight in custody on six occasions on account of intoxication, agitation and aggressive behaviour towards police officers. Although the Court accepted that the detentions were covered by the sub-paragraph as her behaviour had been under the strong influence of alcohol and could reasonably have been

161 *Bouamar v Belgium*, judgment of 29 February 1988 at paragraph 48.

162 *De Wilde, Ooms and Versyp v Belgium* ('Vagrancy cases'), judgment of 18 June 1971 at paragraph 68.

163 E.g. *Herz v Germany*, judgment of 12 June 2003 at paragraphs 43-56.

164 *Witold Litwa v Poland*, judgment of 4 April 2000 at paragraphs 60-63.

considered to entail a threat to public order, the quality of domestic law was considered insufficient to meet the tests under Article 5. Domestic law was not sufficiently precise as to the type of measures that the police were authorised to take in respect of a detainee, nor was the maximum authorised duration of detention specified. While internal police instructions elaborated more detailed rules on the discretion which a police officer enjoyed in ordering detention, the instructions did not permit detention in cases of mere intoxication if an alternative measure could be used. The key issues were that the exercise of discretion by the police, and the duration of the detention, had thus been governed by administrative practice rather than by a settled legal framework. As a result, the law was neither sufficiently precise nor accessible enough to avoid the risk of arbitrariness, and thus the applicant's deprivation of liberty had not been 'lawful'.<sup>165</sup>

### **Illegal immigration, deportation and extradition: Article 5(1)(f)**

Article 5(1)(f) provides for 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. There are thus two 'limbs' to the provision. Detention must be shown to fall under either the first limb (that is, unauthorised entry) or the second (deportation or extradition) and not merely to prevent flight or for any other covert aim.<sup>166</sup>

### **Question 4: has a detained person been accorded the required procedural safeguards?**

The remainder of the text of Article 5 provide a range of guarantees to ensure that an individual can challenge the lawfulness of his loss of liberty, and therefore protect against arbitrary loss of liberty. The key issue is that they require certain positive steps to be taken by police officers, including a general requirement to protect against unwarranted deprivation of liberty by ensuring that the *continuation* of detention is, at all times, justified.

A crucial aspect of the guarantee is the availability of procedural safeguards such as the rights to have notification of the reasons adduced by the authorities and to commence proceedings to test the legal basis of the detention. Where the deprivation of liberty involves suspicion of having committed an offence or where it is reasonably considered necessary to prevent the commission of

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165 *Hilda Hafsteinsdóttir v Iceland*, judgment of 8 June 2004 at paragraphs 51-56.

166 *Bozano v France*, judgment of 18 December 1986 at paragraphs 53-60.

an offence or the flight of a perpetrator, the article additionally guarantees the right to be brought promptly before a judge or other judicial officer who must consider whether there are reasons which would justify the continuation of the detention rather than ordering release on bail; if release pending trial is refused, the detainee has the right to challenge the continuation of detention at subsequent intervals and ultimately to trial within a reasonable time. These rights are positive entitlements which State authorities must specifically provide, whether or not a detained person so requests.<sup>167</sup>

### **The right to be informed promptly of the reason for the detention: Article 5(2)**

Where a person is taken into custody, Article 5(2) provides a person arrested must be 'informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.' This at first glance appears to overlap with the provisions of Article 6(3)(a) which provides that a person charged with a criminal offence must be 'informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'. But the interpretation of each provision is influenced by its particular aim; and since the ultimate purpose of Article 5 is the protection from arbitrary loss of liberty,<sup>168</sup> Article 5(2) seeks to allow the lawfulness of the deprivation of liberty to be tested (rather than as with Article 6(3)(a) which requires a detainee is provided with 'sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence').<sup>169</sup>

- it is important to appreciate that the words used by the drafters have a meaning not dependent upon domestic law: the reference to 'arrest' extends to all deprivations of liberty and not just to a person suspected of committing an offence.<sup>170</sup>
- the giving of information must be assessed independently of its utility: in other words, the fact alone that information is not in practice sufficient to allow applicants to lodge appeals does not mean that the requirements of paragraph 2 have not been satisfied.<sup>171</sup>

167 *Aquilina v Malta*, judgment of 29 April 1999 at paragraph 47.

168 *K.-F. v Germany*, judgment of 27 November 1997 at paragraph 63; and *Erkalo v the Netherlands*, judgment of 2 September 1998 at paragraph 56.

169 *Mattoccia v Italy*, judgment of 25 July 2000 at paragraph 60.

170 *X v the United Kingdom*, judgment of 5 November 1981 at paragraph 66.

171 *Čonka and Others v Belgium*, judgment of 5 February 2002 at paragraphs 50-52.

the content, manner and time of notification are important. The legal basis for the detention together with the essential facts relevant to the lawfulness of the decision must be given in 'simple, non-technical language' that an individual can understand.<sup>172</sup> These requirements cannot be abridged merely because an individual is considered unable or unsuitable to receive the information, and in such a case, the details must be given to a representative such as his lawyer or guardian.<sup>173</sup>

- in relation to a deprivation of liberty on suspicion of involvement in an offence, an individual must be given more than the mere indication of the legal basis for the detention,<sup>174</sup> although paragraph 2 does not imply any duty to make the individual aware of the grounds for the suspicion.<sup>175</sup>

While the information must be given promptly, 'it need not be related in its entirety by the arresting officer at the very moment of the arrest'.<sup>176</sup> Some discussion of Strasbourg Court case law shows the situations that may arise:

■ In *Delcourt v Belgium*, the arrest of a French-speaking individual on the authority of a warrant in Flemish was considered not to have breached this requirement since the subsequent interview had been in French and it could be assumed that the reason for the arrest had been known to the applicant.<sup>177</sup>

■ In *Ireland v the United Kingdom*, following instructions given to military police officers, detainees had not been informed of the grounds for the deprivation of their liberty but had merely been advised they were being held pursuant to the provisions of emergency legislation. This was insufficient to meet the requirements of Article 5.<sup>178</sup>

■ In *Fox, Campbell and Hartley*, in contrast, individuals were only given the most minimal information as to the legal basis for their detention, but within a few hours had been interrogated at length as to their suspected involvement

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172 *Fox, Campbell and Hartley v the United Kingdom*, judgment of 30 August 1990 at paragraph 40.

173 *X v the United Kingdom*, Commission Report of 16 July 1980 at paragraphs 102-108.

174 *Murray v the United Kingdom*, judgment of 28 October 1994 at paragraph 76.

175 *McVeigh, O'Neill and Evans*, Commission Report, 18 March 1981, DR 25, p. 15.

176 *Fox, Campbell and Hartley v the United Kingdom*, judgment of 30 August 1990

177 *Cf Egmez v Cyprus*, judgment of 21 December 2000 at paragraph 85 (detention of a Turkish-speaking individual who could also understand Greek on suspicion of drug trafficking by Greek-speaking officials who had been arrested *in flagrante delicto*, had expressly been informed of the suspicion against him on at least two occasions while in hospital, and by police officers who had interrogated him, one of whom spoke Turkish: no violation).

178 *Ireland v the United Kingdom*, judgment of 18 January 1978 at paragraph 198.

in proscribed terrorist organisations. The Court determined that in the circumstances the reasons for the detention had thereby been brought to the notice of the applicants within the constraints of ‘promptness’.<sup>179</sup>

■ In *Dikme v Turkey*, the Court considered that a threat made to the applicant at the outset of his interrogation was in the circumstances enough to satisfy Article 5(2) since it had contained a ‘fairly precise indication’ of the suspicion of criminal activity.<sup>180</sup>

### **The right of a suspect to be brought ‘promptly’ before a judge: Article 5(3)**

The requirement that a person detained is brought ‘promptly’<sup>181</sup> before a judge serves two purposes. Primarily, this is considered necessary to allow the lawfulness of detention to be assessed and a determination made as to whether the individual should be released or detained in custody pending determination of guilt or innocence.<sup>182</sup> Secondly, prompt judicial appearance also assists in the protection against *incommunicado* detention and, more generally, helps prevent ill-treatment during police custody. As discussed, Article 5’s concern for liberty and security of person concentrates upon the question of whether the loss of liberty is – and remains – lawful, and in this way seeks to protect individuals against arbitrary deprivations of liberty. Issues relating to the personal security and well-being of detainees are more properly a matter for Article 3, which proscribes the infliction of torture, inhuman or degrading treatment or punishment, and ultimately, for Article 2 which requires respect for the right to life. However, there is a close relationship between the aims of each of these three guarantees, as acknowledged by the Court:

” Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention. ... What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a

179 *Fox, Campbell and Hartley v the United Kingdom*, judgment of 30 August 1990 at paragraph 40.

180 *Dikme v Turkey*, judgment of 11 July 2000 at paragraphs 55-57 (‘You belong to *Devrimci Sol* [an illegal organisation], and if you don’t give us the information we need, you’ll be leaving here feet first!’).

181 The interpretation of the guarantee has not been without difficulty, for while the English text of Article 5, paragraph 3, uses the term ‘promptly’, the French text refers to ‘aussitôt’ which, literally, means ‘immediately’.

182 *Brogan and Others v the United Kingdom*, judgment of 29 November 1988 at paragraph 58.

subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.<sup>183</sup>

Fulfilment of the right cannot be made dependent upon a specific request by an accused person but must be conferred automatically.<sup>184</sup>

While most legal systems guarantee that a detainee is brought before a judge, prescribed time limits for bringing a detained suspect before a judge can vary in differing legal systems. The Court's case law suggests that appearance before a judge must take place within four days (unless in wholly exceptional cases, a period exceeding 96 hours before a detainee is released or brought before a judicial officer may be deemed justified, for example on account of the health of the detainee or geographical considerations). However, since the crucial purpose of the requirement is to provide effective judicial control against arbitrary deprivation of liberty, there may in consequence be a responsibility to ensure the appearance of a detainee before a judge sooner than 96 hours in certain cases.

■ In *İpek and Others v Turkey*, minors had been arrested as part of an investigation into terrorist offences and had been held for two days before being questioned. No assistance of a lawyer had been offered as the offences had fallen within the jurisdiction of State security courts. Three days and nine hours after the arrests they were brought before a judge. In emphasising that the authorities do not enjoy unrestricted power under Article 5 to arrest suspects for questioning free from effective control by domestic courts, the age of the suspect, delay in interrogating and lack of legal assistance all supported a finding that the applicant had not been brought 'promptly' before a judge.<sup>185</sup>

Delays attributable to determinations by police officers that denial of access to a court is necessary, for example to address the threat of terrorism, are unlikely to be acceptable.

■ In *Ireland v the United Kingdom*, there had been failures to involve any judicial official of any kind, let alone 'promptly': here, domestic law allowed for detention for up to seven days to enable an investigation into involvement in terrorist activity to take place. Only at the end of this period would a detainee have had the right to have been brought before a judge, or else released. This was held to be a violation of Article 5(3).<sup>186</sup>

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183 *Kurt v Turkey*, judgment of 25 May 1998 at paragraph 123.

184 *Aquilina v Malta*, judgment of 29 April 1999 at paragraph 49.

185 *İpek and Others v Turkey*, judgment of 3 February 2009 at para 34.

186 *Ireland v the United Kingdom*, judgment of 18 January 1978 at paragraph 199.

## **Conclusion**

The most intrusive interference with an individual's liberty is most likely to involve a deprivation of liberty. That a deprivation of liberty may be necessary to assist in the investigation of crime or for the protection of the public and of the individual himself is self-evident, but legitimate State interests cannot be used to justify untrammelled police authority. Guarantees against the use of arbitrary deprivation of liberty are contained in Article 5, and while the case law generated by this provision in part reflects the wide variety of systems of criminal justice found throughout the continent, the underlying principles in this jurisprudence exhibit consistency in stressing the need to ensure that loss of liberty in each instance is lawful, seeks to achieve a permissible end, and is not prolonged any more than is necessary. Deprivation of liberty should only be used where this is justified by the circumstances, and detention which has ceased to be justified must result in the release of the individual. This care to minimise the risk of unwarranted and prolonged deprivations of liberty complements the protection accorded by other guarantees, most noticeably Article 3 in respect of the risk of ill-treatment during detention. Both the risk of ill-treatment and the risk of unwarranted deprivation of liberty are of particular relevance to persons detained on suspicion of commission of an offence. This consequently gives rise to concerns affecting the investigation of crime by police officers, and it is to this subject that attention now logically turns.



## Chapter 4

# Investigating crime; and ensuring the integrity of the criminal process

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### Introduction

**P**olice officers are likely to play the key role in the task of investigating allegations of criminal behaviour. Whether they do so under the general supervision or the specific guidance of a prosecutor or of a judge, or in their own right, the level of involvement of police officers in the initial stages of a criminal process is likely to be considerable. To this end, domestic law will confer considerable authority upon police officers to interrogate suspects and witnesses, to carry out searches, to undertake surveillance, and generally to secure evidence. Many of these powers may be highly intrusive, particularly the powers to detain a suspect and to search for real evidence. In certain circumstances, however, the police are under a particular responsibility to intervene in order to protect the rights of others, and the failure to take appropriate action may indeed constitute a violation of the European Convention on Human Rights.

Much of this chapter seeks to analyse the key considerations for police officers in ensuring the integrity of the criminal process while investigating allegations of crime. Investigation may thus give rise to a number of issues under the European Convention on Human Rights. Most obviously, the deprivation of liberty of a person reasonably suspected of committing an offence will give rise to the compatibility of the detention with Article 5 (as discussed in chapter 3). However, other guarantees under the Convention are also relevant. In particular, Article 8 is likely to be engaged whenever a search or surveillance takes place as this will involve an interference with respect for private life, home and correspondence. Interrogation of suspects which involves the infliction or threat of infliction of ill-treatment may also give rise to issues under Article 3 (as discussed in chapter 2). But these aspects of police investigation practices also have another dimension, as they take place within the context of a criminal process and may also have an important impact upon the fairness of a criminal trial under Article 6.

## **Positive obligations arising under the Convention to investigate allegations of criminal activity in order to protect the rights of individuals**

As noted in an earlier chapter, in certain circumstances, police officers are under a positive obligation to investigate behaviour which may constitute an offence. This is an aspect of the responsibility to protect individuals from behaviour that may constitute ill-treatment whenever police officers have knowledge of the risk of ill-treatment (or ought to have had such knowledge).<sup>187</sup> A similar responsibility arises under Article 2 to protect the life of individuals from identifiable threats where steps may be reasonably taken, and also under Article 8 when it is necessary to ensure respect for private and family life. The duty to ensure the care and protection of detainees thus extends to taking steps to protect individuals from the threat of violence at the hands of other prisoners,<sup>188</sup> but more importantly, also applies to the taking of reasonable steps to protect vulnerable individuals against the risk of ill-treatment in situations such as when domestic violence is suspected.

■ In *Osman v the United Kingdom*, 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 Court eventually considered that the police could not be assumed to have known of any real and immediate risk to the life of the deceased. Nor could it reasonably have been assumed that any action taken by the police would have neutralised any such risk. Consequently, no violation was established in the circumstances. However, 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

187 *PF and EF v the United Kingdom*, decision of 23 November 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 Article 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).

188 Cf *Pantea v Romania*, judgment of 3 June 2003 at paragraphs 177-196.

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'.<sup>189</sup>

■ In *Opuz v Turkey*, the authorities had been aware of incidents of serious violence and threats made by the applicant's husband against her and her mother, but the authorities had considered the incidents to have been a 'family matter' and only one incident had resulted in a successful criminal prosecution before the applicant's mother had been killed by her husband. Repeated requests by the women for protection had been ignored. The Court ruled that there had been a violation of Article 2 since a lethal attack had not only been possible but even foreseeable in light of the history of violence. The response of the authorities to protecting the applicant had been manifestly inadequate. Crucially, too, the circumstances disclosed a violation of Article 14 taken with Articles 2 and 3 in light of international legal standards supporting the principle that the failure (even when unintentional) to protect women against domestic violence violated the women's right to equal protection of the law. The passivity shown by the authorities in Turkey created a climate that was conducive to domestic violence, violence that was gender-based, and that in consequence constituted a form of discrimination against women.<sup>190</sup>

More recently, the duty to intervene has been extended. Many European States are now affected by trafficking, primarily of women and minors, as countries of origin, transit or destination. The Council of Europe Convention on Action against Trafficking in Human Beings which entered into force in 2008 aims to prevent trafficking, to provide protection to victims of trafficking and to prosecute traffickers. State responsibilities are monitored by the independent Group of Experts on Action against Trafficking in Human Beings (GRETA), with the Committee of the Parties (comprising State representatives) having the authority to adopt recommendations to States on measures which should be taken to implement GRETA's conclusions. Where victims of human trafficking are held in servitude or in forced or compulsory labour within the meaning of Article 4 of the European Convention on Human Rights, there must be an effective response from criminal justice agencies, including the police. This is an example of a positive obligation arising from the need to ensure that rights are 'practical and effective'.

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189 *Osman v the United Kingdom*, judgment of 28 October 1998 at paragraphs 116, 199-121.

190 *Opuz v Turkey*, judgment of 9 June 2009 at paragraphs 184-202.

■ In *Rantsev v Cyprus and Russia*, the Court emphasised that positive obligations to prevent and to protect may arise (in the context of cross-border trafficking) both in the country of origin and also in the country of destination (and potentially also in any country of transit). Here, a young Russian woman had died in unexplained circumstances after having fallen from a window of a block of flats in Cyprus where she had gone to work on an 'artiste' visa. The death had occurred an hour after police had asked the manager of the cabaret where she had worked for three days before fleeing to collect her from a police station. An inquest had decided that she had died in an attempt to escape from the apartment in circumstances resembling an accident, but that there had been no evidence to suggest criminal liability for the death. Against the background of reports suggesting the prevalence in Cyprus of trafficking in human beings for commercial sexual exploitation and the role of the cabaret 'industry' and 'artiste' visas in facilitating such trafficking, the woman's father successfully argued that the Cypriot police had failed to protect his daughter from trafficking and to punish those responsible for her death, and also that the Russian authorities had failed to investigate his daughter's trafficking and to take steps to protect her from the risk of trafficking.<sup>191</sup>

## **Preventing and investigating crime – surveillance, and obtaining evidence through searches, etc.:** **Article 8, European Convention on Human Rights**

A decision to carry out a search of a person or of premises, or to instigate surveillance by intercepting correspondence or e-mails, or by placing electronic eavesdropping devices in a home or car, will give rise to an interference with the right to respect for private or family life, home or correspondence within the meaning of Article 8 of the European Convention on Human Rights. The text of this is as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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191 *Rantsev v Cyprus and Russia*, judgment of 7 January 2010 at paragraphs 272-309.

'Private life' is 'a broad term not susceptible to exhaustive definition': it includes such matters as telephone tapping and electronic surveillance, release of images by the police to the media, data retention by the police, and forcible medical examination. A wide range of accommodation may constitute 'home' for the purposes of Article 8, and indeed, 'home' may extend beyond the domestic sphere to business premises (and thus the search of a company's offices and premises also falls within the scope of Article 8).<sup>192</sup>

■ *Niemietz v Germany* involved a court-authorised search of a lawyer's office. In deciding that in certain circumstances business premises could fall within the scope of 'home', the Court remarked that any precise distinction between office and home would often be difficult to draw 'since activities which are related to a profession or business may well be conducted from a person's private residence and activities which are not so related may well be carried on in an office or commercial premises'.<sup>193</sup>

The acquisition, retention, use or disclosure of personal information by the police constitutes an interference with Article 8.<sup>194</sup> Respect for 'home' may give rise to questions including physical intrusion into a home to carry out a search, and possibly also non-physical intrusion through telephone tapping.<sup>195</sup> 'Correspondence' is obviously related closely to both 'private life' and 'family life' and is broad enough to cover most means of communication. Thus a range of techniques used in the prevention or investigation of crime such as the interception of communications,<sup>196</sup> the use of electronic listening devices,<sup>197</sup> the monitoring of emails<sup>198</sup> and the use of GPS tracking devices<sup>199</sup> involve interferences with Article 8 rights, even if no subsequent use is ever

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192 *Stés Colas Est and Others v France*, judgment of 16 April 2002 at paragraphs 40-50.

