

# TO SERVE AND TO PROTECT

**HUMAN RIGHTS AND HUMANITARIAN LAW  
FOR POLICE AND SECURITY FORCES**



**ICRC**



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# **TO SERVE AND TO PROTECT**

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## FOREWORD TO THE SECOND EDITION

Recent decades have seen an increase in the complexity of law enforcement operations undertaken to deal with violence that may be social, political or economic in origin. Every day, its presence in the field brings the International Committee of the Red Cross (ICRC) face to face with the consequences of such violence. Having placed the principle of humanity firmly at the centre of its decision-making processes, our organization has adapted its response to the growing needs of the victims of collective violence and is continually updating its approaches in order to improve that response. The States are also endeavouring to adapt their response to those situations. As they have the monopoly on legitimate recourse to force, they have a particular responsibility to ensure that their agents comply with the rules and standards of international law when responding to violence.

The police and security forces are key players in our sphere of activity. Although they are often heavily criticized for violations of which they may be guilty, they are also the source of solutions as one of their primary functions is to guarantee the rights of each individual. In that sense, they are dialogue partners of importance to our organization, not only because they enable us to gain access to victims of collective violence but also because of their work on behalf of those same victims. At times they may also derive direct benefit from our work when their members are themselves victims of such violence.

The ICRC engages in direct dialogue with those responsible for violence, regardless of whether they are State or non-State players. Indeed, that is one of its specific characteristics. In the 1990s the ICRC began to realize how vital it was to draw on professional law enforcement expertise in its dialogue with police and security forces. The ICRC recruited former police officials in order to gain a better understanding of police dynamics and to be in a position to contribute to solutions to the difficulties encountered by police officials in the exercise of their duties. As a result of the authoritative insights provided by those police experts, our organization has been able to develop a peer-to-peer approach which sets out to provide support for police forces in their efforts to incorporate the rules and standards of international law into their procedures. In pursuing that dialogue, our organization seeks to go beyond a purely legal or theoretical approach, which is why we also take an interest in both professional and operational practices.

Our organization now has more than 20 years of experience of working with the police and security forces of some 80 countries worldwide. Far from being abstract or theoretical, our dialogue is enriched by our operational experience, which makes us aware of the human cost of police interventions that do not comply with the rules and standards of international law.

For the past 15 years, *To serve and to protect* has been a reference manual providing guidance for the ICRC's dialogue with police forces. This revised edition draws on our experience during that period.

A handwritten signature in black ink, reading "Peter Maurer". The signature is written in a cursive style with a large, sweeping flourish at the end.

Peter Maurer  
President of the International Committee of the Red Cross  
Geneva, December 2013

## FOREWORD TO THE FIRST EDITION

The International Committee of the Red Cross (ICRC) is no doubt best known for its humanitarian protection and assistance activities in situations of armed conflict – as well as for its relentless attempts to promote an active respect for the rules of international humanitarian law. ICRC attempts to promote adherence to international humanitarian law have, perhaps inevitably, focused primarily on members of the armed forces worldwide. However, the ICRC is aware that the nature of situations of armed conflict is changing. The majority of present-day armed conflicts are of a non-international character (i.e. they are taking place within the territory of one State). Most of these situations are not formally recognized as non-international armed conflict – to which certain rules of international humanitarian law legally apply. The key actors in present-day conflicts frequently include members of the police and security forces as well as the armed forces. A complication is created through a blurring of the absolute distinction between tasks typically belonging to the armed forces and those typically belonging to the police and security forces – with one readily taking on apparent responsibilities of the other. Contemporary situations of armed violence characterize themselves through a widespread and systematic disregard of fundamental principles of humanity. The right to life, liberty and security of the civilian population are frequently not respected and by consequence there are many victims requiring protection and assistance.

The ICRC has recognized that in order to ensure adequate protection and assistance to victims of situations of armed violence it is important – indeed essential – to focus attention on members of police and security forces as well as on members of the armed forces. The best protection that can be offered to (potential) victims of armed violence is in ensuring respect for fundamental principles of humanity in the conduct of operations not only of the armed forces but also of the police and security forces. Those fundamental principles of humanity can be drawn from both international humanitarian law and international human rights law.

This Manual compiles the relevant rules and principles of international humanitarian law and international human rights law and places them in the context of operational situations in which they must be respected and applied by members of armed forces and of police and security forces alike. The Manual will be used in ICRC's dissemination activities to armed and security forces. It also seeks to provide information and support to all those involved in the development of professional, ethical and protective law enforcement structures and practices.

A handwritten signature in black ink, reading "Cornelio Sommaruga". The signature is fluid and cursive, with a long horizontal stroke at the end.