193 *Niemietz v Germany*, judgment of 16 December 1992 at paragraphs 30-31.

194 *Rotaru v Romania*, judgment of 4 May 2000.

195 *Klass v Germany*, judgment of 6 September 1978 at paragraph 41 (point raised but not decided).

196 *Malone v the United Kingdom*, judgment of 2 August 1984 at paragraph 64 (telephone tapping).

197 E.g. *Khan v the United Kingdom*, judgment of 12 May 2000 at paragraph 25 (evidence obtained by tape-recording of conversations); *PG and JH v the United Kingdom*, judgment of 25 September 2001 at paragraphs 37 and 42 (visual surveillance, covert listening device, and obtaining details of telephone calls).

198 *Copland v the United Kingdom*, judgment of 3 April 2007 at paragraphs 41-42.

199 *Uzun v Germany*, judgment of 2 September 2010 at paragraphs 49-53 (surveillance via GPS tracking device).

made of the data obtained.<sup>200</sup> However, in relation to intelligence-gathering by means of visual observation in public places, Article 8 is only engaged if the State action goes beyond mere observation and involves the active monitoring of individuals.<sup>201</sup> Searches of the person, including intimate searches, may fall within the scope of Article 8 where these involve a degree of coercion, for a voluntary submission to a search (for example, as in an airport) will not constitute an ‘interference’.<sup>202</sup> The taking and retention of fingerprints and DNA samples without consent will involve an interference with respect for private life as fingerprints contain unique information about the individual and their retention cannot be considered as neutral or insignificant, while cellular samples hold significant amounts of personal information, and DNA profiles provide a means of identifying genetic relationships and permit inferences concerning ethnic origin to be drawn.<sup>203</sup>

### Determining whether an interference with Article 8 is justified

An *interference* with Article 8 rights must comply with a range of conditions if it is to be justifiable under the European Convention on Human Rights. These conditions are: (i) the interference must be in pursuance of a legitimate aim; (ii) it must be in accordance with the law; and (iii) it must be necessary in a democratic society. If the State cannot satisfy any of these conditions, there will be a finding of a *violation* of the guarantee.

The justification advanced by a State for measures of surveillance will inevitably involve one of the prescribed reasons in the text of Article 8 such as national security, public safety, or for the prevention of disorder or crime. This will in principle not pose a difficulty for the State to meet this condition. The first substantive question in scrutinising whether any interference is justified will thus be in determining whether the interference is ‘in accordance with the law’.

200 *Kopp v Switzerland*, judgment of 25 March 1998 at paragraphs 51-53.

201 *Peck v the United Kingdom*, judgment of 28 January 2003 at paragraphs 57-63.

202 *Gillan and Quinton v the United Kingdom*, judgment of 12 January 2010 at paragraphs 61-66 (application of search powers under the Terrorism Act 2000, pp. 44-47: allowing individuals to be stopped anywhere and at any time and without notice or choice as to whether to submit were to a search could not be compared to searches of travellers at airports or of visitors to public buildings as these involved consenting to a search by choosing to travel or to visit).

203 *S and Marper v the United Kingdom*, judgment of 4 December 2008 at paragraphs 68-86.

### ‘In accordance with the law’

Most obviously, an unauthorised interception, which takes place without legal basis, will constitute a violation of Article 8.<sup>204</sup> However, there is an expectation that domestic law will also provide sufficient legal regulation to protect against arbitrary interference: that is, the law must also meet the tests of accessibility and foreseeability.<sup>205</sup> Powers of search and seizure, and to subject individuals to surveillance, must have a sufficiently clear basis in domestic law. An administrative practice, even if it is complied with, is insufficient.<sup>206</sup> This is necessary in order to ensure that the scope and manner of the exercise of any discretion is adequately clear. A general power to take steps necessary for the investigation of crime is not a sufficient basis for specific measures, such as the interception of telecommunications.<sup>207</sup> It is necessary that the law contain provisions concerning the precise circumstances under which telecommunications can be intercepted, for what purpose any conversations recorded may be used and for how long they may be retained.<sup>208</sup> In addition, it serves to ensure that persons are in a position to foresee, with a degree of accuracy, the circumstances in which they may be subjected to the exercise of such powers.<sup>209</sup>

■ In *Malone v the United Kingdom*, the European Court of Human Rights found that the scope and manner in which powers to intercept communications could be exercised were not prescribed with sufficient certainty, and reiterated that ‘in accordance with law’ not only referred to the existence of domestic law but also to its quality, which had to be compatible with the notion of the rule of law. Domestic law must therefore determine with sufficient clarity both the scope of any discretionary authority conferred and the manner in which it may be exercised.<sup>210</sup>

■ In *Perry v the United Kingdom*, the covert videoing of the applicant on his arrival at a police station had not been ‘in accordance with law’ as the police had failed to comply with the procedures set out in a code of practice, the

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204 *MM v the Netherlands*, judgment of 8 April 2003 at paragraphs 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).

205 See p. 17 above.

206 *Malone v the United Kingdom*, judgment of 2 August 1984 at paragraph 79.

207 *Kruslin v France*, judgment of 24 April 1990 at paragraph 17.

208 *Ibid.* at paragraph 34.

209 *Khan v the United Kingdom*, judgment of 12 May 2000 at paragraph 26.

210 *Malone v the United Kingdom*, judgment of 2 August 1984 at paragraphs 67-68.

Court observing that while the normal use of security cameras in premises such as police stations where they serve a legitimate and foreseeable purpose does not in itself raise an issue under Article 8, the situation is different where their use goes beyond the normal or expected use of security cameras: as when police officers seek to obtain clear footage of an individual to show to witnesses and where there is no expectation that a suspect is being filmed for identification.<sup>211</sup>

■ In *Gillan and Quinton v the United Kingdom*, two individuals attempting to attend a protest against an arms fair had been searched by police. The statute permitted senior police officers to authorise uniformed police officers, if they considered it 'expedient for the prevention of acts of terrorism', 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. In reaching its decision, the Court considering that the element of humiliation and embarrassment involved in the public nature of a search may have, 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 a 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. First, 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 a very broad scope and did not require any showing of reasonable suspicion. Instead, the power could be employed merely on a 'hunch' or 'professional intuition', the sole proviso being that the purpose of the search was to look for articles which could be used in connection with terrorism, a category of considerable breadth which could cover many articles commonly carried in the streets. The conclusion was 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 insufficiently circumscribed and not subject to adequate legal safeguards against abuse to meet the test of "in accordance with the law".<sup>212</sup>

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211 *Perry v the United Kingdom*, judgment of 17 July 2003 at paragraphs 44-49.

212 *Gillan and Quinton v the United Kingdom*, judgment of 12 January 2010 at paragraphs 76-87.



The retention of information concerning persons by the police must have a basis in national law. It was a feature of many totalitarian regimes in Central and Eastern Europe that they subjected huge numbers of people to surveillance and recorded large amounts of private information, often for purely political reasons.

■ In *Rotaru v Romania*, the applicant had been the subject of a file, created by the Romanian Intelligence Service, which contained a range of information about him. The Court held that ‘since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny ... , it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of unfettered power. Consequently, the law must indicate the scope of any such discretion ... with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.’<sup>213</sup>

### **‘Necessary in a democratic society’**

The second issue will be the determination of whether surveillance, data-gathering or interception of communications is ‘necessary in a democratic society’. In the course of investigations and other work, police may exercise powers under domestic law to obtain fingerprints and other personal information concerning individuals. Information of this type is within the scope of protection provided by Article 8 of the European Convention on Human Rights and therefore its acquisition, retention and use is subject to it. Laws concerning these issues must therefore go no further than is ‘necessary in a democratic society’.

From a policing perspective, it is important to ensure that adequate measures are in place to ensure compliance both with national law and with the European Convention on Human Rights. For example, if national law allows for the exercise of police powers in a very broad range of scenarios, police officers responsible for their exercise should ensure that they only use the powers where there is a demonstrated need, and for their proper purpose. This will assist in reducing the likelihood of a successful legal challenge, either in the domestic courts or in Strasbourg.

Again, the sufficiency of domestic safeguards to protect against arbitrary application of powers is of relevance, for the necessity of an interference is

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213 *Rotaru v Romania*, judgment of 4 May 2000 at paragraph 55.

best determined by domestic authorities, and the Court will thus focus upon whether there were 'adequate and effective guarantees against abuse' in each case.<sup>214</sup> A written record of decisions made, together with the basis on which they were taken, should also be kept in order to facilitate accountability and transparency.

Assessment of the existence and effectiveness of safeguards prohibiting misuse will allow the Court to ensure that domestic decision-makers have addressed the existence of a pressing social need. Therefore the Strasbourg Court's assessment of the relevancy and sufficiency of the reasons for any interception or monitoring will normally be subsumed by examination as to the quality of domestic safeguards, and in particular whether domestic decision-makers have taken into account circumstances such as 'the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law'.<sup>215</sup> The degree of intrusiveness is relevant, for while rather strict standards apply to certain forms of surveillance, such as surveillance by telecommunications, these requirements are less demanding where the measures are less invasive, as in the case of surveillance of movements in public places.<sup>216</sup> But careful scrutiny of the reasons advanced for an interference is always required, to ensure that the reasons are indeed proportionate and relevant, particularly if the confidentiality of the surveillance is subsequently compromised.

■ In *Peck v the United Kingdom*, the applicant had been unaware that he was being filmed by a closed circuit television at the point where he attempted to commit suicide in a deserted public street, but the filming had allowed the police to render medical assistance. Subsequently, the local administration after obtaining copies of the tapes had released still photographs and video footage of the immediate aftermath of the incident 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. For the Strasbourg Court, 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 which far exceeded any exposure to a passer-by or to security observation, and

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214 *Kennedy v the United Kingdom*, judgment of 18 May 2010 at paragraphs 155-170.

215 *Klass and Others v Germany*, judgment of 6 September 1978 at paragraph 50.

216 *Uzun v Germany*, judgment of 2 September 2010 at paragraphs 49-53, 64-74, and 77-81.

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.<sup>217</sup>

■ In *S and Marper v the United Kingdom*, the taking of fingerprints and DNA samples from two applicants who were suspected, but never convicted, of crimes was held to constitute a violation of Article 8. The data was to be retained without a prescribed time limit. 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 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 required retention of data to be proportionate in relation to the purpose of collection, and also limited in time. 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. In *S and Marper v the United Kingdom*, the relevant legal provisions allowed for the taking of DNA samples and fingerprints from every person arrested on suspicion of any offence. This information could be retained indefinitely, regardless of whether the person was convicted or not. Samples and fingerprints could be used for speculative searches in respect of unsolved crimes. The Court held that the 'blanket and indiscriminate nature' of these powers failed 'to strike a fair balance between the competing public and private interests...'. The interference with the right to respect for private life was, consequently, held to be disproportionate and therefore in violation of Article 8.<sup>218</sup>

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217 *Peck v the United Kingdom*, judgment of 28 January 2003 at paragraphs 76-87.

218 *S and Marper v the United Kingdom*, judgment of 4 December 2008 at paragraphs 95-99 and 105-126.

■ In *Keegan v the 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. Police officers had forcibly gained entry into the applicants' home and carried out a search of the premises in the mistaken belief that an armed robber lived in the home. 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.<sup>219</sup>

### **The importance of 'fair hearing' guarantees: Article 6, European Convention on Human Rights**

Article 6 is the provision in the Convention that gives rise to the greatest amount of case law in Strasbourg. Many of these cases involve systemic weaknesses in domestic arrangements, and in particular, the failure of States to ensure 'trial within a reasonable time'. Most of these identified weaknesses do not directly involve police action or inaction (and rather focus upon systemic shortcomings on the part of the judicial system), but certain areas of jurisprudence do have important implications for police practice.

The text of Article 6 is as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
  - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

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219 *Keegan v the United Kingdom*, judgment of 18 July 2006 at paragraphs 29-36.

- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 6 is given a purposive interpretation that furthers the principle of fairness in the administration of justice, for in a democratic society based upon the rule of law, 'the right to a fair administration of justice holds such a prominent place that a restrictive interpretation ... would not correspond to the aim and the purpose of that provision.'<sup>220</sup> Thus an assurance given to an accused that he would not be prosecuted for certain offences may render subsequent criminal proceedings unfair if the authorities renege on the assurance.<sup>221</sup> The fundamental and all-pervasive notion infusing Article 6 is 'fairness' as reflected in Paragraph (1), which refers to the rights to:

- 'a fair and public hearing';
- 'within a reasonable time';
- 'by an independent and impartial tribunal established by law'; and
- which pronounces its judgment publicly except in defined and narrowly construed circumstances.

**Additionally, a person accused of a criminal offence acquires further minimum rights conferred by paragraphs (2) and (3), including the rights:**

- to be presumed innocent until proven guilty;
- to be informed of the charge against him;
- to have adequate time and facilities to prepare his defence;
- to defend himself or have legal assistance;
- to examine (and have examined) witnesses; and
- to the free use of an interpreter.

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220 *Delcourt v Belgium*, judgment of 17 January 1970 at paragraph 25.

221 *Mustafa (Abu Hamza) v the United Kingdom*, decision of 18 January 2011.

In any case, the ultimate question under Article 6 is whether criminal proceedings as a whole were fair, that is, 'what the proper administration of justice required' in the particular circumstances.<sup>222</sup> 'Fairness' can generally be stated to involve four main constituent elements: proceedings which are adversarial in character; fair rules of evidence; legal certainty; and the issuing of a reasoned judgment. The requirements of a 'fair hearing' in the determination of criminal charges are more demanding than in respect of civil proceedings since the text of the provision makes clear that additional guarantees (found in paragraphs (2) and (3)) apply in criminal cases.<sup>223</sup>

While an individual may waive his rights under Article 6 (for example, by declining the services of a lawyer during questioning), this may only happen providing that he does so by 'his own free will and in an unequivocal manner' and as long as no issue of public interest is involved.<sup>224</sup>

### **When does Article 6 apply?**

Article 6 applies to all 'criminal charges'. This is given an autonomous interpretation and is thus not dependent upon domestic classification. There are two principal issues: first, the stage during a criminal investigation at which a 'criminal charge' can be said to exist; and secondly, the circumstances in which a matter considered by domestic law as merely disciplinary or enforced through an administrative penalty will fall, nevertheless, to be considered as a 'criminal charge' for the purpose of the guarantee.

The first issue is important in identifying the stage at which rights in terms of Article 6 come into play. The concept of a 'charge' is not dependent upon domestic law. It involves 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', that is whether the situation of the suspect has been 'substantially affected'.<sup>225</sup> It is possible for Article 6 rights to apply even though an individual has not been formally charged in domestic law with an offence. This means that initial proceedings at the outset of a criminal process may therefore fall within the scope of Article 6: for example, by arresting an individual;<sup>226</sup> by the issue of an arrest or a search warrant;<sup>227</sup> by the imposition of a requirement to give

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222 *Vaudelle v France*, judgment of 30 January 2001 at paragraphs 57-66.

223 *Dombo Beheer BV v the Netherlands*, judgment of 27 October 1993 at paragraph 32.

224 *Albert and Le Compte v Belgium*, judgment of 10 February 1983 at paragraph 35.

225 *Deweert v Belgium*, judgment of 27 February 1980 at paragraph 46.

226 *B v Austria*, judgment of 28 March 1990 at paragraph 48.

227 *Eckle v Germany*, judgment of 15 July 1982 at paragraphs 73-75.

evidence;<sup>228</sup> or by other official measures which implicitly allege possible criminal liability and which similarly 'substantially affect the situation of the suspect'.

The second issue is whether proceedings are 'criminal' even though they may be labelled as 'disciplinary' or 'administrative' in domestic law. Domestic classification is not determinative unless the nature of the classification of the offence in domestic law is 'criminal': if so, then Article 6 applies. Substance rather than form is of the essence in relation to 'administrative' offences; and thus the severity of the penalty which could be imposed upon a determination of guilt is of significant importance. As a general rule, if the penalty could involve loss of liberty, the offence should be taken to give rise to a 'criminal' charge. However, whether the offence is normally seen as 'criminal' in other European States may also be relevant.

■ In *Öztürk v Germany*, the applicant had collided with a parked car and had been subsequently served with a notice imposing a fine and costs. After an unsuccessful appeal against this notice, he had been ordered to pay additional costs and expenses including the fees of an interpreter. His application challenged the violation of the right to a free interpreter under Article 6(3)(e), but it was argued in turn that the case had not involved a criminal charge. The Court first noted that the ambit of the criminal law normally included 'offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty'. Further, the type of road traffic offence in question was classified by the overwhelming majority of European legal systems as criminal, as opposed to administrative, and it was a legal rule which was directed 'not towards a given group possessing a special status – in the manner ... of disciplinary law – but towards all citizens in their capacity as road users' enforced by a sanction that was punitive. Accordingly, the imposition of the administrative penalty (even though it was relatively light) constituted the determination of a criminal charge.<sup>229</sup>

## **The investigation of crime – use of undercover officers, etc.: Article 6, European Convention on Human Rights**

In terms of Article 6, a crucial distinction exists between the investigation of criminal behaviour and its incitement. While recognising the need to use undercover agents, informers and covert practices in tackling organised crime

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228 *O'Halloran and Francis v the United Kingdom*, judgment of 29 June 2007 at paragraph 35 (requirement under road traffic legislation to provide details of person driving a vehicle).

229 *Öztürk v Germany*, judgment of 21 February 1984 at paragraphs 53-54.

and corruption (including corruption in the judicial sphere), the Strasbourg Court has stressed that the risk of police incitement entailed by such techniques requires that their use must be kept within clear limits. Certainly, 'the Convention does not preclude reliance, at the preliminary investigation stage and where the nature of the offence may warrant it, on sources such as anonymous informants'. However, 'the subsequent use of such sources by the trial court to found a conviction is a different matter and is acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question'. Moreover, 'while the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, the public interest cannot justify the use of evidence obtained as a result of police incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset'.<sup>230</sup>

Police incitement 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'.<sup>231</sup> The use of undercover agents must thus be restricted and accompanied by appropriate safeguards.

■ In *Teixeira de Castro v Portugal*, two plain-clothes police officers acting as undercover agents had approached the applicant during a drug trafficking operation and had asked him to supply heroin. The applicant's name had been supplied to the officers and he was arrested at the point where he handed over sachets of the drug. Relying on Article 6, he complained that he had not received a fair trial due to the fact that he was incited to commit an offence by plain-clothes police officers acting 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,

230 *Ramanauskas v Lithuania*, judgment of 5 February 2008 at paragraphs 53-54.

231 *Ramanauskas v Lithuania*, judgment of 5 February 2008 at paragraphs 54-55.