Cornelio Sommaruga  
President of the International Committee of the Red Cross  
Geneva, February 1998





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## BIOGRAPHIES

### **First edition**

The original edition of *To Serve and To Protect* was authored by **Cees de Rover** in his capacity as ICRC Coordinator for Police and Security Forces. Mr de Rover is a former Senior Police Official from the Netherlands. In addition to formal policing qualifications, he holds Master's degrees in business administration (MBA) and in public international law (MIL Hons). As the ICRC's first Coordinator for Police and Security Forces he was responsible for establishing and developing dissemination activities for police and security forces worldwide. He also managed the project to produce the interactive training DVD *To Serve and To Protect*. Mr de Rover has provided consultancy services for various international organizations on human rights, humanitarian law and professional law enforcement practice and has conducted assessment and training missions for police and security forces in more than 60 countries throughout the world. He has also assumed a variety of advisory roles with the United Nations, including as Senior Adviser on Law Enforcement and Security Issues to the Special Representative of the United Nations Secretary-General in Burundi. He is the founder and Executive Director of Equity International, an international non-governmental organization that provides human rights-based training and technical assistance for national police and security forces and advises multinational extractive corporations on corporate social responsibility, security and human rights.



## **Second edition**

**Anja Bienert**, who was in charge of the second edition of *To Serve and To Protect*, studied law in Cologne and Lausanne. She has a PhD in criminal procedure and a Master's degree in humanitarian assistance and has spent many years working in various countries affected by non-international armed conflicts and other situations of violence on three continents. As a delegate of the International Committee of the Red Cross (ICRC), she frequently engaged in dialogue with police and other security forces about their obligations under international humanitarian and international human rights law. She subsequently spent three years as a Geneva-based adviser on ICRC activities with police and security forces, giving guidance to ICRC staff members at headquarters and in delegations worldwide on their dialogue with those forces. She also contributed to the ongoing development of ICRC policy in relation to those forces, analysed the legal and operational framework of police and security forces in numerous countries in which the ICRC was working and developed training material for use with those forces. Under the auspices of the ICRC, she organized the 2010 International Conference for Senior Law Enforcement Officials before beginning her work on the second edition of this Manual. Her present international activities include running training courses and conducting assessments and research on police reform, accountability and the use of force.

## PREFACE

The reference manual *To serve and to protect* was first published in 1998. At that time it filled an important gap in the literature by summarizing the fundamental rules and standards of international human rights law applicable to law enforcement and their implications for the operational work and challenges of law enforcement officials. Since then, rules and standards have been further developed – both in multilateral treaties as well as in United Nations guiding documents. Jurisprudence of international tribunals and opinions of other bodies such as the Human Rights Committee and, more recently, the Human Rights Council have further contributed to their interpretation and development. Furthermore, law enforcement practice has itself evolved as it has responded to new challenges and threats and applied lessons learned from practical experience. The work of the International Committee of the Red Cross (ICRC) with law enforcement agencies in a large number of countries has likewise evolved in the light of practical experience.

A revision of the Manual to take account of these developments was thus long overdue. This second edition is a complete reworking of the 1998 Manual and adopts a new approach so as to cover relevant new developments and issues. In the first edition, each chapter was designed to be read independently, which naturally entailed a number of repetitions. Given the considerably increased volume of information that needed to be included in the second edition, to maintain that approach would have made the Manual totally unwieldy. It was therefore decided to introduce a system of cross-references and to add an index to facilitate the reader's search for information on specific issues.

On a more substantial level, account also needed to be taken of another important matter. As many others working in the field of law enforcement, the ICRC had become increasingly aware that knowledge of the applicable legal framework alone does not necessarily lead to better compliance with that framework. The booklet *Integrating the law*, which the ICRC published in 2007, drew together the lessons learned by the ICRC so as to provide an overview of the process by which human rights law is translated into practical law enforcement means and measures. These issues are now also addressed in the second edition of *To serve and to protect*. However, as the first edition, the Manual refrains from giving operational advice for law enforcement agencies on how to carry out day-to-day law enforcement work. Law enforcement work is not static and ready-made responses to the large variety of situations and challenges faced by law enforcement officials around the world do not exist. Law enforcement agencies have to make their own choices as appropriate to the specific challenges and situations in their context; they cannot be absolved of that responsibility. Rather, the examples and

recommendations contained in this Manual attempt to highlight how the applicable international human rights rules and standards should be taken into consideration when making such choices.

It should also be noted that the Manual does not address all contemporary issues and challenges of law enforcement work. Rather, it sets out to provide general concepts deriving from current human rights rules and standards as they apply to the core of law enforcement work today. Selected reference material is included at the end of each chapter to enable readers to explore specific areas of law enforcement in greater depth, should they wish to do so. Account has been taken of the development of international human rights rules and standards until, and including, 30 September 2013.

A handwritten signature in black ink, reading "Hija Bienen". The signature is written in a cursive style with a small flourish at the end.



## ACKNOWLEDGEMENTS

It was a particularly interesting and challenging task to revise a manual that had been an important reference work in the area of law enforcement for so many years. I would like to sincerely thank François Sénéchaud and Juan Martinez from the International Committee of the Red Cross for entrusting me with this task, which would nonetheless have been impossible, had I not had the help of many other people.

In particular, I would like to thank Stéphanie Nussbaumer of the ICRC's Unit for Relations with Arms Carriers for her tireless efforts and invaluable advice and comments. Her colleagues Raffaella Diana, Nicholas Kerguen, Nelleke van Amstel and Nathalia Estevam Fraga also made helpful observations and carried out vital research work for which I am extremely grateful.

The thorough feedback from the ICRC's Legal Department, particularly from Cordula Droege, but also from many other of her colleagues, was indispensable to ensure legal coherence and consistency of the Manual.