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.<sup>232</sup>

■ 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.<sup>233</sup>

■ In *Miliniënė 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 had then approached the police. While noting that the police had ‘influenced’ events (through approval to offer financial inducements and by supplying technical 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.’<sup>234</sup>

## **Questioning suspects: detainees’ rights while in police custody**

The questioning of suspects is a vital part of policing. However, this must take place alongside a recognition of the suspect’s rights. Two separate issues arise: first, respect for the right to silence and the right against self-incrimination; and secondly, the rights of detainees while in police custody (and in particular, the right of access to a lawyer).

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232 *Teixeira de Castro v Portugal*, judgment of 9 June 1998 at paragraphs 34-39.

233 *Ramanauskas v Lithuania*, judgment of 5 February 2008 at paragraphs 62-74 (and at paragraph 50, noting that the Council of Europe’s Criminal Law Convention on Corruption (ETS 173(1999)), Article 23 requires states to adopt measures permitting the use of special investigative techniques).

234 *Miliniënė v Lithuania*, judgment of 24 June 2008 at paragraphs 35-41.

## The right to silence; and the right against self-incrimination: Article 6, European Convention on Human Rights

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. Whether the risk of a miscarriage of justice has arisen will depend on all the facts. While the text of Article 6 does not specifically mention either the right to remain silent when being questioned by the police or the privilege against self-incrimination, these are 'generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6'.<sup>235</sup> The assumption is that the prosecution proves its case without recourse to methods involving coercion or oppression. In particular, the right not to incriminate oneself is closely linked with the presumption of innocence and concerns respect for 'the will of an accused person to remain silent' (rather than use of compulsory powers to obtain real evidence, such as documents, breath, blood and urine samples and bodily tissue for the purposes of DNA testing).<sup>236</sup>

■ In *Aleksandr Zaichenko v Russia*, the applicant had only been informed of his right to remain silent after he had already made a self-incriminating statement even though it had been incumbent on the police to inform the applicant of the privilege against self-incrimination and his right to remain silent. In this instance, the Court held that the detriment the applicant suffered had not been remedied at the trial, and found that Article 6(1) had been violated.<sup>237</sup>

■ In *Heaney and McGuinness v Ireland* and *Quinn v Ireland*, the imposition of sanctions for failing to answer questions violated Article 6. The applicants had been arrested on suspicion of serious criminal charges and required under domestic law to answer questions put to them. Their refusal had led to each being convicted and sentenced to imprisonment for six months. The Court rejected the State's argument that the domestic law in question was a proportionate response to the threat to public order posed by terrorism, considering that such concerns 'cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination'.<sup>238</sup>

235 *John Murray v the United Kingdom*, judgment of 8 February 1996 at paragraph 45.

236 *Saunders v the United Kingdom*, judgment of 17 December 1996 at paragraph 69.

237 *Aleksandr Zaichenko v Russia*, judgment of 18 February 2010 at paragraphs 55-60.

238 *Heaney and McGuinness v Ireland* and *Quinn v Ireland*, judgments of 21 December 2000, at paragraphs 58 and 59 accordingly.

The use of statements obtained through deception, etc. can also give rise to questions as to whether the resultant evidence obtained can be fairly admitted in any subsequent trial.

■ In *Allan v the United Kingdom*, the applicant, who was suspected of involvement in a murder committed during a robbery, complained that the placing of a police informant in his cell for the specific purpose of eliciting from him information implicating him in the offences of which he was suspected violated Article 6. In finding that there had been a violation of fair hearing guarantees, the Court reiterated that the right to silence ‘serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police’. Thus ‘such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit, from the suspect, confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial’. In this case the Court was influenced in particular by the fact that the informant had been coached by the police and instructed to ‘push for what you can’, and therefore the informant could only be seen as an agent of the State who was *de facto* charged with interrogating the applicant.<sup>239</sup>

### **Access to a lawyer**

The second fundamental concern in the questioning of suspects in police custody under Article 6 of the European Convention on Human Rights is access to a lawyer. A brief overview of CPT expectations helps explain recent developments in the case law of the Strasbourg Court, particularly in interpreting Article 6(3)(c) of the Convention.

### **CPT Standards**

The protection of persons detained by the police on suspicion of having committed a criminal offence is of particular concern to the European Committee for the Prevention of Torture, the CPT. Its focus is upon prevention of ill-treatment; and to this end, it insists that as from the outset of detention, an individual should have the right to have the fact of detention notified to a third party; to be offered access to a lawyer; and to be accorded access to a doctor. These rights should be accorded any individual required to remain in detention,

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239 *Allan v the United Kingdom*, judgment of 5 November 2002 at paragraphs 45-53.

regardless of their status in law.<sup>240</sup> Apart from having ‘a dissuasive effect upon those minded to ill-treat’,<sup>241</sup> these are both effective avenues for transmitting allegations or other information about torture or other forms of ill-treatment as well as important potential measures for collecting evidence of any ill-treatment and having this transmitted to the relevant authorities. Indeed, as the Strasbourg Court itself has noted, ‘allegations of torture in police custody are extremely difficult for the victim to substantiate if he or she has been isolated from the outside world, without access to doctors, lawyers, family or friends who could provide support and assemble the necessary evidence ...’<sup>242</sup> Since these rights would be of little value if individuals are unaware of their existence, there is a corollary right to be expressly informed of these rights ‘without delay and in a language which they understand’; and to ensure this notification is made, ‘a form setting out those rights in a straightforward manner should be systematically given to persons detained by the police at the very outset of their custody. Further, the persons concerned should be asked to sign a statement attesting that they have been informed of their rights.’<sup>243</sup>

However, the CPT has accepted that in exceptional cases it may be necessary to delay access to a lawyer of the suspect’s choice or notification of the fact of detention to a third party in order to protect the legitimate interests of the police investigation. But the CPT has at the same time stressed that such exceptions should be clearly defined and subject to strict limitations and accompanied by further appropriate guarantees (for example, any delay must be recorded in writing with the reasons for the delay, and this should only occur with the authorisation of a senior police officer unconnected with the case, or of a prosecutor or judge). Nevertheless, the safeguards should be applied without unduly impeding the police in the proper exercise of their duties:

” ‘a lawyer is well placed to take appropriate action if ill-treatment actually occurs. The CPT recognises that in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person’s access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer should be arranged.’<sup>244</sup> ‘Of course, the CPT recognises that the exercise of this right might have to be made subject to certain exceptions, in order to protect the legitimate interests of

240 12th General Report on the CPT’s activities, CPT/Inf (2002) 15, paragraph 41.

241 6th General Report on the CPT’s activities, CPT/Inf (96) 21, paragraph 15.

242 *Mammadov (Jalaloglu) v Azerbaijan*, judgment of 11 January 2007 at paragraph 74.

243 12th General Report on the CPT’s activities, CPT/Inf (2002) 15, paragraph 44.

244 12th General Report on the CPT’s activities, CPT/Inf (2002) 15, paragraph 41.

the police investigation. However, such exceptions should be clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards (e.g. any delay in notification of custody to be recorded in writing with the reasons therefore, and to require the approval of a senior police officer unconnected with the case or a prosecutor).<sup>245</sup>

For the CPT, access to a lawyer must include the right to a consultation in private, the presence of the legal representative at interrogations, and the availability of legal aid for persons who are not in a position to pay for the services.<sup>246</sup> Again, though, this must not interfere with the legitimate interests of police investigations: 'this should not prevent the police from questioning a detained person on urgent matters, even in the absence of a lawyer (who may not be immediately available), nor rule out the replacement of a lawyer who impedes the proper conduct of an interrogation.'<sup>247</sup>

The CPT has also given notice that it expects that domestic provision should be made for a code of conduct for the interrogation of suspects in the form of rules or guidelines. This is necessary to help ensure that interrogators adhere to the 'precise aim' of interrogation and protect detainees against the risk of ill-treatment. Specific provisions should regulate the questioning of vulnerable individuals such as the young or mentally disabled and individuals under the influence of drugs or alcohol or who are in a state of shock. In particular, juveniles should never be required to sign any document without having a legal representative or trusted adult present.<sup>248</sup> The practice of blindfolding detainees in police custody should be expressly prohibited as a form of oppressive conduct which may frequently be considered as amounting to psychological ill-treatment even where no actual physical ill-treatment has occurred (it is clear to the committee that the practice is normally adopted to ensure that detainees are prevented from being able to identify law-enforcement officials who inflict actual ill-treatment, despite conflicting or even contradictory justifications from police officers to the contrary).<sup>249</sup> Relevant information surrounding the physical well-being of the detainee and both the advising and exercise of legal rights should be entered into the detainee's custody record and

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245 Ibid. paragraph 43.

246 Note the CPT's view that this should be applicable to persons required to stay with the police regardless of their status. 12th General Report on the CPT's activities, CPT/Inf (2002) 15, paragraph 41.

247 Ibid.

248 See for example CPT/Inf (2004) 16 (Turkey), paragraph 27.

249 12th General Report, CPT/Inf (2002) 15, paragraph 38.

made available to his lawyer.<sup>250</sup> In addition, electronic recording of interviews is commended by the committee: this would provide protection for suspects against the actual or threatened use of ill-treatment, as well as protecting police interrogators against unfounded allegations of improper physical or psychological pressure.<sup>251</sup> Further, as regards the assessment of evidence at trial, 'such a device can also reduce the opportunity for defendants to later falsely deny that they have made certain admissions'.<sup>252</sup>

Appropriate accommodation for the interviewing of suspects and the regulation of the conduct of interrogations are also crucial. First, police premises should not appear intimidating. Rooms used for interrogation should conform to certain basic standards. Accommodation should be adequately lit, heated and ventilated. All participants in the interview process should be seated on chairs of a similar style and standard of comfort, and specifically, the officer conducting the interview should not be placed in a remote or dominating or elevated position as regards the suspect. Neutral colour schemes should be adopted: the situation occasionally uncovered of interrogation rooms painted in black and equipped with spotlights directed at the seat used by the person undergoing interrogation is condemned outright.<sup>253</sup> Secondly, police premises must be free of what the committee terms 'suspicious objects' such as wooden sticks, broom handles, baseball bats, metal rods, pieces of thick electric cable, imitation firearms or knives, the presence of which can lend credence to allegations that detainees in these premises have either been threatened or struck with such objects (the usual justification for such 'suspicious objects' is that these have been confiscated from suspects; but if such items are indeed real evidence, they should be properly labelled and retained in a dedicated store room).<sup>254</sup>

### **Access to legal representation: Article 6(3)(c), European Convention on Human Rights**

The CPT's emphasis on access to a lawyer is essentially concerned with helping secure the transmission of any allegations of ill-treatment or of information from the detainee to his lawyer, rather than on helping ensure the fairness of

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250 *2nd General Report*, CPT/Inf (92) 3, paragraph 40.

251 *Ibid.* paragraph 39; and *12th General Report*, CPT/Inf (2002) 15, paragraph 36.

252 *2nd General Report*, CPT/Inf (92) 3, paragraph 36. See further Evans, M. and Morgan, R., *Preventing Torture*, Clarendon Press, Oxford, 1998, pp. 267-274 and 288-291.

253 *12th General Report*, CPT/Inf (2002) 15, paragraph 37.

254 *Ibid.* paragraph 39.

evidence obtained under questioning. The focus of Article 6 is in ensuring fairness. Article 6(3)(c) provides an accused person with three inter-related rights: 'to defend himself in person'; to defend himself 'through legal assistance of his own choosing'; and 'if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'. The issue for police officers is access to legal representation during police questioning. Access to a legal adviser during detention by the police is now generally required at the time of interrogation to prevent the possibility of 'irretrievable prejudice' to an accused person.<sup>255</sup> If a person decides not to avail himself of this right, the decision must be based on the detainee's free will and cannot be the subject of improper influence by police. The possibility of such prejudice is obvious where inferences may be drawn from an individual's silence or refusal to answer questions. However, it is now clear that access to legal representation should be available at the outset of *any* interviewing of a suspect.

■ In *Averill v the United Kingdom*, 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 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 his interrogation began.<sup>256</sup>

■ 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 Strasbourg Court considered that in order to ensure 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

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255 *Salduz v Turkey*, judgment of 27 November 2008.

256 *Averill v the United Kingdom*, judgment of 6 June 2000 at paragraph 59.

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'. 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.<sup>257</sup>

■ In *Panovits v Cyprus*, the pre-trial questioning of a minor in the absence of his guardian and without being sufficiently informed of his right to receive legal representation was held to have violated his rights of defence under Article 6(3)(c) in conjunction with Article 6(1). The confession had been treated as voluntary and thus admissible as evidence, and although it was not the sole evidence on which the applicant had been convicted, it had constituted a significant element. For the Court, 'the passive approach adopted by the authorities in the present circumstances was clearly not sufficient to fulfil their positive obligation to furnish the applicant with the necessary information enabling him to access legal representation'. While he had been cautioned before being interviewed, 'it was unlikely that a mere caution in the words provided for in the domestic law would be enough to enable him to sufficiently comprehend the nature of his rights'. Nor had subsequent proceedings remedied the nature of the detriment suffered at pre-trial stage. The conclusion was that there had been a violation of Article 6(3)(c) in conjunction with Article 6(1), while the subsequent use at the trial stage of the applicant's confession was also considered to have given rise to a separate violation of Article 6(1).<sup>258</sup>

■ In *Aleksandr Zaichenko v Russia*, in contrast, 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 had made the statements at the time of the inspection of the vehicle and in public before two witnesses.<sup>259</sup>

257 *Salduz v Turkey*, judgment of 27 November 2008 at paragraphs 50-63.

258 *Panovits v Cyprus*, judgment of 11 December 2008 at paragraphs 64-77 and 84-86.

259 *Aleksandr Zaichenko v Russia*, judgment of 18 February 2010 at paragraphs 46-51.



## **The admissibility of irregularly obtained evidence in subsequent criminal proceedings**

Whether evidence improperly obtained should be admissible in subsequent criminal proceedings is generally a matter for domestic courts. Thus even where it is shown that police officers have obtained evidence in violation of domestic law, or even where this has given rise to a violation under the Convention and has led this evidence in a criminal trial, this will not in itself render the criminal proceedings unfair if other guarantees have ensured that the rights of the defence have been respected (such as whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use, whether the admissions made by the applicant were made voluntarily, and whether the circumstances in which the evidence was obtained cast doubt on its reliability or accuracy).<sup>260</sup>

■ 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.<sup>261</sup>

■ In *Khan v the United Kingdom*, the applicant had been one of a number of visitors to the house of an individual who was being investigated for drugs trafficking and in which the police had installed a listening device. At one point during a conversation which was being recorded, the applicant had admitted dealing in drugs. During his trial, the applicant had sought to challenge the admissibility of the evidence obtained through the surveillance, but after the judge had considered the question of admissibility and had declined to exercise his powers to exclude this, the applicant had pled guilty to an alternative charge. Although the Court accepted 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

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260 *Khan v the United Kingdom*, judgment of 12 May 2000 at paragraphs 36-37.

261 *Schenk v Switzerland*, judgment of 12 July 1988 at paragraphs 46-47.

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.<sup>262</sup>

■ In *Allan v the United Kingdom*, the applicant complained that he had been convicted on the basis both of evidence obtained from audio and video bugging devices which 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.<sup>263</sup>

On the other hand, if the evidence has been obtained through ill-treatment (that is, in violation of Article 3) its subsequent use in a trial will generally be deemed to violate the right to a fair trial under Article 6. The use of ill-treatment by police officers in order to question a suspect with a view to obtaining a confession thus negates the use of ill-treatment as a means of interrogation. Further, as discussed in chapter 2, ill-treatment by State authorities inflicted for a particular purpose, such as to extract a confession or information, is treated as an aggravated violation of Article 3.<sup>264</sup> In short, 'the use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings.'<sup>265</sup> 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

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262 *Khan v the United Kingdom*, judgment of 12 May 2000 at paragraphs 36–40.

263 *Allan v the United Kingdom*, judgment of 5 November 2002 at paragraphs 46–48 and 52–53.

264 See p. 36 above.

265 *Gäfgen v Germany*, judgment of 1 June 2010 at paragraph 165.

crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct.<sup>266</sup> Domestic determination that a confession has been given voluntarily rather than under compulsion is not conclusive.

■ In *Harutyunyan v Armenia*, 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'.<sup>267</sup>

■ In *Magee v the United Kingdom*, the applicant had been held *incommunicado* in a Northern Ireland holding centre and interviewed for extended periods on five occasions by police officers operating in relays before he confessed his part in the planning of a terrorist attack. His initial request for access to a solicitor had been refused. He complained that he had been kept in virtual solitary confinement in a coercive environment and prevailed upon to incriminate himself. The domestic court had found that the applicant had not been ill-treated and that the confession had been voluntary, and the incriminating statements had formed the basis of the prosecution case against him. The Strasbourg Court concluded that denial of access to a lawyer for over 48 hours and in a situation where the rights of the defence had been irretrievably prejudiced was incompatible with the rights of the accused under paragraphs (1) and (3)(c) of Article 6. For the Court, 'the austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent'. In such circumstances, the applicant 'as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation

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266 *Jalloh v Germany*, judgment of 11 July 2006 at paragraph 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).

267 *Harutyunyan v Armenia*, judgment of 28 June 2007 at paragraph 63; the final quotation comes from the US Supreme Court judgment in *Rochin v California* (342 US 165 (1952)).

as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confide in his interrogators.<sup>268</sup>

■ In *Gäfgen v Germany*, police had obtained evidence from the applicant by methods of interrogation which had 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 applicant had repeated his confession to a prosecutor. 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. 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 secondly, 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 of its being unreliable, the need for supporting evidence is correspondingly weaker'. 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.<sup>269</sup>

## **The presumption of innocence: Article 6(2), European Convention on Human Rights**

A final issue under Article 6 of relevance for police officers arises under Article 6(2). This provides that 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law', but the obligation to respect the presumption of innocence not only applies to judges but also to other public officials in general. In particular, statements to the media by police officers must not undermine the presumption of innocence nor render a trial unfair.

268 *Magee v the United Kingdom*, judgment of 6 June 2000 at paragraphs 38-46.

269 *Gäfgen v Germany*, judgment of 1 June 2010 at paragraphs 162-188.

■ In *Alленet 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 both encouraged public belief in the applicant’s guilt and also tainted the objective assessment of the relevant facts, and thus resulted in a finding of violation of paragraph (2).<sup>270</sup>

## **Conclusion**

The discussion above has shown the importance of awareness of certain aspects of human rights protection in the discharge of policing responsibilities in relation to the investigation of crime. Much of this is driven by concerns not to prejudice any subsequent criminal prosecution: fairness to an accused starts from the moment when an individual is made aware that he faces allegations of the commission of a criminal offence and when his situation thereby is ‘substantially affected’. But other considerations also apply, most noticeably when search or surveillance activities interfere with respect for private life, home and correspondence. In discharging such aspects of policing, police officers require sensitivity to the rights of individuals to ensure that their work is not irredeemably prejudiced.

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270 *Alленet de Ribemont v France*, judgment of 10 February 1995 at paragraph 38.

## Chapter 5

# Policing democratic freedoms

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**‘Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment.’<sup>271</sup>**

### **Introduction**

**O**ne of the most challenging, complicated and important roles of the police in a democratic society is the policing of the exercise of democratic freedoms. These freedoms include the right to respect for freedom of expression, assembly and association, and freedom of thought, conscience and religion. They also include the right to respect for private and family life, home and correspondence.

Democratic freedoms are fundamental to the existence of a democratic society, where views and information can be exchanged. The role of the police is to facilitate the democratic process, through ensuring that persons and associations can exercise their rights of freedom of expression and association, in accordance with the provisions of the Convention. This can involve difficult legal and operational decisions for police, requiring the balancing of competing interests. In certain cases, police may find themselves in the middle of contentious disputes, necessitating the taking of measures to protect the exercise of democratic freedoms.

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271 *Stoll v Switzerland*, judgment of 10 December 2007 at paragraph 101.

Police services may only interfere with the exercise of democratic freedoms in limited cases, where it is legally permissible, and for good reason. Any interference must be proportionate. In certain cases, the police are required to take steps to protect the exercise of democratic freedoms. For example, the police must take reasonable steps to protect assemblies from attack by those who oppose them.

In discharging their obligations, it is critical that the police service and individual police officers remain neutral. It is not the role of police to approve or disapprove of political speech, etc., unless such speech involves the commission of a specific criminal offence (for example, incitement to violence). This is the case, even where persons are engaged in expressing views that are offensive or not well-received.

It is important to stress that domestic arrangements are respected, providing that in particular instances minimum European expectations are met. Many European countries make the police authorities responsible for decisions as to whether, and under what conditions, assemblies may take place. Other arrangements are possible. In the Netherlands, for example, the Mayor of the relevant Municipality must be notified of planned public assemblies and may impose conditions or prohibitions on them.<sup>272</sup> In Serbia, notifications must be given to the Ministry of the Interior.<sup>273</sup> Decisions regarding imposing conditions, etc., are either taken exclusively by the authority who receives notification, or in conjunction with municipal or other authorities. There is significant case law of the European Court of Human Rights, making it clear that any decision to restrict the right to freedom of assembly must only be done in pursuance of a legitimate aim, on the basis of a lawful power and for reasons that are necessary in a democratic society.<sup>274</sup> Even where a protest has received prior approval, issues of public order may arise.

This chapter will focus on explaining the practical impact of democratic freedoms for policing. The European Court of Human Rights has, over many years, developed a significant amount of case law dealing with the challenges posed by these issues. Some discussion of the key implications for police officers follows.

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272 Public Assemblies Act (20 April 1988), Section 5.

273 Public Assembly Act (1992), Article 6.

274 E.g. *Djavit An v Turkey*, judgment of 20 February 2003 and *Barankevich v Russia*, judgment of 26 July 2007.

## **General considerations: interferences with Articles 8 - 11, European Convention on Human Rights**

Articles 8, 9, 10 and 11 of the Convention grant individuals certain qualified rights:

- ▶ the right to respect for private and family life, home and correspondence;
- ▶ the right to freedom of thought, conscience and religion;
- ▶ the right to freedom of expression; and
- ▶ the right to freedom of assembly and association.

These rights are different from the right to life (Article 2) and the right to freedom from torture and inhuman and degrading treatment and punishment (Article 3) in that, in respect of Articles 8-11, there are clearly-defined situations where they can be the subject of interference by State authorities. However, any *interference* with these rights must comply with a range of conditions if it is to be justifiable under the Convention. These conditions are: (i) the interference must be in accordance with the law; (ii) it must be in pursuance of a legitimate aim; and (iii) it must be necessary in a democratic society. If the State cannot satisfy any of these conditions, there will be a finding of a *violation* of a particular provision. It is first necessary to examine the scope of protection available under each guarantee.

### **Respect for private and family life, home and correspondence: Article 8, European Convention on Human Rights**

Article 8 of the Convention protects the right to respect for private and family life, home and correspondence. It may be relevant in relation to a number of situations concerning policing activities, and has been discussed in respect of the prevention and investigation of crime in the previous chapter.<sup>275</sup>

### **Freedom of thought, conscience and religion: Article 9, European Convention on Human Rights**

Article 9 protects the right to hold religious and non-religious beliefs, to change those beliefs and to manifest them, whether alone or with others, in public or in private. Both individuals and religious associations enjoy rights

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<sup>275</sup> See pp. 67-75.



under Article 9. Article 9 covers a broad range of beliefs, including pacifism and veganism, as well as traditional beliefs. All of the main religious denominations are covered by Article 9, as well as ones that are less well-known. In addition, certain organisations linked to controversial beliefs (e.g. the Church of Scientology) have been accepted by the Strasbourg Court as coming within the scope of protection afforded by Article 9.

The *holding* of beliefs cannot be interfered with by the State, under any circumstances. No police action can be taken against any person solely because of their beliefs. However, the *manifestation* of such beliefs may be interfered with in certain circumstances. If the interference is based on an identifiable legal provision, in pursuance of a legitimate aim and necessary in a democratic society, it will be in accordance with Article 9.

The arrest and conviction of members of religious groups for proselytization has been considered by the Strasbourg Court. In two cases concerning Greece, the Court held that it must be demonstrated that an attempt had been made to put undue pressure on a person to join the faith in question. This is more likely to be the case where those proselytizing are in a position of authority towards those they are seeking to convert. This is because those they are seeking to convert may fear adverse consequences if they do not allow themselves to be indoctrinated.<sup>276</sup>

As well as requiring respect, Article 9 can also require the State to take positive action in certain cases.

■ In *Members of the Gldani Congregation of Jehovah's Witnesses v Georgia*, the applicants (members of a religious minority) alleged complaints of ill-treatment at the hands of members of the religious majority, and of a failure by the authorities to respond. The Court held that 'through their inactivity, the relevant authorities failed in their duty to take the necessary measures to ensure that the group of Orthodox extremists ... tolerated the existence of the applicants' religious community and enabled them to exercise freely their rights to freedom of religion.'<sup>277</sup>

Article 9 also has certain implications for the management of police services. If the majority population in a country or territory is of one religion, this may well

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276 *Kokkinakis v Greece*, judgment of 25 May 1993 and *Larissis and Others v Greece*, judgment of 24 February 1998.

277 *Members of the Gldani Congregation of Jehovah's Witnesses v Georgia*, judgment of 3 May 2007 at paragraph 134.

be reflected in the composition of the police service. This is not problematic in itself. However, care must be taken to ensure that the culture and ethos of the police does not become associated exclusively with that religion. In addition, it may be necessary to take steps to prevent proselytism by officers within the police service. This is because, in a disciplined environment such as exists in the police and armed forces, it may be seen as a form of harassment or abuse of power.<sup>278</sup>

### Freedom of expression: Article 10, European Convention on Human Rights

Article 10 protects the right to freedom of expression, which the Strasbourg Court has described as ‘one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual’s self-fulfilment.’<sup>279</sup> It applies not only to ideas that are favourably received, but also to ideas that may shock or offend certain sections of the population.<sup>280</sup>

A wide range of forms of expression are covered by Article 10. There is no definitive list, but the European Court of Human Rights has held that the following media are covered: books,<sup>281</sup> cartoons,<sup>282</sup> the internet,<sup>283</sup> radio,<sup>284</sup> and works of art.<sup>285</sup> A wide spectrum of opinions, too, fall within the scope of Article 10, for example criticism of political figures<sup>286</sup> and challenges to religious beliefs.<sup>287</sup> There is often a close overlap with other rights. When a person exercises their right to freedom of expression, this may well (i) involve the exercise of other rights and (ii) have implications for others. For example, a person expressing religious views in public may be exercising their rights under Articles 9 and 10 simultaneously. Article 11 guaranteeing freedom of assembly may also be relevant, but in a case against Hungary, the Court stated ‘that the mere fact that an expression occurs in the public space does not necessarily turn such an event into an assembly.’<sup>288</sup>

278 *Larissis v Greece*, judgment of 24 February 1998 at paragraph 51.

279 *Handyside v the United Kingdom*, judgment of 7 December 1976.

280 *Ibid.*

281 *Ibid.*

282 *Leroy v France*, judgment of 2 October 2008.

283 *Perrin v the United Kingdom*, Court decision of 18 October 2005.

284 *Barthold v Germany*, judgment of 23 March 1985.

285 *Muller v Switzerland*, judgment of 24 May 1988.

286 *Oberschlick v Austria*, judgment of 23 May 1991.

287 *Otto-Preminger Institute v Austria*, judgment of 20 September 1994.

288 *Faber v Hungary*, judgment of 24 July 2012 at paragraph 38.

■ In *Chorherr v Austria*, the applicant carried a placard with a political message at a public assembly. He was therefore expressing political opinions, which brought him within the scope of Article 10. His placard annoyed certain members of the assembly, both in terms of its message and as it blocked their view. He refused to comply with a police request to cease his demonstration on the ground that it was disturbing public order. He was then arrested and fined. The Strasbourg Court found no violation of Article 10, as both his arrest and conviction were in accordance with Austrian law and intended to prevent disorder at the assembly.<sup>289</sup>

### Assembly and association: Article 11, European Convention on Human Rights

Article 11 guarantees the right to peaceful assembly and association with others. It extends to peaceful gatherings, including marches, processions, parades, private and public meetings, demonstrations and counter-demonstrations. The rights granted by Article 11 are subject to certain limitations, and there is a specific provision allowing for the imposition of restrictions on the freedom of association of certain groups, including police.

The task of ensuring freedom of assembly places great demands on the police, both in terms of operational requirements and in terms of ensuring compliance with domestic and international law. Apart from the requirement to refrain from unjustified interferences, there may also be situations where the police are under a positive obligation to protect the freedom of association from attack by others, including private individuals.

■ In *Oya Ataman v Turkey*, the Court stated that ‘where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance.’<sup>290</sup>

Article 11 does not protect violent assembly. If elements in an assembly are engaged in violent acts, police action should be focussed on those elements.<sup>291</sup> But an assembly needs at least a minimum constituent element. Gatherings of small numbers of people may not, in Convention terms, constitute an assembly.

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289 *Chorherr v Austria*, judgment of 25 August 1993 at paragraph 33.

290 *Oya Ataman v Turkey*, judgment of 5 December 2006 at paragraphs 41 and 42.

291 *Ziliberberg v Moldova*, judgment of 1 February 2005.

■ In *Tatar and Faber v Hungary*, two people went to the Hungarian Parliament and attached dirty clothes to the fence around the building for a period of thirteen minutes. This was to express a comment on the political situation in the country. They were convicted of holding an un-notified assembly. The Court held that the actions of the applicants did not constitute an assembly, as there was ‘no intentional gathering of participants.’<sup>292</sup>

The Strasbourg Court has said that democracy is the only political model contemplated in the Convention and the only one compatible with it<sup>293</sup> and that the ‘guarantee of the right of freedom of assembly cannot be left to the whim of the authorities and their perception of what is or is not deserving of authorisation.’<sup>294</sup> In addition, it has held that any ‘measures interfering with freedom of expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it.’<sup>295</sup>

If police actions are designed to undermine the right to freedom of association, they will be likely to be held to violate that guarantee. In a number of cases decided by the Strasbourg Court, peaceful demonstrators have been arrested on spurious grounds.

■ In *Hyde Park and Others v Moldova (nos. 5 and 6)*, for example, a number of demonstrators at lawful protests were arrested for alleged irregularities in paperwork, or taken away for further examination of their identity papers. They were also convicted of violations of the domestic Law on Assemblies. The Strasbourg Court held that these actions constituted violations of the right to freedom of assembly.<sup>296</sup>

The Strasbourg Court will take a particularly strict view of attempts to restrict demonstrations which involve the legitimate activities of a political party.

■ In *Christian Democratic People’s Party v Moldova*, the applicant political party organised demonstrations against the Moldovan Government’s proposals to make learning Russian compulsory for all schoolchildren above the age of 7. The authorities, when they received notification of the demonstrations, altered the proposed venue without any consultation with the organisers. The

292 *Tatar and Faber v Hungary*, judgment of 12 June 2012 at paragraph 39.

293 *Christian Democratic People’s Party v Moldova*, judgment of 14 February 2006 at paragraph 63.

294 *Hyde Park and others v Moldova*, judgment of 31 March 2009 at paragraph 30.

295 *Faber v Hungary*, judgment of 24 July 2012 at paragraph 37.

296 *Hyde Park and Others v Moldova (nos. 5 and 6)*, judgment of 14 September 2010.

organisers nonetheless proceeded to hold the demonstration at the location which was originally notified. In response, the authorities suspended the activities of the Christian Democratic People's Party for a period of one month. Videos of the demonstrations showed that they were essentially peaceful. The Court, in finding a violation of Article 11, stated that 'only very serious breaches such as those which endanger political pluralism or fundamental political principles could justify a ban on the activities of a political party.'<sup>297</sup>

## **Positive obligations**

Article 10 does not just restrict the situations in which the exercise of freedom of expression may be interfered with. In view of the importance of the right in a democratic society, there are situations where the State is obliged to take feasible steps to protect its exercise.

■ In *Ozgur Gundem v Turkey*, a newspaper, linked to the Kurdish Workers' Party (PKK) and its staff, had been subjected to a lengthy campaign of intimidation and violence, resulting in a number of deaths. The authorities, despite being requested by the newspaper, did not take any protective steps. This constituted a violation of Article 10.<sup>298</sup>

In the event that there are reasonable grounds to believe that a person or organisation may be attacked due to the exercise of freedom of expression (however unpopular), it may be necessary for police to take steps to seek to protect them. It is important to bear in mind that this is not an obligation of result. The police cannot be expected to ensure that no harm comes to any person in their jurisdiction. The precise nature of any such steps is impossible to define in the abstract. Professional policing decisions, based on relevant national legislation and police practice, will be likely to be deemed sufficient.

## **Justification for interferences with Articles 8-11, European Convention on Human Rights**

As noted above, the rights contained in Articles 8 to 11 may be limited, in certain defined circumstances and under specified conditions. Firstly, any interference must pursue a 'legitimate aim'. Secondly, the interference must be 'in accordance with the law'. Thirdly, the interference must be no more

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297 *Christian Democratic People's Party v Moldova*, judgment of 14 February 2006 at paragraph 76.

298 *Ozgur Gundem v Turkey*, judgment of 16 March 2000 at paragraph 44.

than 'is necessary in a democratic society'. These issues are some of the most difficult in the interpretation of the Convention, and can also be very difficult for police officers when called upon to justify an action.

### **'In accordance with the law'**

Article 8 of the Convention requires that any interference with the rights it protects must be 'in accordance with the law'. Articles 9 to 11 require that any interference be 'prescribed by law'. These terms have the same meaning. They are intended to ensure that a person can, with a reasonable degree of certainty, foresee any limitations on the right concerned. This is a key safeguard against arbitrary action by the authorities. Foreseeability requires that: (i) there must be a legal basis in national law; (ii) the law must be accessible; and (iii) the law must allow a person to assess the likely consequences of his actions.

As regards (i), the legal basis may be in statute or other legal norm provided for in the domestic legal system. Case law can constitute 'law'.<sup>299</sup> In order to qualify as a 'law' in Convention terms, the measure must indicate the scope of any discretion conferred on the decision-making authorities with a reasonable degree of precision<sup>300</sup>. In order to ensure that any decisions taken by police are defensible, strict compliance with relevant laws and any applicable guidance is required. Recording decisions and the reasons for them is also important.

### **'In pursuance of a legitimate aim'**

Articles 8 to 11 specify a range of legitimate aims which interferences with protected rights may pursue. These are similar across the different Articles, but important differences do exist. For example, Articles 8, 10 and 11 include national security as a legitimate aim. However, Article 9 (freedom of thought conscience and religion) does not include this as a legitimate aim. In policing terms, the most relevant aims are likely to be the prevention of disorder or crime, the protection of public order and the protection of the rights and freedoms of others. There must be a link between the action complained of and the aim pursued. In practice, establishing this is not unduly difficult. For example, decisions taken to restrict or prohibit assemblies will often be aimed at preventing disorder.

299 *Sunday Times v the United Kingdom*, judgment of 26 April 1979.

300 *Malone v the United Kingdom*, judgment of 2 August 1984.

### **‘Necessary in a democratic society’**

For an action by police to be ‘necessary in a democratic society’, it must: (i) correspond to a pressing social need; (ii) be proportionate to the aim sought to be achieved; and (iii) relevant, sufficient reasons must exist for the action.

In terms of assessing proportionality, three main issues are relevant:

- ▶ the degree of the interference;
- ▶ whether there were less intrusive means available;
- ▶ the procedural safeguards available.

It is difficult to assess the proportionality of an action in isolation. Issues such as the existence of alternative courses of action, the importance of the legitimate aim pursued, etc., will be important. Police officers are often called upon to justify their actions in limiting the rights protected by Articles 8 to 11. In particular, explanation of police actions may be required as part of any investigation carried out by accountability mechanisms, such as police Ombudsmen. In addition, it may assist in articulating the complexities of police decisions and actions to the public, media and civil society.

### **Proportionality**

The considerations set out below are designed to assist officers in assessing whether actions are proportionate. They may be useful in helping to focus decision-making and to demonstrate that all relevant factors were taken into account. They are also important in ensuring that decisions are transparent, non-discriminatory and accountable. In many situations, there is no correct or incorrect answer. As acknowledged by the European Court of Human Rights, the ‘difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources’<sup>301</sup> mean that a degree of latitude must be given to the police authorities in how they deal with a situation.

In any situation, a range of different actions and decisions will be open to the police and other relevant authorities. By addressing the issues below, police officers will be in a strong position to show that their decision-making process was proportionate:

1. the reason(s) for the action taken.
2. whether other, less intrusive means could have been taken to achieve the same aim.

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301 *Kontrova v Slovakia*, judgment of 31 May 2007 at paragraph 50.

3. details of relevant legal and administrative provisions and how they have been complied with.
4. the necessity for the action to be taken and the foreseeable consequences.
5. how the is action likely to impact upon others.
6. confirmation, including reasons specific to the decision concerned, that the action is being taken for a legitimate reason and is non-discriminatory.
7. whether the decision has been taken on the basis of all relevant information.

Answers to these questions may also be of assistance in defending your actions during any subsequent investigation or other form of scrutiny.

### Positive obligations

The rights granted under Articles 8 to 11 of the Convention also oblige the State authorities (including police) to take certain steps to facilitate the exercise by individuals of their rights under those Articles. The Court has said that these rights are more than just an obligation on the State not to interfere with the exercise. For example, in *Ozgur Gundem v Turkey*, Turkey was found to be under a positive obligation to take investigative and protective measures, following a campaign of violence and intimidation against a Kurdish newspaper.<sup>302</sup>

In situations where a planned assembly is expected to result in disorder, national laws allowing for the prohibition of assemblies may be invoked by police or the competent authorities. However, a threat of violence from others is not sufficient grounds to ban an assembly. If the mere threat of disorder was sufficient grounds to ban an assembly, this could easily be used as a pretext to prohibit assemblies for inappropriate reasons. Accordingly, if a counter-protest is to be organised, the State is required to take reasonable steps within its power to facilitate the assembly, through providing a police presence, etc.<sup>303</sup> In a case against Austria, involving an assembly by doctors against abortion and a counter-demonstration, the Court held that certain actions (e.g. a police presence) are required to secure the right of freedom of assembly.<sup>304</sup> However, the Court has also stated that while 'it is the duty of Contracting States to

302 *Ozgur Gundem v Turkey*, judgment of 16 March 2000.

303 *Plattform 'Ärzte für das Leben' v Austria*, judgment of 21 June 1988.