Other ICRC departments also provided useful suggestions and comments. I am also grateful to Glynis Thompson, engaged by the ICRC's Language Unit, for her editorial input.

I would like to express my profound gratitude to all the aforementioned as well as to those who commented anonymously on the draft versions of the Manual. Their indefatigable commitment to the task nurtures my hope that the revised version of *To serve and to protect* may be as well received in the world of law enforcement as the previous edition.

A handwritten signature in black ink, reading "Maja Bienen". The signature is written in a cursive style with a small flourish at the end.

## ABBREVIATIONS AND ACRONYMS

<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>ACHR</b>	American Convention on Human Rights
<b>ACWC</b>	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
<b>AICHR</b>	ASEAN Intergovernmental Commission on Human Rights
<b>Anti-Personnel Mine Ban Convention</b>	Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction
<b>ArabCHR</b>	Arab Charter on Human Rights
<b>Arab League</b>	League of Arab States
<b>ARF</b>	ASEAN Regional Forum
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>ASEAN Charter</b>	Charter of the Association of Southeast Asian Nations
<b>Asian-African Refugee Principles</b>	Principles Covering Treatment of Refugees
<b>AU</b>	African Union
<b>Bangkok Principles</b>	Bangkok Principles on the Status and Treatment of Refugees
<b>Bangkok Rules</b>	United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders
<b>Beijing Rules</b>	United Nations Standard Minimum Rules for the Administration of Juvenile Justice
<b>Biological Weapons Convention</b>	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction
<b>Body of Principles</b>	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
<b>BPUFF</b>	Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
<b>Cartagena Declaration</b>	Cartagena Declaration on Refugees
<b>CAT</b>	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>CCLEO</b>	Code of Conduct for Law Enforcement Officials
<b>CCPR</b>	Committee on Civil and Political Rights, also referred to as the Human Rights Committee
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>Chemical Weapons Convention</b>	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
<b>CPED</b>	International Convention for the Protection of All Persons from Enforced Disappearance
<b>CRC</b>	Convention on the Rights of the Child
<b>CRSR</b>	Convention relating to the Status of Refugees
<b>Draft Articles</b>	Draft Articles on Responsibility of States for Internationally Wrongful Acts
<b>ECHR</b>	European Convention on Human Rights
<b>ECOSOC</b>	United Nations Economic and Social Council
<b>ECOWAS</b>	Economic Community of West African States
<b>ESC</b>	European Social Charter
<b>EU</b>	European Union
<b>Geneva Protocol</b>	Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare
<b>Hague Convention I</b>	Hague Convention for the Pacific Settlement of International Disputes
<b>Hague Convention IV</b>	Hague Convention respecting the Laws and Customs of War on Land and its Annex, Regulations concerning the Laws and Customs of War on Land

IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICRC	International Committee of the Red Cross
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRPD	International Convention on the Rights of Persons with Disabilities
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally displaced people
IHL	International humanitarian law
IHRL	International human rights law
Montevideo Convention	Montevideo Convention on the Rights and Duties of States
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
OAS	Organization of American States
OAS Charter	Charter of the Organization of American States
OAU	Organization of African Unity
OAU Refugee Convention	Convention Governing the Specific Aspects of Refugee Problems in Africa
OPCAT	Optional Protocol to the CAT
OP/CEDAW	Optional Protocol to the CEDAW
OP/CRC-AC	Optional Protocol to the CRC on the involvement of children in armed conflict
OP/CRC-CP	Optional Protocol to the CRC on a communications procedure
OP/ICCPR I / OP/ICCPR II	Optional Protocol I/II to the ICCPR
OP/ICESCR	Optional Protocol to the CRC on a communications procedure
OP/ICESCR	Optional Protocol to the ICESCR
OP/ICRPD	Optional Protocol to the ICRPD
Paris Principles	Principles relating to the Status of National Institutions
POW	Prisoner of war
Rome Statute	Rome Statute of the International Criminal Court
Riyadh Guidelines	United Nations Guidelines for the Prevention of Juvenile Delinquency
SMR	Standard Minimum Rules for the Treatment of Prisoners
Tokyo Rules	United Nations Standard Minimum Rules for Non-custodial Measures
Turku Declaration	Declaration on Minimum Humanitarian Standards
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAC	United Nations Convention against Corruption
UN Charter	Charter of the United Nations
UNHCR	United Nations High Commissioner for Refugees
UNRPJ	United Nations Rules for the Protection of Juveniles Deprived of their Liberty
Victims Declaration	Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
Vienna Convention	Vienna Convention on the Law of Treaties





# **GENERAL SYNOPSIS**



## GENERAL SYNOPSIS

The International Committee of the Red Cross (ICRC), in its capacity as an impartial, neutral and independent humanitarian organization, engages in dialogue with police and security forces in numerous countries around the world. This dialogue seeks to limit and prevent suffering among people affected by armed conflict and other situations of violence. Police and security forces mandated to enforce the law in their countries play an important role in that regard since it is their responsibility to serve and protect people and communities and, in particular, to prevent and detect crime, to maintain public order and to protect and assist people in need. When fulfilling their obligations in that respect, they are duty bound to respect the international legal framework applicable to the law enforcement task, international human rights law. The ICRC concentrates its dialogue with law enforcement agencies on a core set of human rights that are particularly relevant in armed conflict and other situations of violence. The overall objective is to promote respect for the law that protects people in such circumstances. This Manual seeks to explain the relevant international rules and standards applicable to the law enforcement function and their practical implication for law enforcement work.