304 *Ibid.*



take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used.<sup>305</sup>

■ In *Faber v Hungary*, the applicant was fined for refusing to cease displaying a lawful flag, with controversial historical connotations. He displayed it near an assembly, and the justification for the police action was that they feared disorder. The Court examined this rationale very carefully and found that the 'mere existence of a risk is insufficient for banning the event: in making their assessment the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralizing the threat of violent clashes.'<sup>306</sup>

Any decision to ban an assembly is a serious interference with the rights guaranteed under Article 11. It accordingly requires a very strong justification and must comply with the requirements of paragraph 2 of the Article.<sup>307</sup>

The Court has, however, recognised that the police and other authorities are best placed to assess the feasibility of dealing with anticipated disorder. In *Faber*, it held that 'national authorities ... are best positioned to evaluate the security risks and those of disturbance as well as the appropriate measures dictated by the risk assumption.'<sup>308</sup>

## **Public assemblies – policing issues**

The case law of the European Court of Human Rights indicates that policing public assemblies poses a wide range of significant problems for police services and other authorities across Europe. Cases decided by the Strasbourg Court have considered issues such as repeated refusal of permission to hold assemblies<sup>309</sup>, disproportionate interferences with the right to hold assemblies<sup>310</sup> and failure to protect assemblies from attack by private individuals.<sup>311</sup>

The sheer variety of situations that can arise in relation to the exercise of democratic freedoms means that policing them is extremely difficult.<sup>312</sup> It

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305 *Faber v Hungary*, judgment of 24 July 2012 at paragraph 39.

306 *Ibid.* at paragraph 40.

307 See pp. 100-103 above

308 *Faber v Hungary*, judgment of 24 July 2012 at paragraph 42.

309 *Alekseyev v Russia*, judgment of 21 October 2010.

310 *Oellinger v Austria*, judgment of 29 June 2006.

311 *Gldani v Georgia*, judgment of 3 May 2007.

312 See for example *Giuliani and Gaggio v Italy*, judgment of 25 August 2009 at paragraph 238.

demands detailed planning, well-trained staff, adequate equipment and sufficient flexibility to be able to respond to new situations as they arise, often without any forewarning. These difficulties are heightened by the fact that the police are not required to merely respond to events; they are required to ensure that peaceful assembly is protected. This may require proactive steps to safeguard the enjoyment of these rights.

All police officers should receive training in applicable human rights standards. This training should focus on the need to ensure that police operations are planned and controlled in such a manner as to minimise the likelihood of recourse to lethal force<sup>313</sup>, to ensure that any force used is lawful and the minimum necessary in the circumstances, and to ensure that the right to peaceful assembly and related rights are upheld. Police officers who are responsible for commanding public order operations should have appropriate training and experience.<sup>314</sup> Police officers commanding public order operations should consider the implications of any use of force, and should always ensure that all policing decisions are taken on the basis of the requirement to minimise the use of force.

## Relations with the public

Successful public order policing can only be carried out with the support and co-operation, to the greatest extent possible, of the community. Police should make every effort to secure and retain this support. Links with the community are invaluable in providing information regarding tensions and potential problems, as well as in reducing any existing tensions and resolving difficult situations. Engagement with the public should not occur only in times of tension or disorder, but should be an on-going process. In this way, durable relationships will be established with the community, which can assist in times of difficulty. Police should communicate with all persons affected by public order operations. Communication during events can reduce the possibility of misunderstandings and hostility towards others and the police. Technical means to facilitate this should be available.

Policing public order and community policing are closely linked. Patrolling by local police officers, with detailed knowledge of the specific nature of an area, should be maintained at all times. They are the officers who are required to police areas after disorder occurs. They can also be a very effective

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313 *McCann and Others v the United Kingdom*, judgment of 27 September 1995.

314 *Andronicou and Constantinou v Cyprus*, judgment of 9 October 1997.

‘early-warning’ system for tensions that may exist. Normal community policing should be the day-to-day reality and public order policing should support it, not undermine it. This should be considered when deciding to intervene in any situation where public order has been disrupted.

Police actions during public order situations must be lawful and proportionate.<sup>315</sup> Excessive force can damage relations with the community and make the work of the police more difficult in the long term. It corrodes the relationship between the police and the public and can lead to a breakdown of trust and communication.

Police should be approachable and accessible during public order operations, subject to safety considerations. They should be capable of entering into dialogue and negotiations with participants in, and those affected by, public assemblies. Police should inform, as far as possible, the public of their plans, so that the scope for misunderstanding police action is reduced. Efforts should be made to establish and maintain links with those affected by public order situations, such as participants and local residents. Communications with the public should be made in plain language and be planned and co-ordinated, in order to avoid confusion and misunderstandings.

### **Police powers (e.g. use of force, arrest, criminal investigation)**

Every exercise of police powers, in relation to any aspect of their involvement with public order operations, must be done in an appropriate and proportionate manner. Powers of intervention should be considered optional, and not mandatory. If a situation arises where police have powers of intervention, these should not automatically be used. The use of powers of intervention can often inflame situations, thus leading to higher levels of tension and increasing the scope for violence. Levels of confidence in the police can also be reduced.

If violations of the law are observed by the police during assemblies, consideration should be given to whether action needs to be taken immediately, or whether action can be taken after the assembly has ended. Police should ensure that, in the event that measures need to be taken in relation to public assembly, they are targeted against the persons responsible, and that non-participants are unaffected, to the extent that this is possible. The use of violence by a small minority in a larger, peaceful, assembly does not justify the

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315 *P.F. and E.F. v the United Kingdom*, decision of 23 November 2010.

dispersal of the assembly. Proportionate and lawful force may, if necessary, be used against those responsible for the violence.<sup>316</sup>

### Planning police operations

Planning for public order events should be based upon objective information. Past history of similar events can be taken into account in determining the police response, resource levels, potential tactics, etc. Police officers commanding public order operations should consider whether they ought to seek specialist advice, e.g. from legal advisors, technical specialists, etc. The resources available to the police should, as far as possible, be appropriate to the seriousness of the operation concerned. Co-ordination mechanisms should be established with other services (ambulances, hospitals and the fire brigade) that may be required.

Video recording of an assembly by the police or other public authority is acceptable, as it can increase public safety and assist in the investigation of any offences. Visible recording can also deter certain people from engaging in criminal acts. However, if not done in a sensitive manner, it can lead to intimidation of participants. A publicly-available policy on how video recordings are made and retained should be in place. Footage should only be used for the purposes of criminal investigations, and should not be retained for longer than necessary. If footage is retained for longer than required, and is stored in such a way that individuals can be identified from it, it may result in a violation of the right to respect for private life (as guaranteed by Article 8 of the Convention).<sup>317</sup>

Amicable relations should be maintained with the media, and full access should be given to them to areas where police operations are on-going, subject to safety concerns. Designated points of contact should be nominated, to provide information and interviews. Officers should be told when, and under what circumstances, they may be allowed to speak to the media. Briefings should be provided in advance of events, in order to inform the public and allow people to avoid the area.

### The psychology of crowds

In order for the police to be able to deal effectively with assemblies, it is necessary for them to have some degree of understanding of crowd psychology. It

316 *Oellinger v Austria*, judgment of 29 June 2006.

317 See pp. 68 and 95 above.

is crucially important that the police operation does not assume that crowds will be violent, or that disorder will occur. As much information as possible should be collected and analysed in order to assess the potential for disorder. This will facilitate the making of police decisions on the basis of information and professional judgment, rather than preconception or prejudice.

Policing operations that are based on the assumption that disorder will occur may actually cause disorder. This is because the type of equipment deployed, coupled with the attitude of police officers, may portray an aggressive impression, which can lead to persons in the crowd responding in an aggressive manner. Police tactics should, as far as possible, seek to promote positive behaviour by the crowd. Briefings to officers deployed during the assembly are also crucial. If officers are told that trouble is expected, they are likely to respond more quickly and forcefully to any incidents, however minor, that take place. However, if appropriate briefings are given, officers are likely to respond to events in a more proportionate manner. Negotiation and dialogue is often successful in defusing tense situations.

If members of a crowd witness excessive use of force by police, they may lose any belief in the legitimacy of the police response, and therefore not feel constrained by the normal rules of behaviour. This can lead to increased use of aggression or violence against police or others. In any crowd, there are likely to be a number of elements. The majority of people will generally respect the police, and be supportive of them. A smaller element may be intent on confrontation and violence. Other elements may respond to events as they occur. There is always scope for inappropriate police action to render the police action illegitimate in the eyes of members of the crowd. This can lead to the crowd feeling that it is acceptable to use violence against the police or others. It is important that the police differentiate between different elements of the crowd. Any police action should be directed against those who are the source of any disorder, etc., rather than against the crowd as a whole.

A key method of ensuring that the crowd does not lose confidence in the police is maintaining dialogue. By providing information to the crowd, the police can dispel rumours and demonstrate why particular actions are being taken. This can undermine those in the crowd who would wish to exploit the situation.

Mediation is also a useful tool to ensure effective communication between police and participants. In the event that restrictions are necessarily imposed on the assembly or its participants, seeking prior approval of such restrictions with representatives of the assembly should always be sought. In certain situations,

e.g. where there is a high degree of distrust of the police, negotiation may be best conducted through intermediaries, for example trusted members of the community. The police should seek to facilitate the group as much as possible, within the constraints of the law and respecting the rights of others. Dialogue should be commenced at the earliest possible stage, so that relationships can be developed over time. Other relevant stakeholders should be involved, for example representatives of the local public administration authorities.

### **Abuse of rights: Article 17, European Convention on Human Rights**

Article 17 of the Convention reads as follows:

” Nothing in this Convention 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 set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The essential function of Article 17 is ‘to protect the rights enshrined in the Convention by safeguarding the free functioning of democratic institutions.’<sup>318</sup> It has been used primarily in cases involving extremist groups or persons, who have sought to undermine the functioning democratic institutions in a country or the rights of others.<sup>319</sup>

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318 *KPD v Germany*, decision on admissibility of 20 July 1957.

319 E.g. *Refah Partisi (The Welfare Party) and Others v Turkey*, judgment of 13 February 2003 at paragraph 96.

## Chapter 6

# Maintaining a professional police service

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### The Council of Europe Code of Police Ethics

**P**olicing is an honourable profession, but one which imposes significant physical and mental demands on police officers. Officers are subject to onerous responsibilities, which they must often discharge in very difficult and dangerous conditions. The European Convention on Human Rights is of direct relevance to police officers in discharging their obligations and duties; however, police offices are at the same time primarily human rights defenders. The proper discharge of their functions will not only protect individual rights but will also create the conditions for social and economic development.

The Council of Europe Code of Police Ethics was adopted in 2001. It is a Recommendation of the Committee of Ministers of the Council of Europe,<sup>320</sup> and provides (in the appendix to the Recommendation) a number of non-binding principles designed to be of influence at a domestic level. Many of the principles found in the case law of the European Convention on Human Rights are also reflected in the Code of Police Ethics. For example, an identifiable *leitmotif* running throughout the discussion of the Strasbourg Court's case law to date has been the importance of proportionality in the application of powers authorised by law to be exercised by the police; another is the positive obligation to protect individuals from the wrongful actions of third parties; while a third reflects the importance of upholding democratic freedoms, such as protest. All of these also find expression in the Code.<sup>321</sup>

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320 Rec(2001)10 on the European Code of Police Ethics.

321 See Appendix B, below.

The Code stresses the fundamental objectives of the police service in a democracy: to maintain public tranquillity and law and order in society; to protect and respect the individual's fundamental rights and freedoms; to prevent and combat crime; to detect crime; and to provide assistance and service functions to the public. To this end, policing operations must meet the basic expectations of the rule of law: that is, that they are conducted in accordance with the national law and international standards (with domestic law and regulations accessible to the public and sufficiently clear and precise in their nature).

The organisational structure of the police should help reinforce the idea of earning and maintaining public respect 'as professional upholders of the law and providers of services to the public'.<sup>322</sup> Organisational arrangements should also promote good public relations and effective co-operation with other appropriate agencies, local communities, NGOs and other representative groups including ethnic minority groups. Sufficient operational independence from other State bodies is necessary; further, clear distinctions are necessary between the role of the police and the prosecution, the judiciary and the correctional system, and the police must not have any controlling functions over these other bodies and must also strictly respect the independence and the impartiality of the judicial system. On the other hand, functional and appropriate co-operation between the police and the public prosecution service is expected (and where domestic law places the police under the authority of the public prosecution or an investigating judge, the police are to be given clear instructions as to the priorities governing crime investigation policy and the progress of criminal investigation in individual cases). The role of defence lawyers in the criminal justice process must be respected and police officers must assist in ensuring the right of access to legal assistance is effective, particularly when an individual is deprived of his liberty.

Ensuring professionalism (including combating corruption) is stressed. Thus recruitment should be based on objective and non-discriminatory grounds and upon appropriate personal qualifications and experience so as to allow police personnel 'to demonstrate sound judgment, an open attitude, maturity, fairness, communication skills and, where appropriate, leadership and management skills', and a good understanding of social, cultural and community issues is expected.<sup>323</sup> Training (both initial and regular in-service) should be based on the fundamental values of democracy, the rule of law and the protection of

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322 Code of Police Ethics, paragraph 12.

323 Ibid. paragraph 23.



human rights (and in particular, should include practical training on the use of force and limits with regard to established human rights principles, and take full account of the need to challenge and combat racism and xenophobia). The Code also includes a statement of guidelines for police action or intervention in both general and specific situations based upon general principles that reflect expectations under the European Convention on Human Rights. For example, ‘police personnel shall act with integrity and respect towards the public and with particular consideration for the situation of individuals belonging to especially vulnerable groups’,<sup>324</sup> while any deprivation of liberty ‘shall be as limited as possible and conducted with regard to the dignity, vulnerability and personal needs of each detainee.’<sup>325</sup>

### **Rights of police officers**

The responsibilities of police officers have been stressed in the discussion to date. This is entirely understandable, but it is also necessary to acknowledge that police officers also have *rights*. The Council of Europe Code of Police Ethics also contains a number of provisions concerning the rights of police personnel, including:

- ▶ A clear statement that police officers ‘enjoy the same civil and political rights as other citizens. Restrictions to these rights may only be made when they are necessary for the exercise of the functions of the police in a democratic society, in accordance with the law, and in conformity with the European Convention on Human Rights.’<sup>326</sup>
- ▶ A statement that police officers should enjoy social and economic rights to the fullest extent possible, including the formation of representative organisations, and to receive adequate remuneration and social protection.
- ▶ A right to the review of any disciplinary measures by an independent tribunal.
- ▶ A right to protection from ill-founded allegations.

These provisions should be incorporated into domestic legal systems in order to ensure adequate protection for police officers. Some brief discussion of the relationship between the Code and the case law of the Strasbourg Court follows.

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324 Ibid. paragraph 44.

325 Ibid. paragraph 54.

326 Recommendation (Rec. (2001)10) of the Committee of Ministers adopted on 19 September 2001 at paragraph 31.

## Police officers and freedom of association

As an important principle, police officers enjoy the same civil and political rights as any other person. One of these rights is freedom of association. This includes the right to form and join trade unions and other representative associations. Any interference with these rights must have a specific justification, which must be in accordance with the law and must be related to the specific nature of the police service in the country concerned. It is not sufficient to provide a generic rationale for any restriction.

The European Court of Human Rights has stated that police officers owe a special duty of loyalty, reserve and discretion.<sup>327</sup> Accordingly, the expression of political opinions by police officers and police representative associations can be interfered with if it is 'aimed at ensuring respect for the requirement that police officers should act in an impartial manner when expressing their views so that their reliability and trustworthiness in the eyes of the public be maintained...'<sup>328</sup>

Many European countries prevent police officers from taking an active part in politics. The reason for this is to ensure that the police are seen as politically neutral, in recognition of the fact that they are at the service of the State.<sup>329</sup> This will be a stronger rationale in countries with a history of totalitarianism where the police enforced such regimes.

In the *Rekvenyi v Hungary* case, the Court stated that 'the desire to ensure that the crucial role of the police in society is not compromised through the corrosion of the political neutrality of its officers is one that is compatible with democratic principles.'<sup>330</sup>

## Police officers and allegations of wrongdoing

A further consistent theme throughout this handbook has been the need for independent and effective investigations of credible allegations of wrongdoing by police officers in a number of circumstances. For example, this positive obligation on the State to carry out an effective investigation arises whenever there is a credible claim or other indications that an individual has been subjected to ill-treatment falling within the scope of Article 3. This is the so-called

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327 *Trade Union of the Police in the Slovak Republic and Others v Slovakia*, judgment of 25 September 2012 at paragraphs 57 and 69.

328 *Ibid.* paragraph 70.

329 *Rekvenyi v Hungary*, judgment of 20 May 1999 at paragraph 41.

330 *Ibid.*

‘procedural aspect’ or ‘procedural limb’ of Article 3, but the obligation can also arise under other provisions of the European Convention on Human Rights. The result is that a violation of a Convention guarantee may be established if any subsequent State investigation of a credible assertion that ill-treatment has taken place is deemed inadequate. The procedural ‘limb’ of a guarantee thus seeks to render the guarantee effective in practice. To this end, the investigation must be sufficiently thorough to be capable of establishing the facts and also of leading to the identification and punishment of those responsible. It is important to note, however, that ‘an obligation to investigate’ is not an obligation of result, but of means’: not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant’s account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible.<sup>331</sup>

This accountability requirement means that police officers may find themselves under investigation, for a disciplinary or criminal matter. Being the subject of an investigation is an extremely stressful matter, regardless of the professionalism of the investigation and regardless of one’s own conduct. In most circumstances, it is likely that police officers will be entitled to the same rights as any other person under investigation if the investigation alleges criminal wrongdoing. In the event that disciplinary proceedings may result in outcomes that are determinative of civil rights (e.g. dismissal), Article 6 guarantees may also apply, unless domestic law clearly excludes such proceedings, and the exclusion is ‘justified on objective grounds in the State’s interest’.<sup>332</sup> If disciplinary proceedings indeed involve Article 6 of the Convention (which requires that any person subject to criminal proceedings be afforded a detailed range of procedural rights in order to ensure that the proceedings are fair), the additional guarantees required in respect of Article 6 must be afforded. These include:

- ▶ the right to know the details of the charges;
- ▶ the right to call and cross-examine witnesses;
- ▶ the right to a trial within a reasonable time; and
- ▶ the right to adequate time and facilities for the preparation of the defence.<sup>333</sup>

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331 *Barabanshchikov v Russia*, judgment of 8 January 2009 at paragraph 54.

332 *Vilho Eskelinen and Others v Finland*, judgment of 19 April 2007 at paragraph 62.

333 See pp. 75-77 above. Further details regarding Article 6 of the Convention can be found at the following link: <http://echr.coe.int/NR/rdonlyres/687924D0-A8FF-4EE7-99C81707A6FCF466/0/DG2ENHRHAND032006.pdf>

Further, all persons subject to criminal proceedings retain the right to respect for private and family life. This right is a limited right, so it may be restricted in certain situations. In the case of criminal proceedings involving police officers, the media and public are likely to be interested in the details of the case. In addition, there is a public interest in knowing that there is an independent and effective mechanism for the investigation of complaints against officers. However, there may be safety or security concerns for police officers or their families whose identities are revealed. In addition, the public interest in knowing the specific identity of an individual police officer is lower than knowing that a police officer is the subject of disciplinary or criminal proceedings. Therefore, while the default position under Article 6 is that proceedings should be public, there may be situations where, on the basis of an identified risk, and in accordance with relevant provisions of national law allowing for the Court to prevent reporting of the identity of a defendant, the identity of a police officer should not be disclosed.

### **Protecting the police officer during criminal trials**

The Strasbourg Court has accepted that special arrangements may be appropriate in certain cases to protect vulnerable witnesses, for example by withholding their identity or by screening them while they are giving evidence in court. This is of general applicability, but may be of specific relevance to certain police officers. However, such measures taken on the ground of expediency cannot be allowed to interfere with the fundamental right of an accused person to a fair trial. The matter is generally considered in terms of the fairness of the admissibility of evidence. Over the course of time, the Court has elaborated its approach. The Court's jurisprudence also highlights the importance placed on the domestic court's assessment of the need for the witness to remain anonymous. A decision to protect the anonymity of a witness had to be justified by reasons which were both relevant and also sufficient in each case to ensure that the interests of a witness properly outweighed those of the accused.

■ In *Lüdi v Switzerland*, statements had been given by an undercover police officer whose actual identity was not known to the applicant, but whom he had met on five occasions. The State had sought to argue that the need to protect the undercover agent's anonymity was vital in order to continue with the infiltration of drug-dealers, but the Court considered that the legitimate interest in protecting the identity of a police officer engaged in such investigations could have been met in a manner which was also consistent with respect for the interests of the defence. Here, neither the investigating judge nor the

trial courts had been willing to hear the officer as a witness or to carry out a confrontation to allow his statements to be contrasted with the applicant's assertions, nor had the defence enjoyed even the opportunity to question the officer to attempt to cast doubt on his credibility, and thus there had been a violation of the guarantee.<sup>334</sup>

■ In *Van Mechelen and Others v the Netherlands*, the Court held that there had been a violation of Article 6 since the defence had not only been unaware of the identity of the police officers but had also been prevented from observing their demeanour while under direct questioning, therefore not allowing their reliability to be tested. The State had not been able to explain to the Court's satisfaction why such extreme limitations on the rights of an accused had been required, and there had been a failure to counterbalance the handicaps under which the defence laboured in presenting its case. Further, the Court considered that the position of a police officer in such situations 'is to some extent different from that of a disinterested witness or a victim' on account of his close link with the prosecution and, consequently, the use of an anonymous police witness 'should be resorted to only in exceptional circumstances'.<sup>335</sup>

### **Right to decent working conditions**

Police officers, like all public servants, are entitled to decent working conditions. In addition, they are entitled to be 'provided with special health and security measures, taking into account the particular character of police work'.<sup>336</sup> This is important in order to ensure that the profession of policing is recognised as an important one for society, capable of attracting a high calibre of applicant. In addition, when police officers are remunerated adequately, they are less likely to be tempted to engage in corruption.

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334 *Lüdi v Switzerland*, judgment of 15 June 1992 at paragraphs 44-50.

335 *Van Mechelen and Others v the Netherlands*, judgment of 23 April 1997 at paragraphs 56-65.

336 European Code of Police Ethics at paragraph 32.

# Appendix A: CPT Standards and the police

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As discussed above,<sup>337</sup> the work of the European Committee for the prevention of Torture and Inhuman or Degrading Treatment or Punishment, the CPT, is of direct relevance for the work of police officers. The following extracts from the most recent compilation of CPT standards<sup>338</sup> are of particular importance:

- a. Detention by law enforcement officials
- b. Access to a lawyer as a means of preventing ill-treatment
- c. Juveniles deprived of their liberty
- d. Women deprived of their liberty
- e. Electrical discharge weapons
- f. Combating impunity

## **a. Detention by law enforcement officials**

### **Extract from the 2nd General Report [CPT/Inf (92) 3]**

36. The CPT attaches particular importance to three rights for persons detained by the police: the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities).<sup>339</sup> They are, in the CPT's opinion, three fundamental safeguards against the ill-treatment of detained persons which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc.).

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337 See pp. 20, 42 and 83.

338 Extracted from CPT/Inf/E (2002) 1 - Rev. 2011.

339 This right has subsequently been reformulated as follows: the right of access to a doctor, including the right to be examined, if the person detained so wishes, by a doctor of his own choice (in addition to any medical examination carried out by a doctor called by the police authorities).

37. Persons taken into police custody should be expressly informed without delay of all their rights, including those referred to in paragraph 36. Further, any possibilities offered to the authorities to delay the exercise of one or other of the latter rights in order to protect the interests of justice should be clearly defined and their application strictly limited in time. As regards more particularly the rights of access to a lawyer and to request a medical examination by a doctor other than one called by the police, systems whereby, exceptionally, lawyers and doctors can be chosen from pre-established lists drawn up in agreement with the relevant professional organisations should remove any need to delay the exercise of these rights.

38. 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.

As regards the medical examination of persons in police custody, all such examinations should be conducted out of the hearing, and preferably out of the sight, of police officers. Further, the results of every examination as well as relevant statements by the detainee and the doctor's conclusions should be formally recorded by the doctor and made available to the detainee and his lawyer.

39. Turning to the interrogation process, 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 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).

40. 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, 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.

41. Further, the existence of an independent mechanism for examining complaints about treatment whilst in police custody is an essential safeguard.

42. Custody by the police is in principle of relatively short duration. Consequently, physical conditions of detention cannot be expected to be as good in police establishments as in other places of detention where persons may be held for lengthy periods. However, certain elementary material requirements should be met.

All police cells should be of a reasonable size for the number of persons 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 (for example, a fixed chair or bench), and persons obliged to stay overnight in custody 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.<sup>340</sup>

43. 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 criterion (seen as a desirable level rather than a minimum standard) is 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 metres, 2 metres or more between walls, 2.5 metres between floor and ceiling.

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340 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.



### **Extract from the 6th General Report [CPT/Inf (96) 21]**

14. The CPT welcomes the support for its work expressed in Parliamentary Assembly Recommendation 1257 (1995), on conditions of detention in Council of Europe Member States. It was also most pleased to learn from the reply to Recommendation 1257 that the Committee of Ministers has invited the authorities of Member States to comply with the guidelines on police custody as laid down in the 2nd General Report of the CPT (cf. CPT/Inf (92) 3, paragraphs 36 to 43).

In this connection, it should be noted that some Parties to the Convention are reluctant to implement fully certain of the CPT's recommendations concerning safeguards against ill-treatment for persons in police custody, and in particular the recommendation that such persons be accorded a right of access to a lawyer as from the very outset of their custody.

15. The CPT wishes to stress that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is 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 will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.

The CPT recognises that in order to protect the interests of justice, it may exceptionally be necessary to delay for a certain period a detained person's access to a particular lawyer chosen by him. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer who can be trusted not to jeopardise the legitimate interests of the police investigation should be arranged.

16. The CPT also emphasised in the 2nd General Report the importance of persons taken into police custody being expressly informed without delay of all their rights.

In order to ensure that this is done, the CPT considers that a form setting out those rights in a straightforward manner should be systematically given to persons detained by the police at the very outset of their custody. Further, the persons concerned should be asked to sign a statement attesting that they have been informed of their rights.

The above-mentioned measures would be easy to implement, inexpensive and effective.

**Extract from the 12th General Report [CPT/Inf (2002) 15]**

33. It is essential to the good functioning of society that the police have the powers to apprehend, temporarily detain and question criminal suspects and other categories of persons. However, these powers inherently bring with them a risk of intimidation and physical ill-treatment. The essence of the CPT's work is to seek ways of reducing that risk to the absolute minimum without unduly impeding the police in the proper exercise of their duties. Encouraging developments in the field of police custody have been noted in a number of countries; however, the CPT's findings also highlight all too often the need for continuing vigilance.

34. The **questioning of criminal suspects** is a specialist task which calls for specific training if it is to be performed in a satisfactory manner. First and foremost, *the precise aim of such questioning* must be made crystal clear: that aim should be to obtain accurate and reliable information in order to discover the truth about matters under investigation, not to obtain a confession from someone already presumed, in the eyes of the interviewing officers, to be guilty. In addition to the provision of appropriate training, ensuring adherence of law enforcement officials to the above-mentioned aim will be greatly facilitated by the drawing up of a code of conduct for the questioning of criminal suspects.

35. Over the years, CPT delegations have spoken to a considerable number of detained persons in various countries, who have made credible claims of having been physically ill-treated, or otherwise intimidated or threatened, by police officers trying to obtain confessions in the course of interrogations. It is self-evident that a criminal justice system which places a premium on *confession evidence* creates incentives for officials involved in the investigation of crime - and often under pressure to obtain results - to use physical or psychological coercion. In the context of the prevention of torture and other forms of ill-treatment, it is of fundamental importance to develop methods of crime investigation capable of reducing reliance on confessions, and other evidence and information obtained via interrogations, for the purpose of securing convictions.

36. The **electronic (i.e. audio and/or video) recording of police interviews** represents an important additional safeguard against the ill-treatment of detainees. The CPT is pleased to note that the introduction of such systems is under consideration in an increasing number of countries. Such a facility can provide a complete and authentic record of the interview process, thereby greatly facilitating the investigation of any allegations of ill-treatment. This is

in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure. Electronic recording of police interviews also reduces the opportunity for defendants to later falsely deny that they have made certain admissions.

37. 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.

38. 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.

39. It is not unusual for the CPT to find **suspicious objects** on police premises, such as wooden sticks, broom handles, baseball bats, metal rods, pieces of thick electric cable, imitation firearms or knives. The presence of such objects has on more than one occasion lent credence to allegations received by CPT delegations that the persons held in the establishments concerned have been threatened and/or struck with objects of this kind.

A common explanation received from police officers concerning such objects is that they have been confiscated from suspects and will be used as evidence. The fact that the objects concerned are invariably unlabelled, and frequently are found scattered around the premises (on occasion placed behind curtains

or cupboards), can only invite scepticism as regards that explanation. In order to dispel speculation about improper conduct on the part of police officers and to remove potential sources of danger to staff and detained persons alike, items seized for the purpose of being used as evidence should always be properly labelled, recorded and kept in a dedicated property store. All other objects of the kind mentioned above should be removed from police premises.

40. As from the outset of its activities, the CPT has advocated 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**. In many States, steps have been taken to introduce or reinforce these rights, in the light of the CPT's recommendations. More specifically, the right of access to a lawyer during police custody is now widely recognised in countries visited by the CPT; in those few countries where the right does not yet exist, plans are afoot to introduce it.

41. However, in a number of countries, there is considerable reluctance to comply with the CPT's recommendation that the right of **access to a lawyer**<sup>341</sup> be guaranteed from the very outset of custody. In some countries, persons detained by the police enjoy this right only after a specified period of time spent in custody; in others, the right only becomes effective when the person detained is formally declared a 'suspect'.

The CPT has repeatedly stressed that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is 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 will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs. The CPT recognises that in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer should be arranged.

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341 The CPT has subsequently published a more detailed section on 'access to a lawyer as a means of preventing ill-treatment'; see paragraphs 18-25 of the 21st General Report (CPT/Inf (2011) 28).

The right of access to a lawyer must include the right to talk to him in private. The person concerned should also, in principle, be entitled to have a lawyer present during any interrogation conducted by the police. Naturally, this should not prevent the police from questioning a detained person on urgent matters, even in the absence of a lawyer (who may not be immediately available), nor rule out the replacement of a lawyer who impedes the proper conduct of an interrogation.

The CPT has also emphasised that the right of access to a lawyer should be enjoyed not only by criminal suspects but also by anyone who is under a legal obligation to attend - and stay at - a police establishment, e.g. as a 'witness'.

Further, for the right of access to a lawyer to be fully effective in practice, appropriate provision should be made for persons who are not in a position to pay for a lawyer.

42. Persons in police custody should have a formally recognised right of **access to a doctor**. In other words, a doctor should always be called without delay if a person requests a medical examination; police officers should not seek to filter such requests. Further, the right of access to a doctor should include the right of a person in custody to be examined, if the person concerned so wishes, by a doctor of his/her own choice (in addition to any medical examination carried out by a doctor called by the police).

All medical examinations of persons in police custody must be conducted out of the hearing of law enforcement officials and, unless the doctor concerned requests otherwise in a particular case, out of the sight of such officials.

It is also important that persons who are released from police custody without being brought before a judge have the right to directly request a medical examination/certificate from a recognised forensic doctor.

43. A detained person's **right to have the fact of his/her detention notified to a third party** should in principle be guaranteed from the very outset of police custody. Of course, the CPT recognises that the exercise of this right might have to be made subject to certain exceptions, in order to protect the legitimate interests of the police investigation. However, such exceptions should be clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards (e.g. any delay in notification of custody to be recorded in writing with the reasons therefor, and to require the approval of a senior police officer unconnected with the case or a prosecutor).

44. Rights for persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence. Consequently, it is imperative that persons taken into police custody are **expressly informed of their rights** without delay and in a language which they understand. In order to ensure that this is done, a form setting out those rights in a straightforward manner should be systematically given to persons detained by the police at the very outset of their custody. Further, the persons concerned should be asked to sign a statement attesting that they have been informed of their rights.

45. The CPT has stressed on several occasions **the role of judicial and prosecuting authorities** as regards combatting ill-treatment by the police.

For example, all persons detained by the police whom it is proposed to remand to prison should be physically brought before the judge who must decide that issue; there are still certain countries visited by the CPT where this does not occur. Bringing the person before the judge will provide a timely opportunity for a criminal suspect who has been ill-treated to lodge a complaint. Further, even in the absence of an express complaint, the judge will be able to take action in good time if there are other indications of ill-treatment (e.g. visible injuries; a person's general appearance or demeanour).

Naturally, the judge must take appropriate steps when there are indications that ill-treatment by the police may have occurred. In this regard, whenever criminal suspects brought before a judge at the end of police custody allege ill-treatment, the judge should record the allegations in writing, order immediately a forensic medical examination and take the necessary steps to ensure that the allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries. Further, even in the absence of an express allegation of ill-treatment, the judge should request a forensic medical examination whenever there are other grounds to believe that a person brought before him could have been the victim of ill-treatment.

The diligent examination by judicial and other relevant authorities of all complaints of ill-treatment by law enforcement officials and, where appropriate, the imposition of a suitable penalty will have a strong deterrent effect. Conversely, if those authorities do not take effective action upon complaints referred to them, law enforcement officials minded to ill-treat persons in their custody will quickly come to believe that they can do so with impunity.

46. **Additional questioning by the police of persons remanded to prison** may on occasion be necessary. The CPT is of the opinion that from the standpoint

of the prevention of ill-treatment, it would be far preferable for such questioning to take place within the prison establishment concerned rather than on police premises. The return of remand prisoners to police custody for further questioning should only be sought and authorised when it is absolutely unavoidable. It is also axiomatic that in those exceptional circumstances where a remand prisoner is returned to the custody of the police, he/she should enjoy the three rights referred to in paragraphs 40 to 43.

47. Police custody is (or at least should be) of relatively short duration. Nevertheless, **conditions of detention in police cells** must meet certain *basic requirements*.

All police cells should be clean and of a reasonable size<sup>342</sup> for the number of persons they are used to accommodate, and have adequate lighting (i.e. sufficient to read by, sleeping periods excluded); 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 overnight in custody should be provided with a clean mattress and clean blankets. Persons in police custody should have access to a proper toilet facility under decent conditions, and be offered adequate means to wash themselves. They should have ready access to drinking water and be given food at appropriate times, including at least one full meal (i.e. something more substantial than a sandwich) every day. Persons held in police custody for 24 hours or more should, as far as possible, be offered outdoor exercise every day.

Many police detention facilities visited by CPT delegations do not comply with these minimal standards. This is particularly detrimental for persons who subsequently appear before a judicial authority; all too frequently persons are brought before a judge after spending one or more days in substandard and filthy cells, without having been offered appropriate rest and food and an opportunity to wash.

48. The duty of care which is owed by the police to persons in their custody includes the responsibility to ensure their *safety and physical integrity*. It follows that the proper monitoring of custody areas is an integral component of the duty of care assumed by the police. Appropriate steps must be taken to ensure that persons in police custody are always in a position to readily enter into contact with custodial staff.

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342 As regards the size of police cells, see also paragraph 43 of the 2nd General Report (CPT/Inf (92) 3).

On a number of occasions CPT delegations have found that police cells were far removed from the offices or desks where police officers are normally present, and were also devoid of any means (e.g. a call system) enabling detained persons to attract the attention of a police officer. Under such conditions, there is considerable risk that incidents of various kinds (violence among detainees; suicide attempts; fires etc.) will not be responded to in good time.

49. The CPT has also expressed misgivings as regards the practice observed in certain countries of each operational department (narcotics, organised crime, anti-terrorism) in a police establishment having its own detention facility staffed by officers from that department. The Committee considers that such an approach should be discarded in favour of a *central detention facility*, staffed by a distinct corps of officers specifically trained for such a custodial function. This would almost certainly prove beneficial from the standpoint of the prevention of ill-treatment. Further, relieving individual operational departments of custodial duties might well prove advantageous from the management and logistical perspectives.

50. Finally, the **inspection of police establishments by an independent authority** can make an important contribution towards the prevention of ill-treatment of persons held by the police and, more generally, help to ensure satisfactory conditions of detention. To be fully effective, visits by such an authority should be both regular and unannounced, and the authority concerned should be empowered to interview detained persons in private. Further, it should examine all issues related to the treatment of persons in custody: the recording of detention; information provided to detained persons on their rights and the actual exercise of those rights (in particular the three rights referred to in paragraphs 40 to 43); compliance with rules governing the questioning of criminal suspects; and material conditions of detention.

The findings of the above-mentioned authority should be forwarded not only to the police but also to another authority which is independent of the police.

## **b. Access to a lawyer as a means of preventing ill-treatment**

### **Extract from the 21st General Report [CPT/Inf (2011) 28]**

18. The possibility for persons taken into police custody to have access to a lawyer is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill-treat detained persons. Further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.



19. To be fully effective, the right of access to a lawyer should be guaranteed as from the very outset of a person's deprivation of liberty<sup>343</sup>. Indeed, the CPT has repeatedly found that the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Further, the right of access to a lawyer should apply as of the moment of deprivation of liberty, irrespective of the precise legal status of the person concerned; more specifically, enjoyment of the right should not be made dependent on the person having been formally declared to be a 'suspect'. For example, under many legal systems in Europe, persons can be obliged to attend – and stay at – a law enforcement establishment for a certain period of time in the capacity of a 'witness' or for 'informative talks'; the CPT knows from experience that the persons concerned can be at serious risk of ill-treatment.

20. The right of access to a lawyer should be enjoyed by everyone who is deprived of their liberty, no matter how 'minor' the offence of which they are suspected. In numerous countries visited by the CPT, persons can be deprived of their liberty for several weeks for so-called 'administrative' offences. The Committee can see no justification for depriving such persons of the right of access to a lawyer. Further, the Committee has frequently encountered the practice of persons who are in reality suspected of a criminal offence being formally detained in relation to an administrative offence, so as to avoid the application of the safeguards that apply to criminal suspects; to exclude certain offences from the scope of the right of access to a lawyer inevitably brings with it the risk of loopholes of this kind developing.

21. Similarly, the right of access to a lawyer should apply, no matter how 'serious' the offence of which the person detained is suspected. Indeed, persons suspected of particularly serious offences can be among those most at risk of ill-treatment, and therefore most in need of access to a lawyer. Consequently, the CPT opposes measures which provide for the systematic denial for a given period of access to a lawyer for detained persons who are suspected of certain categories of offences (e.g. offences under anti-terrorism legislation). The question whether restrictions on the right of access to a lawyer are justified should be assessed on a case-by-case basis, not determined by the category of offence involved.<sup>344</sup>

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343 Of course, depending on the circumstances of the case concerned, the right of access to a lawyer may become operative at an even earlier stage.

344 Reference might be made here to the judgment of the European Court of Human Rights in the case of *Salduz v Turkey* (judgment of 27 November 2008), in which the Court found that '...