The purpose of the following synopsis is to provide the reader with an overview of the most important elements addressed in the Manual.

### **International law and international human rights law**

#### **International law**

International law is a set of rules that governs the relationship between subjects of international law, i.e. entities with legal capacities. These are, in particular, States, public international organizations and individuals. The International Committee of the Red Cross is an organization *sui generis* and has observer status at the United Nations.

Primary sources of international law are international conventions, international custom and general principles of law recognized by independent nations. Secondary sources are judicial decisions and teachings of highly qualified publicists.

An international convention (or treaty or covenant) is *“an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”* (Vienna Convention on the Law of Treaties, Article 2(1)(a)). A document of that kind becomes legally binding on a State on signature and ratification or subsequent accession. However, if and as far as the treaty permits, a State may declare a reservation to certain parts of the treaty, with the consequence that the State

will not be bound by the provisions in question – as long as the reservation is not incompatible with the object and the purpose of the treaty (Vienna Convention on the Law of Treaties, Article 19).

International custom is “*evidence of a general practice accepted as law*” (Statute of the International Court of Justice (ICJ), Article 38(1)(b)). Evidence therefore needs to be provided of a consistent (habitual) practice based on a perceived legal obligation.

*Jus cogens* or peremptory norms of international law are those norms of customary law from which no derogation is allowed (even through treaties). The absolute prohibition of torture is an example of this.

Important additional sources of international law are *soft law documents*. Soft law comprises non-binding instruments, established through resolutions of the General Assembly of the United Nations. They may serve to strengthen States’ commitment to international agreements, reaffirm international norms or establish a legal foundation for subsequent treaties. The United Nations Code of Conduct for Law Enforcement Officials (CCLEO) or the Basic Principles for the Use of Force and Firearms by Law Enforcement Officials (BPUFF) are examples of such instruments that are of particular relevance to law enforcement.

While the actual applicability of international law within the domestic system may vary depending on the national legal framework, a State may not invoke its constitution or other national laws as reasons for not fulfilling its obligations under international law. When signing a treaty, a State is obliged to bring its domestic legislation into line with the international treaty. It must furthermore ensure that State representatives or institutions comply with the State’s international obligations. Failure to do so will entail the responsibility of the State in respect of “*conduct consisting of an action or omission [...] attributable to the State under international law [and that] constitutes a breach of an international obligation of the State*” (Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 2). This responsibility is particularly relevant when it comes to law enforcement as violation of the State’s obligations under international human rights law by law enforcement officials in the exercise of their duty will entail the State’s responsibility at the international level, including the obligation to provide compensation and redress.

At the domestic level, States have powers of legislation (prescriptive jurisdiction) as well as powers of enforcement (enforcement jurisdiction). The latter include both executive and judiciary powers and cover civil as well as criminal domains. However, when it comes to criminal jurisdiction for particularly serious crimes, international criminal jurisdiction may come into play. After the first specific international criminal tribunals (Nuremberg, Tokyo, Yugoslavia and Rwanda),

a permanent tribunal was created in 2002, the International Criminal Court (ICC). The Rome Statute of the ICC, which was adopted in 1998 and entered into force in 2002, established this court to deal with cases of serious crimes where domestic jurisdiction fails to provide an (effective) response. The jurisdiction of the ICC covers the following crimes: genocide, crimes against humanity, war crimes and the crime of aggression. The ICC may take up cases when the accused person is a national of a State Party, when the alleged crime was committed on the territory of a State Party or when a situation has been referred to it by the United Nations Security Council.

Two important areas of international law are international human rights law and international humanitarian law. Their common aim is to protect people's lives, health and dignity but they have different scopes of application. International human rights law applies at all times and is binding on States in their relationship to the individuals living in their territory (an essentially "vertical" relationship); international humanitarian law is applicable in situations of armed conflict and constitutes in this regard a *lex specialis*; it is binding on all parties to a conflict.

### **International human rights law**

Human rights are legal entitlements possessed by each individual human being. They are universal and belong to everyone without distinction. They are part of the law and although they may perhaps be violated, they may not be taken away. To study the very beginnings of human rights, one has to go back several centuries. At a universal level, however, they started to play a more substantial role in the 20th century.

After the failure of the League of Nations, which was created after the First World War, the United Nations was created in 1945 in order to promote and maintain peace and security. Its founding instrument is the Charter of the United Nations (UN Charter). This document contains an important commitment to human rights in Article 55, according to which "*the United Nations shall promote [...] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.*"

The following major steps towards further codification of human rights at the universal level together form what is often referred to today as the International Bill of Human Rights:

- The Universal Declaration of Human Rights (UDHR), adopted by the General Assembly of the United Nations in 1948;
- The International Covenant on Economic, Social and Cultural Rights (ICESCR), which was adopted in 1966 and entered into force in 1976, and its Optional Protocol;

- The International Covenant on Civil and Political Rights (ICCPR), which was adopted in 1966 and entered into force in 1976, and its two Optional Protocols, which were adopted in 1966 and 1989 and entered into force in 1976 and 1991 respectively.