22. The CPT fully recognises that it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer who can be trusted not to jeopardise the legitimate interests of the investigation should be organised. It is perfectly feasible to make satisfactory arrangements in advance for this type of situation, in consultation with the local Bar Association or Law Society.

23. The right of access to a lawyer during police custody must include the right to meet him, and in private. Seen as a safeguard against ill-treatment (as distinct from a means of ensuring a fair trial), it is clearly essential for the lawyer to be in the direct physical presence of the detained person. This is the only way of being able to make an accurate assessment of the physical and psychological state of the person concerned. Likewise, if the meeting with the lawyer is not in private, the detained person may well not feel free to disclose the manner in which he is being treated. Once it has been accepted that exceptionally the lawyer in question may not be a lawyer chosen by the detained person but instead a replacement lawyer chosen following a procedure agreed upon in advance, the CPT fails to see any need for derogations to the confidentiality of meetings between the lawyer and the person concerned.

24. The right of access to a lawyer should also include the right to have the lawyer present during any questioning conducted by the police and the lawyer should be able to intervene in the course of the questioning. Naturally, this should not prevent the police from immediately starting to question a detained person who has exercised his right of access to a lawyer, even before the lawyer arrives, if this is warranted by the extreme urgency of the matter in hand; nor should it rule out the replacement of a lawyer who impedes the proper conduct of an interrogation. That said, if such situations arise, the police should subsequently be accountable for their action.

25. Finally, in order for the right of access to a lawyer during police custody to be fully effective in practice, appropriate provision should be made already at this early stage of the criminal procedure for persons who are not in a position to pay for a lawyer.

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Article 6§1 [of the European Convention on Human Rights] requires that, as a rule, access to a lawyer should be provided ... unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.' (paragraph 55).

### c. Juveniles deprived of their liberty

#### Extract from the 9th General Report [CPT/Inf (99) 12]

##### Preliminary remarks

20. In certain of its previous general reports, the CPT has set out the criteria which guide its work in a variety of places of detention, including police stations, prisons, holding centres for immigration detainees and psychiatric establishments.

The Committee applies the above-mentioned criteria, to the extent to which they are appropriate, in respect of juveniles (i.e. persons under the age of 18) deprived of their liberty. However - regardless of the reason for which they may have been deprived of their liberty - juveniles are inherently more vulnerable than adults. In consequence, particular vigilance is required to ensure that their physical and mental well-being is adequately protected. In order to highlight the importance which it attaches to the prevention of ill-treatment of juveniles deprived of their liberty, the CPT has chosen to devote this chapter of its 9<sup>th</sup> General Report to describing some of the specific issues which it pursues in this area.

In the following paragraphs, the Committee identifies a number of the safeguards against ill-treatment which it considers should be offered to all juveniles deprived of their liberty, before focussing on the conditions which should obtain in detention centres specifically designed for juveniles. The Committee hopes in this way to give a clear indication to national authorities of its views regarding the manner in which such persons ought to be treated. As in previous years, **the CPT would welcome comments on this substantive section of its General Report.**

21. The Committee wishes to stress at the outset that any standards which it may be developing in this area should be seen as being complementary to those set out in a panoply of other international instruments, including the 1989 United Nations Convention on the Rights of the Child; the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (*the Beijing Rules*); the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency (*the Riyadh Guidelines*).

The Committee also wishes to express its approval of one of the cardinal principles enshrined in the above-mentioned instruments, namely that juveniles

should only be deprived of their liberty as a last resort and for the shortest possible period of time (cf. Article 37 b. of the Convention on the Rights of the Child and Rules 13 and 19 of *the Beijing Rules*).

### **Safeguards against the ill-treatment of juveniles**

22. Given its mandate, the CPT's first priority during visits to places where juveniles are deprived of their liberty is to seek to establish whether they are being subjected to deliberate ill-treatment. The Committee's findings to date would suggest that, in most of the establishments which it visits, this is a comparatively rare occurrence.

23. However, as is the case for adults, it would appear that juveniles run a higher risk of being deliberately ill-treated in police establishments than in other places of detention. Indeed, on more than one occasion, CPT delegations have gathered credible evidence that juveniles have featured amongst the persons tortured or otherwise ill-treated by police officers.

In this context, the CPT has stressed that it is during the period immediately following deprivation of liberty that the risk of torture and ill-treatment is at its greatest. It follows that it is essential that all persons deprived of their liberty (including juveniles) enjoy, as from the moment when they are first obliged to remain with the police, the rights to notify a relative or another third party of the fact of their detention, the right of access to a lawyer and the right of access to a doctor.

Over and above these safeguards, certain jurisdictions recognise that the inherent vulnerability of juveniles requires that additional precautions be taken. These include placing police officers under a formal obligation themselves to ensure that an appropriate person is notified of the fact that a juvenile has been detained (regardless of whether the juvenile requests that this be done). It may also be the case that police officers are not entitled to interview a juvenile unless such an appropriate person and/or a lawyer is present. The CPT welcomes this approach.

24. In a number of other establishments visited, CPT delegations have been told that it was not uncommon for staff to administer the occasional 'pedagogic slap' to juveniles who misbehaved. The Committee considers that, in the interests of the prevention of ill-treatment, all forms of physical chastisement must be both formally prohibited and avoided in practice. Inmates who misbehave should be dealt with only in accordance with prescribed disciplinary procedures.

25. The Committee's experience also suggests that when ill-treatment of juveniles does occur, it is more often the result of a failure adequately to protect the persons concerned from abuse than of a deliberate intention to inflict suffering. An important element in any strategy to prevent such abuse is observance of the principle that juveniles in detention should as a rule be accommodated separately from adults.

Examples of a failure to respect this principle which have been observed by the CPT have included: adult male prisoners being placed in cells for male juveniles, often with the intention that they maintain control in those cells; female juveniles being accommodated together with adult women prisoners; juvenile psychiatric patients sharing accommodation with chronically ill adult patients.

The Committee accepts that there may be exceptional situations (e.g. children and parents being held as immigration detainees) in which it is plainly in the best interests of juveniles not to be separated from particular adults. However, to accommodate juveniles and unrelated adults together inevitably brings with it the possibility of domination and exploitation.

26. Mixed gender staffing is another safeguard against ill-treatment in places of detention, in particular where juveniles are concerned. The presence of both male and female staff can have a beneficial effect in terms of both the custodial ethos and in fostering a degree of normality in a place of detention.

Mixed gender staffing also allows for appropriate staff deployment when carrying out gender sensitive tasks, such as searches. In this respect, the CPT wishes to stress that, regardless of their age, persons deprived of their liberty should only be searched by staff of the same gender and that any search which requires an inmate to undress should be conducted out of the sight of custodial staff of the opposite gender; these principles apply *a fortiori* in respect of juveniles.

27. Lastly, in a number of establishments visited, CPT delegations have observed custodial staff who come into direct contact with juveniles openly carrying batons. Such a practice is not conducive to fostering positive relations between staff and inmates. Preferably, custodial staff should not carry batons at all. If, nevertheless, it is considered indispensable for them to do so, the CPT recommends that the batons be hidden from view.

## **d. Women deprived of their liberty**

### **Extract from the 10th General Report [CPT/Inf (2000) 13]**

#### **Preliminary remarks**

22. It should be stressed at the outset that the CPT's concerns about the issues identified in this chapter apply irrespective of the nature of the place of detention. Nevertheless, in the CPT's experience, risks to the physical and/or psychological integrity of women deprived of their liberty may be greater during the period immediately following apprehension. Consequently, particular attention should be paid to ensuring that the criteria enunciated in the following sections are respected during that phase.

The Committee also wishes to emphasise that any standards which it may be developing in this area should be seen as being complementary to those set out in other international instruments, including the European Convention on Human Rights, the United Nations Convention on the Rights of the Child, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women and the United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.

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#### **Separate accommodation for women deprived of their liberty**

24. The duty of care which is owed by a State to persons deprived of their liberty includes the duty to protect them from others who may wish to cause them harm. The CPT has occasionally encountered allegations of woman upon woman abuse. However, allegations of ill-treatment of women in custody by men (and, more particularly, of sexual harassment, including verbal abuse with sexual connotations) arise more frequently, in particular when a State fails to provide separate accommodation for women deprived of their liberty with a preponderance of female staff supervising such accommodation.

As a matter of principle, women deprived of their liberty should be held in accommodation which is physically separate from that occupied by any men being held at the same establishment. That said, some States have begun to make arrangements for couples (both of whom are deprived of their liberty) to be accommodated together, and/or for some degree of mixed gender association in prisons. The CPT welcomes such progressive arrangements, provided that the prisoners involved agree to participate, and are carefully selected and adequately supervised.

## **e. Electrical discharge weapons**

### **Extract from the 20th General Report [CPT/Inf (2010) 28]**

#### **Preliminary remarks**

65. It is 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.

66. The use of EDW by law enforcement and other public officials is a controversial subject. There are 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. It is also a fact that, by their very nature, EDW lend themselves to misuse. The CPT has on several occasions gathered credible evidence that such weapons have been exploited to inflict severe ill-treatment on persons deprived of their liberty, and the Committee has frequently received allegations that detained persons have been threatened with ill-treatment via the use of EDW.

67. The CPT has already addressed the issue of EDW in several of its visit reports. In the following paragraphs, the Committee wishes to highlight the positions it has adopted to date and indicate some areas of concern. The CPT would welcome comments on this section of its General Report, so as to help the Committee develop its standards in relation to this complex subject.

#### **General principles**

68. The CPT understands the wish of national authorities to provide their law enforcement officials with means enabling them to give a more graduated response to dangerous situations with which they are confronted. There is no doubt that the possession of less lethal weapons such as EDW may in some cases make it possible to avoid recourse to firearms. However, electrical discharge weapons can cause acute pain and, as already indicated, they are open to abuse. Consequently, 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 the country's national executive and legislature. Further, the criteria for deploying EDW should be both defined by law and spelt out in specific regulations.

69. The CPT considers 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.

70. In the CPT's view, 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.

#### **Application of these principles to specific situations**

71. Applying these principles to specific situations, the CPT has, for example, come out clearly against the issuing of EDW to members of units responsible for deportation operations vis-à-vis immigration detainees. Similarly, the Committee has 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 subject to the strict condition that the weapons concerned are used only by specially trained staff. There should be no question of any form of EDW being standard issue for staff working in direct contact with persons held in prisons or any other place of deprivation of liberty.

72. Electrical discharge weapons are increasingly being used when effecting arrests, and there have been well-publicised examples of their misuse in this context (e.g. the repeated administration of electric shocks to persons lying on the ground). Clearly, the resort to EDW in such situations must be strictly circumscribed. The guidance found by the CPT in some countries, to the effect that these weapons may be used when law enforcement officials are facing violence – or a threat of violence – of such a level that they would need to use



force to protect themselves or others, is so broad as to leave the door open to a disproportionate response. If EDW gradually become the weapon of choice whenever faced with a recalcitrant attitude at the time of arrest, this could have a profoundly negative effect on the public's perception of law enforcement officials.

73. Having regard to the limits of its mandate, the CPT has been reluctant to adopt a firm position vis-à-vis the use of electrical discharge weapons in the context of operations for the maintenance or restoration of public order (e.g. control of demonstrations). That said, in the light of the principles set out in paragraph 70 above, the resort to EDW during such operations can be considered inappropriate unless there is a real and immediate threat to life or risk of serious injury. The law enforcement officials involved will (or should) have at their disposal other means of protection and action that are specifically adapted to the task in hand. It is noteworthy that some police forces in Europe have excluded the use of EDW in the course of operations to control public demonstrations.

74. Particular reference should be made to stun belts and similar devices. The CPT has made clear its opposition to the use of equipment of this kind for controlling the movements of detained persons, whether inside or outside places of deprivation of liberty. Such equipment is, in the Committee's opinion, inherently degrading for the person to whom it is applied, and the scope for misuse is particularly high. Alternative means of ensuring security during the movements of detained persons can and should be found.

### **Instructions and training**

75. Following any decision to issue EDW, the authorities concerned must ensure that detailed instructions are disseminated within the services which will have such weapons at their disposal. Further, the officials who may use the weapons must be specifically selected – taking into account their resistance to stress and faculty of discernment – and suitably trained. An in-service training programme should be put in place together with regular testing (see also paragraph 80).

### **Technical aspects**

76. As with any weapon system, before the EDW in question are made available they should be the subject of a technical authorisation procedure. This procedure should, in particular, ensure that the number, duration and intensity of the electrical discharges is limited to a safe level. The CPT knows

of cases in which persons deprived of their liberty have been subjected to several electrical discharges in quick succession; such excessive, unnecessary use of force certainly qualifies as ill-treatment. In addition, provision should be made for a regular maintenance/servicing procedure.

77. EDW should be equipped with devices (generally a memory chip) that can be used for recording various items of information and conducting checks on the use of the weapon (such as the exact time of use; the number, duration and intensity of electrical discharges, etc.). The information stored on these chips should be systematically read by the competent authorities at appropriate intervals (at least every three months). Further, the weapons should be provided with built-in laser aiming and video recording devices, making safe aiming possible and enabling the circumstances surrounding their use to be recorded.

78. Electrical discharge weapons issued to law enforcement officials commonly offer different modes of use, in particular a 'firing' and a 'contact' (drive-stun) mode. In the former, the weapon fires projectiles which attach to the person targeted at a short distance from each other, and an electrical discharge is generated. In the great majority of cases, this discharge provokes generalised muscular contraction which induces temporary paralysis and causes the person concerned to fall to the ground. In contrast, when the 'contact' mode is used, electrodes on the end of the weapon produce an electrical arc and when they are brought into contact with the person targeted the electrodes cause very intense, localised pain, with the possibility of burns to the skin. The CPT has strong reservations concerning this latter mode of use. Indeed, properly trained law enforcement officials will have many other control techniques available to them when they are in touching distance of a person who has to be brought under control.

### **Medical aspects**

79. The potential effects of EDW on the physical and mental health of persons against whom they are used is the subject of much argument, a debate that has been fuelled in part by a number of cases of persons dying shortly after having been the target of such a weapon. Although the research on this matter remains for the time being largely inconclusive, it is undisputed that the use of EDW does present specific health risks, such as the possibility of injury on falling after being struck by projectiles or of burns in the event of prolonged use of such a weapon in the 'contact' mode. In the absence of detailed research on the potential effects of EDW on particularly vulnerable

persons (e.g. the elderly, pregnant women, young children, persons with a pre-existing heart condition), the CPT believes that their use vis-à-vis such persons should in any event be avoided. The use of EDW on people who are delirious or intoxicated is another sensitive issue; persons in this state of mind may well not understand the significance of an advance warning that the weapon will be used and could instead become ever more agitated in such a situation. Deaths during arrest have been attributed to these medical conditions, in particular when EDW have been deployed. Therefore, particular caution is warranted and the use of EDW should be avoided in such a case and, in general, in situations where EDW might increase the risk of death or injury.

80. The training of officials to be issued with EDW should include information about when it is inappropriate, for medical reasons, to use them as well as concerning emergency care (in the event of a fall, burns, wounds from the projectiles, cardiac disturbances, agitated delirium, etc.). Further, once brought under control, a person who has been the target of an EDW should be informed that the weapon has only a temporary effect.

81. The CPT considers that anyone against whom an EDW has been used should, in all cases, be seen by a doctor and, where necessary, taken to hospital. Doctors and accident/emergency services should be informed of the ways in which persons who have been the target of such weapons may be affected and of the relevant forms of treatment, from the standpoint of both physical and psychological health. Further, a medical certificate should be given to the persons concerned (and/or to their lawyer, upon request).

#### **Post-incident procedure**

82. Following each use of an EDW, there should be a debriefing of the law enforcement official who had recourse to the weapon. Further, the incident should be the subject of a detailed report to a higher authority. This report should indicate the precise circumstances considered to justify resort to the weapon, the mode of use, as well as all other relevant information (presence of witnesses, whether other weapons were available, medical care given to the person targeted, etc.). The technical information registered on the memory chip and the video recording of the use of the EDW should be included in the report.

83. This internal procedure should be accompanied by an external monitoring element. This could consist of systematically informing, at regular intervals, an independent body responsible for supervising law enforcement agencies of all cases of resort to EDW.

84. Whenever it transpires that the use of an EDW may not have been in accordance with the relevant laws or regulations, an appropriate investigation (disciplinary and/or criminal) should be set in motion.

## **f. Combating impunity**

### **Extract from the 14th General Report [CPT/Inf (2004) 28]**

25. The *raison d'être* of the CPT is the 'prevention' of torture and inhuman or degrading treatment or punishment; it has its eyes on the future rather than the past. However, assessing the effectiveness of action taken when ill-treatment has occurred constitutes an integral part of the Committee's preventive mandate, given the implications that such action has for future conduct.

The credibility of the prohibition of torture and other forms of ill-treatment is undermined each time officials responsible for such offences are not held to account for their actions. If the emergence of information indicative of ill-treatment is not followed by a prompt and effective response, those minded to ill-treat persons deprived of their liberty will quickly come to believe – and with very good reason – that they can do so with impunity. All efforts to promote human rights principles through strict recruitment policies and professional training will be sabotaged. In failing to take effective action, the persons concerned – colleagues, senior managers, investigating authorities – will ultimately contribute to the corrosion of the values which constitute the very foundations of a democratic society.

Conversely, when officials who order, authorise, condone or perpetrate torture and ill-treatment are brought to justice for their acts or omissions, an unequivocal message is delivered that such conduct will not be tolerated. Apart from its considerable deterrent value, this message will reassure the general public that no one is above the law, not even those responsible for upholding it. The knowledge that those responsible for ill-treatment have been brought to justice will also have a beneficial effect for the victims.

26. Combating impunity must start at home, that is within the agency (police or prison service, military authority, etc.) concerned. Too often the esprit de corps leads to a willingness to stick together and help each other when allegations of ill-treatment are made, to even cover up the illegal acts of colleagues. Positive 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.

An atmosphere must be created in which the right thing to do is to report ill-treatment by colleagues; there must be a clear understanding that culpability for ill-treatment extends beyond the actual perpetrators to anyone who knows, or should know, that ill-treatment is occurring and fails to act to prevent or report it. This implies the existence of a clear reporting line as well as the adoption of whistle-blower protective measures.

27. In many States visited by the CPT, torture and acts such as ill-treatment in the performance of a duty, coercion to obtain a statement, abuse of authority, etc. constitute specific criminal offences which are prosecuted *ex officio*. The CPT welcomes the existence of legal provisions of this kind.

Nevertheless, the CPT has found that, in certain countries, prosecutorial authorities have considerable discretion with regard to the opening of a preliminary investigation when information related to possible ill-treatment of persons deprived of their liberty comes to light. In the Committee's view, even in the absence of a formal complaint, such authorities should be under a **legal obligation to undertake an investigation** whenever they receive credible information, from any source, that ill-treatment of persons deprived of their liberty may have occurred. In this connection, the legal framework for accountability will be strengthened if public officials (police officers, prison directors, etc.) are formally required to notify the relevant authorities immediately whenever they become aware of any information indicative of ill-treatment.

28. The existence of a suitable legal framework is not of itself sufficient to guarantee that appropriate action will be taken in respect of cases of possible ill-treatment. Due attention must be given to **sensitising the relevant authorities** to the important obligations which are incumbent upon them.

When persons detained by law enforcement agencies are brought before prosecutorial and judicial authorities, this provides a valuable opportunity for such persons to indicate whether or not they have been ill-treated. Further, even in the absence of an express complaint, these authorities will be in a position to take action in good time if there are other indicia (e.g. visible injuries; a person's general appearance or demeanour) that ill-treatment might have occurred.

However, in the course of its visits, the CPT frequently meets persons who allege that they had complained of ill-treatment to prosecutors and/or judges, but that their interlocutors had shown little interest in the matter, even when

they had displayed injuries on visible parts of the body. The existence of such a scenario has on occasion been borne out by the CPT's findings. By way of example, the Committee recently examined a judicial case file which, in addition to recording allegations of ill-treatment, also took note of various bruises and swellings on the face, legs and back of the person concerned. Despite the fact that the information recorded in the file could be said to amount to *prima-facie* evidence of ill-treatment, the relevant authorities did not institute an investigation and were not able to give a plausible explanation for their inaction.

It is also not uncommon for persons to allege that they had been frightened to complain about ill-treatment, because of the presence at the hearing with the prosecutor or judge of the very same law enforcement officials who had interrogated them, or that they had been expressly discouraged from doing so, on the grounds that it would not be in their best interests.

It is imperative that prosecutorial and judicial authorities take resolute action when any information indicative of ill-treatment emerges. Similarly, they must conduct the proceedings in such a way that the persons concerned have a real opportunity to make a statement about the manner in which they have been treated.

29. **Adequately assessing allegations of ill-treatment** will often be a far from straightforward matter. Certain types of ill-treatment (such as asphyxiation or electric shocks) do not leave obvious marks, or will not, if carried out with a degree of proficiency. Similarly, making persons stand, kneel or crouch in an uncomfortable position for hours on end, or depriving them of sleep, is unlikely to leave clearly identifiable traces. Even blows to the body may leave only slight physical marks, difficult to observe and quick to fade. Consequently, when allegations of such forms of ill-treatment come to the notice of prosecutorial or judicial authorities, they should be especially careful not to accord undue importance to the absence of physical marks. The same applies *a fortiori* when the ill-treatment alleged is predominantly of a psychological nature (sexual humiliation, threats to the life or physical integrity of the person detained and/or his family, etc.). Adequately assessing the veracity of allegations of ill-treatment may well require taking evidence from all persons concerned and arranging in good time for on-site inspections and/or specialist medical examinations.

Whenever criminal suspects brought before prosecutorial or judicial authorities allege ill-treatment, those allegations should be recorded in writing, a forensic medical examination (including, if appropriate, by a forensic psychiatrist)

should be immediately ordered, and the necessary steps taken to ensure that the allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries. Even in the absence of an express allegation of ill-treatment, a forensic medical examination should be requested whenever there are other grounds to believe that a person could have been the victim of ill-treatment.

30. It is also important that no barriers should be placed between persons who allege ill-treatment (who may well have been released without being brought before a prosecutor or judge) and doctors who can provide forensic reports recognised by the prosecutorial and judicial authorities. For example, access to such a doctor should not be made subject to prior authorisation by an investigating authority.

31. The CPT has had occasion, in a number of its visit reports, to assess the activities of the authorities empowered to conduct official investigations and bring criminal or disciplinary charges in cases involving allegations of ill-treatment. In so doing, the Committee takes account of the case law of the European Court of Human Rights as well as the standards contained in a panoply of international instruments. It is now a well established principle that **effective investigations**, capable of leading to the identification and punishment of those responsible for ill-treatment, are essential to give practical meaning to the prohibition of torture and inhuman or degrading treatment or punishment.

Complying with this principle implies that the authorities responsible for investigations are provided with all the necessary resources, both human and material. Further, investigations must meet certain basic criteria.

32. For an investigation into possible ill-treatment to be effective, it is essential that the persons responsible for carrying it out are **independent** from those implicated in the events. In certain jurisdictions, all complaints of ill-treatment against the police or other public officials must be submitted to a prosecutor, and it is the latter – not the police – who determines whether a preliminary investigation should be opened into a complaint; the CPT welcomes such an approach. However, it is not unusual for the day-to-day responsibility for the operational conduct of an investigation to revert to serving law enforcement officials. The involvement of the prosecutor is then limited to instructing those officials to carry out inquiries, acknowledging receipt of the result, and deciding whether or not criminal charges should be brought. It is important to ensure that the officials concerned are not from the same service as those

who are the subject of the investigation. Ideally, those entrusted with the operational conduct of the investigation should be completely independent from the agency implicated. Further, prosecutorial authorities must exercise close and effective supervision of the operational conduct of an investigation into possible ill-treatment by public officials. They should be provided with clear guidance as to the manner in which they are expected to supervise such investigations.

33. An investigation into possible ill-treatment by public officials must comply with the criterion of **thoroughness**. It must be capable of leading to a determination of whether force or other methods used were or were not justified under the circumstances, and to the identification and, if appropriate, the punishment of those concerned. This is not an obligation of result, but of means. It requires that all reasonable steps be taken to secure evidence concerning the incident, including, inter alia, to identify and interview the alleged victims, suspects and eyewitnesses (e.g. police officers on duty, other detainees), to seize instruments which may have been used in ill-treatment, and to gather forensic evidence. Where applicable, there should be an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.

The investigation must also be conducted in a comprehensive manner. The CPT has come across cases when, in spite of numerous alleged incidents and facts related to possible ill-treatment, the scope of the investigation was unduly circumscribed, significant episodes and surrounding circumstances indicative of ill-treatment being disregarded.

34. In this context, the CPT wishes to make clear that it has strong misgivings regarding the practice observed in many countries of law enforcement officials or prison officers wearing masks or balaclavas when performing arrests, carrying out interrogations, or dealing with prison disturbances; this will clearly hamper the identification of potential suspects if and when allegations of ill-treatment arise. This practice should be strictly controlled and only used in exceptional cases which are duly justified; it will rarely, if ever, be justified in a prison context.

Similarly, the practice found in certain countries of blindfolding persons in police custody should be expressly prohibited; it can severely hamper the bringing of criminal proceedings against those who torture or ill-treat, and has done so in some cases known to the CPT.



35. To be effective, the investigation must also be conducted in a prompt and reasonably expeditious manner. The CPT has found cases where the necessary investigative activities were unjustifiably delayed, or where prosecutorial or judicial authorities demonstrably lacked the requisite will to use the legal means at their disposal to react to allegations or other relevant information indicative of ill-treatment. The investigations concerned were suspended indefinitely or dismissed, and the law enforcement officials implicated in ill-treatment managed to avoid criminal responsibility altogether. In other words, the response to compelling evidence of serious misconduct had amounted to an 'investigation' unworthy of the name.

36. In addition to the above-mentioned criteria for an effective investigation, there should be a sufficient element of **public scrutiny** of the investigation or its results, to secure accountability in practice as well as in theory. The degree of scrutiny required may well vary from case to case. In particularly serious cases, a public inquiry might be appropriate. In all cases, the victim (or, as the case may be, the victim's next-of-kin) must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

37. **Disciplinary proceedings** provide an additional type of redress against ill-treatment, and may take place in parallel to criminal proceedings. Disciplinary culpability of the officials concerned should be systematically examined, irrespective of whether the misconduct in question is found to constitute a criminal offence. The CPT has recommended a number of procedural safeguards to be followed in this context; for example, adjudication panels for police disciplinary proceedings should include at least one independent member.

38. Inquiries into possible disciplinary offences by public officials may be performed by a separate internal investigations department within the structures of the agencies concerned. Nevertheless, the CPT strongly encourages the creation of a fully-fledged independent investigation body. Such a body should have the power to direct that disciplinary proceedings be instigated.

Regardless of the formal structure of the investigation agency, the CPT considers that its functions should be properly publicised. Apart from the possibility for persons to lodge complaints directly with the agency, it should be mandatory for public authorities such as the police to register all representations which could constitute a complaint; to this end, appropriate forms should be introduced for acknowledging receipt of a complaint and confirming that the matter will be pursued.

If, in a given case, it is found that the conduct of the officials concerned may be criminal in nature, the investigation agency should always notify directly – without delay – the competent prosecutorial authorities.

39. Great care should be taken to ensure that persons who may have been the victims of ill-treatment by public officials are not dissuaded from lodging a complaint. For example, the potential negative effects of a possibility for such officials to bring proceedings for defamation against a person who wrongly accuses them of ill-treatment should be kept under review. The balance between competing legitimate interests must be evenly established. Reference should also be made in this context to certain points already made in paragraph 28.

40. Any evidence of ill-treatment by public officials which emerges during **civil proceedings** also merits close scrutiny. For example, in cases in which there have been successful claims for damages or out-of-court settlements on grounds including assault by police officers, the CPT has recommended that an independent review be carried out. Such a review should seek to identify whether, having regard to the nature and gravity of the allegations against the police officers concerned, the question of criminal and/or disciplinary proceedings should be (re)considered.

41. It is axiomatic that no matter how effective an investigation may be, it will be of little avail if the **sanctions imposed for ill-treatment** are inadequate. When ill-treatment has been proven, the imposition of a suitable penalty should follow. This will have a very strong dissuasive effect. Conversely, the imposition of light sentences can only engender a climate of impunity.

Of course, judicial authorities are independent, and hence free to fix, within the parameters set by law, the sentence in any given case. However, via those parameters, the intent of the legislator must be clear: that the criminal justice system should adopt a firm attitude with regard to torture and other forms of ill-treatment. Similarly, sanctions imposed following the determination of disciplinary culpability should be commensurate to the gravity of the case.

42. Finally, no one must be left in any doubt concerning the **commitment of the State authorities** to combating impunity. This will underpin the action being taken at all other levels. When necessary, those authorities should not hesitate to deliver, through a formal statement at the highest political level, the clear message that there must be ‘zero tolerance’ of torture and other forms of ill-treatment.

# Appendix B: European Code of Police Ethics<sup>345</sup>

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## **Definition of the scope of the code**

This code applies to traditional public police forces or police services, or to other publicly authorised and/or controlled bodies with the primary objectives of maintaining law and order in civil society, and who are empowered by the state to use force and/or special powers for these purposes.

### **I. Objectives of the police**

1. The main purposes of the police in a democratic society governed by the rule of law are:

- ▶ to maintain public tranquillity and law and order in society;
- ▶ to protect and respect the individual's fundamental rights and freedoms as enshrined, in particular, in the European Convention on Human Rights;
- ▶ to prevent and combat crime;
- ▶ to detect crime;
- ▶ to provide assistance and service functions to the public.

### **II. Legal basis of the police under the rule of law**

2. The police are a public body which shall be established by law.
3. Police operations must always be conducted in accordance with the national law and international standards accepted by the country.
4. Legislation guiding the police shall be accessible to the public and sufficiently clear and precise, and, if need be, supported by clear regulations equally accessible to the public and clear.
5. Police personnel shall be subject to the same legislation as ordinary citizens, and exceptions may only be justified for reasons of the proper performance of police work in a democratic society.

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345 Appendix to Recommendation Rec(2001)10 on the European Code of Police Ethics.

### **III. The police and the criminal justice system**

6. There shall be a clear distinction between the role of the police and the prosecution, the judiciary and the correctional system; the police shall not have any controlling functions over these bodies.
7. The police must strictly respect the independence and the impartiality of judges; in particular, the police shall neither raise objections to legitimate judgments or judicial decisions, nor hinder their execution.
8. The police shall, as a general rule, have no judicial functions. Any delegation of judicial powers to the police shall be limited and in accordance with the law. It must always be possible to challenge any act, decision or omission affecting individual rights by the police before the judicial authorities.
9. There shall be functional and appropriate co-operation between the police and the public prosecution. In countries where the police are placed under the authority of the public prosecution or the investigating judge, the police shall receive clear instructions as to the priorities governing crime investigation policy and the progress of criminal investigation in individual cases. The police should keep the superior crime investigation authorities informed of the implementation of their instructions, in particular, the development of criminal cases should be reported regularly.
10. The police shall respect the role of defence lawyers in the criminal justice process and, whenever appropriate, assist in ensuring the right of access to legal assistance effective, in particular with regard to persons deprived of their liberty.
11. The police shall not take the role of prison staff, except in cases of emergency.

### **IV. Organisational structures of the police**

#### **A. General**

12. The police shall be organised with a view to earning public respect as professional upholders of the law and providers of services to the public.
13. The police, when performing police duties in civil society, shall be under the responsibility of civilian authorities.
14. The police and its personnel in uniform shall normally be easily recognisable.

15. The police shall enjoy sufficient operational independence from other state bodies in carrying out its given police tasks, for which it should be fully accountable.
16. Police personnel, at all levels, shall be personally responsible and accountable for their own actions or omissions or for orders to subordinates.
17. The police organisation shall provide for a clear chain of command within the police. It should always be possible to determine which superior is ultimately responsible for the acts or omissions of police personnel.
18. The police shall be organised in a way that promotes good police/public relations and, where appropriate, effective co-operation with other agencies, local communities, non-governmental organisations and other representatives of the public, including ethnic minority groups.
19. Police organisations shall be ready to give objective information on their activities to the public, without disclosing confidential information. Professional guidelines for media contacts shall be established.
20. The police organisation shall contain efficient measures to ensure the integrity and proper performance of police staff, in particular to guarantee respect for individuals' fundamental rights and freedoms as enshrined, notably, in the European Convention on Human Rights.
21. Effective measures to prevent and combat police corruption shall be established in the police organisation at all levels.

#### **B. Qualifications, recruitment and retention of police personnel**

22. Police personnel, at any level of entry, shall be recruited on the basis of their personal qualifications and experience, which shall be appropriate for the objectives of the police.
23. Police personnel shall be able to demonstrate sound judgment, an open attitude, maturity, fairness, communication skills and, where appropriate, leadership and management skills. Moreover, they shall possess a good understanding of social, cultural and community issues.
24. Persons who have been convicted for serious crimes shall be disqualified from police work.
25. Recruitment procedures shall be based on objective and non-discriminatory grounds, following the necessary screening of candidates. In

addition, the policy shall aim at recruiting men and women from various sections of society, including ethnic minority groups, with the overall objective of making police personnel reflect the society they serve.

### **C. Training of Police Personnel**

26. Police 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.

27. General police training shall be as open as possible towards society.

28. General initial training should preferably be followed by in-service training at regular intervals, and specialist, management and leadership training, when it is required.

29. Practical training on the use of force and limits with regard to established human rights principles, notably the European Convention on Human Rights and its case law, shall be included in police training at all levels.

30. Police training shall take full account of the need to challenge and combat racism and xenophobia.

### **D. Rights of police personnel**

31. Police staff shall as a rule enjoy the same civil and political rights as other citizens. Restrictions to these rights may only be made when they are necessary for the exercise of the functions of the police in a democratic society, in accordance with the law, and in conformity with the European Convention on Human Rights.

32. Police staff shall enjoy social and economic rights, as public servants, to the fullest extent possible. In particular, staff shall have the right to organise or to participate in representative organisations, to receive an appropriate remuneration and social security, and to be provided with special health and security measures, taking into account the particular character of police work.

33. Disciplinary measures brought against police staff shall be subject to review by an independent body or a court.

34. Public authorities shall support police personnel who are subject to ill-founded accusations concerning their duties.

## **V. Guidelines for police action/intervention**

### **A. Guidelines for police action/intervention: general principles**

35. The police, and all police operations, must respect everyone's right to life.
36. The police shall not inflict, instigate or tolerate any act of torture or inhuman or degrading treatment or punishment under any circumstances.
37. The police may use force only when strictly necessary and only to the extent required to obtain a legitimate objective.
38. Police must always verify the lawfulness of their intended actions.
39. Police personnel shall carry out orders properly issued by their superiors, but they shall have a duty to refrain from carrying out orders which are clearly illegal and to report such orders, without fear of sanction.
40. The police shall carry out their tasks in a fair manner, guided, in particular, by the principles of impartiality and non-discrimination.
41. The police shall only interfere with individual's right to privacy when strictly necessary and only to obtain a legitimate objective.
42. The collection, storage, and use of personal data by the police shall be carried out in accordance with international data protection principles and, in particular, be limited to the extent necessary for the performance of lawful, legitimate and specific purposes.
43. The police, in carrying out their activities, shall always bear in mind everyone's fundamental rights, such as freedom of thought, conscience, religion, expression, peaceful assembly, movement and the peaceful enjoyment of possessions.
44. Police personnel shall act with integrity and respect towards the public and with particular consideration for the situation of individuals belonging to especially vulnerable groups.
45. Police personnel shall, during intervention, normally be in a position to give evidence of their police status and professional identity.
46. Police personnel shall oppose all forms of corruption within the police. They shall inform superiors and other appropriate bodies of corruption within the police.

## **B. Guidelines for police action/intervention: specific situations**

### *1. Police investigation*

47. Police investigations shall, as a minimum, be based upon reasonable suspicion of an actual or possible offence or crime.
48. The police must follow the principles that everyone charged with a criminal offence shall be considered innocent until found guilty by a court, and that everyone charged with a criminal offence has certain rights, in particular the right to be informed promptly of the accusation against him/her, and to prepare his/her defence either in person, or through legal assistance of his/her own choosing.
49. Police investigations shall be objective and fair. They shall be sensitive and adaptable to the special needs of persons, such as children, juveniles, women, minorities including ethnic minorities and vulnerable persons.
50. Guidelines for the proper conduct and integrity of police interviews shall be established, bearing in mind Article 48. They shall, in particular, provide for a fair interview during which those interviewed are made aware of the reasons for the interview as well as other relevant information. Systematic records of police interviews shall be kept.
51. The police shall be aware of the special needs of witnesses and shall be guided by rules for their protection and support during investigation, in particular where there is a risk of intimidation of witnesses.
52. Police shall provide the necessary support, assistance and information to victims of crime, without discrimination.
53. The police shall provide interpretation/translation where necessary throughout the police investigation.

### *2. Arrest/deprivation of liberty by the police*

54. Deprivation of liberty of persons shall be as limited as possible and conducted with regard to the dignity, vulnerability and personal needs of each detainee. A custody record shall be kept systematically for each detainee.
55. The police shall, to the extent possible according to domestic law, inform promptly persons deprived of their liberty of the reasons for the deprivation of their liberty and of any charge against them, and shall also without delay inform persons deprived of their liberty of the procedure applicable to their case.



56. 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.

57. 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, to have access to legal assistance and to have a medical examination by a doctor, whenever possible, of their choice.

58. The police shall, to the extent possible, separate persons deprived of their liberty under suspicion of having committed a criminal offence from those deprived of their liberty for other reasons. There shall normally be a separation between men and women as well as between adults and juveniles.

## **VI. Accountability and control of the police**

59. The police shall be accountable to the state, the citizens and their representatives. They shall be subject to efficient external control.

60. State control of the police shall be divided between the legislative, the executive and the judicial powers.

61. Public authorities shall ensure effective and impartial procedures for complaints against the police.

62. Accountability mechanisms, based on communication and mutual understanding between the public and the police, shall be promoted.

63. Codes of ethics of the police, based on the principles set out in the present recommendation, shall be developed in member states and overseen by appropriate bodies.

## **VII. Research and international co-operation**

64. Member states shall promote and encourage research on the police, both by the police themselves and external institutions.

65. International co-operation on police ethics and human rights aspects of the police shall be supported.

66. The means of promoting the principles of the present recommendation and their implementation must be carefully scrutinised by the Council of Europe.

The handbook is a tool for the police and other state authorities to prevent and fight police misconduct or impunity and uphold the human rights. It was drawn up bearing in mind the European Convention on Human Rights, in the light of the relevant case law of the European Court of Human Rights, as well as the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and other relevant standards established within the framework of the Council of Europe.

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