The UDHR had a major impact on subsequent universal and regional human rights treaties as well as on national constitutions and other laws. As a consequence, there are a number of provisions that can today be considered customary law, e.g. the prohibition of racial discrimination, the prohibition of torture and other forms of ill-treatment, and the prohibition of slavery.

Following the International Bill of Human Rights, a number of treaties were drafted that dealt with specific topics. They include the following:

- International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol (OP/CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol (OPCAT);
- Convention on the Rights of the Child (CRC) and its Optional Protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography.

International human rights treaties that are binding on all States Parties (and their agents) are increasingly complemented by soft law documents that provide guidance and establish more detailed human rights standards. In addition to the two soft law documents already mentioned (CCLEO and BPUFF), the following soft law documents, for instance, are of particular relevance to law enforcement officials:

- Standard Minimum Rules for the Treatment of Prisoners (SMR);
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration).

### **The United Nations and human rights**

The promotion and protection of human rights is one of the main purposes of the United Nations, which, through its different organs and bodies, has embarked on an extensive standard-setting exercise.

The executive organ of the United Nations is the Security Council, which has primary responsibility for peace and security. It consists of 15 members, five of which (the People's Republic of China, France, Russia, the United Kingdom

and the USA) are permanent members, while the other 10 are elected by the General Assembly for a term of two years.

The General Assembly is the plenary organ of the United Nations, consisting of all member States. It has the power to discuss any questions or matters that lie within the scope of the UN Charter. However, it cannot legislate directly for the member States and proceeds through recommendations rather than through binding decisions.

Another principal organ of the United Nations is the Economic and Social Council (ECOSOC). Among other things, it has the power to “*set up commissions in economic and social fields and for the promotion of human rights*” (UN Charter, Article 68). Important commissions set up by the ECOSOC in the field of human rights are:

- Commission on Crime Prevention and Criminal Justice, whose standard-setting work, for instance the drafting of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF), is of particular relevance to law enforcement officials;
- Commission on the Status of Women;
- Commission on Human Rights, whose work was taken over by the United Nations Human Rights Council in 2006;
- Committee on Economic, Social and Cultural Rights.

The Human Rights Council is a subsidiary organ of the the General Assembly of the United Nations and was created in 2006. It comprises 47 members, each elected for a three-year term. In the Universal Periodic Review, the Council reviews the human rights situation in each member State once every four years. It is also mandated to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms through a complaint procedure and is supported in this by the Working Group on Communications and the Working Group on Situations.

The principal human rights official of the United Nations is the High Commissioner for Human Rights, who has the power to address any contemporary human rights problem and is effectively engaged in the prevention of human rights violations around the world. The Commissioner also provides support for the other United Nations human rights mechanisms, in particular the Human Rights Council, as well as the different human rights treaty-monitoring bodies.

Those bodies are in charge of monitoring the implementation of specific international human rights treaties and exist for 10 different human rights treaties (CAT, CEDAW, CERD, CPED, CRC, ICRPD, ICCPR, ICESCR, ICRMW, OPCAT). They may also issue interpretations of human rights provisions by way of “General comments” or “General recommendations.”

Besides the universal human rights system of the United Nations, there are also important regional arrangements that establish and promote human rights:

- African Union: the African Charter on Human and Peoples' Rights (ACHPR) is the main regional human rights treaty and the African Commission on Human and Peoples' Rights the main monitoring body; the African Court of Justice and Human Rights (a merger of the previously existing African Court of Justice and the African Court on Human Rights) is the principal judicial organ of the African Union;
- Organization of American States (OAS): the OAS Charter and the American Convention on Human Rights (ACHR) are the fundamental human rights instruments. The Inter-American Commission on Human Rights is the monitoring body and the Inter-American Court of Human Rights is the principal judicial organ of the OAS;
- League of Arab States: the Arab Charter on Human Rights is the main human rights treaty and the Arab Human Rights Committee the monitoring body for that instrument;
- Association of Southeast Asian Nations (ASEAN): the ASEAN Intergovernmental Commission on Human Rights is mandated to develop strategies for the promotion and protection of human rights and fundamental freedoms and to develop an ASEAN Human Rights Declaration.
- In Europe there is a dual human rights structure:
  - Council of Europe: The European Convention on Human Rights established by the Council of Europe is the main human rights treaty. The Commissioner for Human Rights is in charge of the promotion of human rights and the monitoring of the Convention and the European Court of Human Rights is the judicial organ with jurisdiction over respect for the Convention.
  - European Union: The Charter of Fundamental Rights of the European Union is the latter's main human rights instrument; the European Commission, as the executive body of the European Union, and the Court of Justice of the European Union are in charge of ensuring that member States comply with their obligations under EU treaty law, which includes the Charter.

Most of the regional arrangements have also adopted specific human rights treaties, e.g. in relation to the prohibition of torture, the rights of children or the rights of women.

## **Law enforcement function and responsibilities**

### **Law enforcement organization, concepts and governing principles**

It is the State's responsibility to maintain law and order, peace and security within its territory. The structures set up by States for that purpose as well as the underlying law enforcement philosophies and concepts vary considerably across the world and it is unlikely that two identical systems exist. Whatever the choices made by States in this regard, they have to ensure that law



enforcement is carried out in a way that respects the State's obligations under international human rights law. This means that both domestic legislation and the practice adopted by law enforcement agencies must comply with the applicable provisions of international human rights law.

The State's obligations in this regard encompass:

- the duty to respect, i.e. not to violate, human rights;
- the duty to protect human rights, e.g. against violations by others;
- the duty to ensure and fulfil human rights, i.e. to provide for circumstances in which human rights can be fully enjoyed;
- the duty not to discriminate, i.e. to ensure equal treatment of all persons before the law.

As representatives of the State, law enforcement officials are expected to fulfil the aforementioned obligations when carrying out their responsibilities, i.e. to maintain public order, to prevent and detect crime and to provide aid and assistance for people and communities in need. They are given specific powers to enable them to carry out their tasks: the power to use force and firearms, to arrest and detain, and to carry out searches or seizure. They must respect human rights when exercising those powers, which means, in particular, observing four fundamental principles that should govern all State actions with a possible impact on human rights:

- All action should be based on provisions of the law (principle of legality);
- It should not affect nor restrict human rights more than is necessary (principle of necessity);
- It should not affect human rights in a way that is disproportionate to the aim (principle of proportionality);
- Those carrying out the action should be fully accountable to all relevant levels (the judiciary, the public, the government and the internal chain of command).

However, despite clear legal standards, law enforcement work is not a mathematical science that leads to clear-cut answers. Because law enforcement officials have to deal with a wide range of situations with many conflicting interests, they are accorded a degree of discretion, which places considerable responsibility on them to make appropriate choices. The fact that law enforcement officials frequently find themselves in stressful or dangerous situations and have to deal on a regular basis with people who have broken the law or are suspected of having done so means that high moral and ethical standards have to be met to ensure that law enforcement officials act in accordance with the law at all times. Breaches of the law by law enforcement officials have a devastating effect on law enforcement work and ultimately on society as a whole. Nonetheless, it is all too easy for "the end justifies the means" attitudes to be adopted in an environment in which serious crimes have been committed and where the difficulties of working in such an

environment contribute to the development of group ethics and individual sets of standards. The leadership of law enforcement agencies needs to be aware of the inherent risk of such group ethics fostering “grey policing” that may not always comply fully with the law. Commanding officers have to ensure that institutional ethics are formulated, promulgated and constantly upheld, thus clearly establishing full respect for the law as the fundamental standard to be met at all times.

The United Nations Code of Conduct for Law Enforcement Officials (CCLEO) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF) formulate relevant standards in that regard, and law enforcement agencies are advised to incorporate them into their own rules, regulations and ethical codes.

However, setting high ethical standards is not enough in the difficult and dangerous working environment of law enforcement. Orders and procedures that clearly establish what is expected of the individual law enforcement official and their effective enforcement are indispensable to ensure that law enforcement work is always carried out in full compliance with the law.

### **Preventing and detecting crime**

Prevention and detection of crime is a key obligation of the State as part of its duty to protect the human rights of all those who have become, or may become, the victims of a crime. At the same time, the exercise of powers by law enforcement officials investigating a crime may affect individuals’ human rights. To effectively fulfil both obligations requires careful balancing of, on the one hand, the rights of the potential or actual victims as well as of society in general and, on the other hand, the rights of those who may be affected by law enforcement work. International human rights law provides the legal framework for this balancing act. In particular, it sets out a number of guarantees and rights to be respected throughout the entire judicial process, starting from the very first stages of the investigation.

At the centre of these rights is the right to a fair trial, which is actually a set of rights that include the presumption of innocence, the right to be informed about the charges, the right to defence, legal counsel and unimpeded communication with the legal counsel, the right to be tried without undue delay, the right to an interpreter and the right not to be compelled to testify against oneself or to confess guilt.

Almost every investigation results in one way or another in an invasion of the individual’s private sphere, affecting the right to privacy that is protected under Article 17 of the International Covenant on Civil and Political Rights (ICCPR). Thus, as with any other interference in individuals’ rights, such actions

must be permissible under domestic law, necessary and in proportion to the legitimate objective to be achieved. Moreover, in accordance with Article 4 of the CCLEO, the executing law enforcement officials have a responsibility to respect and protect the privacy and confidentiality of information obtained.

Law enforcement officials are required to carry out the investigation with utmost objectivity and impartiality. The whole process must be free from any discriminatory reasoning or bias: *“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law”* (ICCPR, Article 26).

Investigations that prematurely focus on (members of) specific groups solely on the basis of ethnic origins, physical appearance or membership, for example, and without any additional objective indicators pointing in such a direction are both discriminatory and inefficient. Furthermore, they may ultimately alienate members of such groups and give rise to harmful distrust of the police.

Respect for the above-mentioned rules may occasionally encounter some resistance on the part of law enforcement officials, who may perceive them as inappropriate obstacles to efficient policing and as protecting “criminals.” The commanding leadership of the law enforcement agency has the utmost responsibility for conveying a clear message to the contrary, i.e. that only lawful policing is good policing and that bending or violating laws, rules or regulations will, in the end, affect not only the judicial process but also the law enforcement institution as a whole, including its acceptance and support among the people. To foster a culture of respect for the rule of law requires a set of measures to be taken at all levels – policies and procedures, education, training and equipment – as well as an effective system of sanctions to enforce respect for the rules and regulations.

The investigative process itself needs to demonstrate a high degree of professionalism:

- Material evidence needs to be collected thoroughly by competent law enforcement officials trained in forensics or supported by specialized personnel;
- Great care should be taken when interviewing witnesses so as not to obtain biased information;
- Proactive information gathered through the use of informants needs to be particularly controlled, preventing any tampering with the process; the same applies to the deployment of law enforcement officials as undercover agents, who should, in particular, abstain from any form of incitement to commit legal offences or crimes;
- Statements by suspects are a relevant source of information in the investigative process. However, law enforcement officials should avoid

- relying too heavily on them and attempt as far as possible to obtain objective evidence that helps to confirm (or otherwise) a suspect's statement;
- Interrogation of the suspect must be carried out in full respect of fundamental rights, in particular the presumption of innocence, the right not to be compelled to testify against oneself or to confess guilt;
  - Torture and other forms of cruel, inhuman or degrading treatment are prohibited at all times. Such treatment has long-lasting adverse consequences for the victim, the perpetrator, the law enforcement agency as a whole, the justice system and society in general. There are no exceptional situations that may justify a departure from this rule and the commanding leadership of the law enforcement agency must constantly affirm that. The leadership must also take a range of measures to prevent torture from occurring, including a clearly regulated investigation and interrogation process, respect for judicial safeguards and allowing places of detention to be inspected by external bodies.

Enforced disappearance and extrajudicial killings are among the most serious crimes and – being, by definition, committed, ordered or tolerated by State agents (see the definition in the International Convention for the Protection of All Persons from Enforced Disappearance (CPED)) – they undermine the very foundation of the rule of law and of society. Every effort must be made to ensure the effective prevention of these crimes, which can only be achieved if the law enforcement agency is fully transparent and accountable.

An important element in the prevention of crime is the prevention of juvenile delinquency. A number of documents have been established to ensure that the justice system deals with young offenders or alleged young offenders in a way that takes account of their specific vulnerability and of their limited maturity and that prioritizes the prevention of future offences. The central document in this regard is the Convention of the Rights of the Child (CRC), which defines a child as *“every human being below the age of eighteen years unless under the national law applicable to the child, majority is attained earlier”* (Article 1). In addition, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), a non-treaty document, defines a juvenile as *“a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult.”* (Part one, section 2.2(a)).

When such persons have reached the minimum age established by domestic legislation for being considered responsible under criminal law, the concept of diversion (i.e. removal from criminal justice proceedings) is the approach recommended by the Committee on the Rights of the Child and in various soft law documents. This is based on the idea that youthful conduct which does not conform to overall social norms is part of the maturation process

and that a child-oriented approach involving all parts of society is more likely to prevent the child from embarking on a “career” as a criminal. For the same reason, the United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) promote non-custodial measures.

Furthermore, it is recognized that juvenile offenders need special protection and treatment and law enforcement officials involved in the administration of juvenile justice therefore need to be given appropriate specialized training (Beijing Rule No. 12).

### **Maintaining public order**

The maintenance of public order is a core responsibility of law enforcement officials that calls for constant careful balancing of the rights and interests of all sections of the population. Strict compliance with the applicable legal framework is indispensable to ensure that this balancing act is successful. The prevention of violence and avoidance of the need to resort to force should be guiding principles in the management of any public order situation (see BPUFF Nos 4 and 13). A precondition is the existence of a domestic legal framework that governs public order and, in particular, public assemblies in compliance with the State’s obligations under international human rights law: *“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others”* (ICCPR, Article 21).

Within this legal framework, law enforcement officials will be called upon to handle public assemblies in a way that complies with the principles of legality, necessity, proportionality and accountability. Any restrictions imposed on assemblies should be based on provisions of domestic law and should not go beyond what is necessary to ensure peace and order. Moreover, they should not disproportionately affect the rights of those involved in the assembly. Respect for and protection of the right to life, liberty and security of person is of particular importance in this regard. This includes the duty to protect peaceful assemblies against violent acts committed by others, e.g. in the course of violent counter-demonstrations. Furthermore, where assemblies are considered unlawful but are taking place in a peaceful manner, law enforcement officials should refrain from actions, e.g. dispersal of the assemblies, if such actions are likely to lead to an unnecessary escalation of the situation which may involve a high risk of injury, loss of life and damage to property (see BPUFF No. 13).

In any case, communication, negotiation and de-escalation are all methods that should be given priority in public order situations (see BPUFF No. 20). For that purpose, law enforcement officials should be trained in appropriate

communication with organizers and demonstrators, have adequate communication equipment and know how to use it.

The right choices in terms of equipment and weapons are equally crucial in that respect. The physical appearance of law enforcement officials should not be threatening or otherwise contribute to an atmosphere of hostility. This also applies to the use of firearms in situations of violence. In most situations they will not contribute to re-establishing peace and order but run the risk of worsening an already chaotic situation. They should therefore not be considered as a tactical tool for public order situations but remain the exceptional, ultimate resort in response to individual situations which threaten to cause death or serious injury, to be used only where all other means have failed.

Where public order is constantly threatened by demonstrations, rallies, riots and other situations of violence, authorities may decide to declare a state of emergency for the purpose of re-establishing peace and order. In particular, they may take measures that derogate from certain human rights, provided that the country is in a situation of *"public emergency which threatens the life of the nation and the existence of which is officially proclaimed"* (ICCPR, Article 4). Such a declaration needs to be made by the institution or body empowered to do so under domestic law and it should acquaint the population with the exact material, territorial and temporal scope of the measure. The derogations made may not be discriminatory or affect non-derogable rights, e.g. those mentioned in Article 4(2) of the ICCPR or those included by way of interpretation by the Human Rights Committee (see General Comment No. 29 on the ICCPR, Article 4). The Turku Declaration offers guidance as to the operational behaviour of law enforcement agencies and the minimum humanitarian standards to be observed.

Situations of public emergency present particular challenges for law enforcement agencies when it comes to their effective capability to enforce the law and to maintain peace and order. A frequent reaction by authorities in general and law enforcement agencies in particular is to justify the imposition of stronger human rights restrictions and to extend the powers of the public security apparatus. However, the need to resort to such measures needs to be assessed carefully, since unnecessary, disproportionate or discriminatory measures can be counterproductive in the attempt to restore peace, order and security. Law enforcement agencies also need to be aware of their own crucial role in upholding the rule of law in such difficult times, preventing any sort of unlawful, arbitrary or discriminatory action that would further exacerbate tensions and endanger public safety.

In such situations, authorities frequently decide to entrust the maintenance of public order to military armed forces. However, they should be aware of the risks

and challenges involved. Military armed forces, which are normally tasked, trained and equipped to fight an enemy of their country, have to make a fundamental shift in their thinking in order to deal with members of their own country. The legal framework and the procedures governing their operations are also completely different. Training and equipment will have to be adapted accordingly and safeguards established to ensure that they do not resort to their usual way of operating, i.e. when conducting hostilities against an enemy. Where these precautions and safeguards cannot be established, authorities should refrain from deploying their military armed forces in law enforcement missions.

### **Providing protection and assistance for people in need**

The provision of protection and assistance for people in need is the third pillar of law enforcement responsibilities. This responsibility becomes particularly relevant for vulnerable people, i.e. people who may be at an increased risk of being exposed to discrimination, abuse and exploitation, who do not have access to the basic means of survival and/or who are unable to look after themselves. It is important for law enforcement officials to be aware of groups with one or more of the above-mentioned characteristics within the society, the risks that they may face and their specific protection and assistance needs.

### **Victims of crime and abuse of power**

Law enforcement officials are often the first point of contact for victims of crime and/or abuse of power. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration) provides comprehensive guidance on the approach to be adopted by law enforcement officials when dealing with such people, who often suffer long-term physical and/or psychological harm, material damage, stigmatization, etc.

People who have suffered any form of harm (physical, mental, emotional or material) in violation of criminal law (see Victims Declaration, Article 1) deserve to be treated with particular compassion and sensitivity and should be given immediate assistance. Investigating law enforcement officials must take the victim's particular situation into consideration and make every effort to respect and to protect his or her privacy and, as far as possible, to avoid any re-traumatization. Victims are entitled to play an active part in the judicial process and have a right to information, redress and compensation. Clear instructions should be given on how to deal with the media to ensure continued protection of the victim's dignity and privacy.

A particularly serious crime with the most severe physical and mental consequences for the victim is the **crime of torture**. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines torture as *"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted"* by, or carried out at the instigation

of or with the consent or acquiescence of, a public official or someone acting in an official capacity in order to obtain information or a confession or to exert punishment or intimidation (CAT, Article 1). The CAT requires States to establish torture as a crime under domestic criminal law (Article 4) and to ensure prompt and impartial investigation of all cases of (alleged) torture. Victims of torture are entitled to protection, redress and fair and adequate compensation (Articles 13 and 14). Statements obtained by means of torture “*shall not be invoked as evidence*” in court (Article 15) – except when cited in a trial against the alleged perpetrator of acts of torture. Regional treaties in relation to the prevention of torture contain similar provisions. Further guidance on the protection and the rights of victims of torture is also given in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

A crime that is particularly difficult for law enforcement officials to deal with is **domestic violence**. It is of utmost importance for law enforcement officials not to consider domestic violence as a private matter but to investigate it properly and to provide all possible protection for the victim. Specific training is required to develop skills that are appropriate for handling such cases.

**Abuse of power** is unlawful behaviour on the part of State officials. It does not necessarily constitute a crime but nonetheless represents a violation of human rights (see Victims Declaration, Article 18). Numerous international human rights law documents at global and regional levels provide for the rights of victims affected by such acts in terms of redress, prompt and impartial investigation, compensation, etc. It is the duty of law enforcement officials to carry out the following:

- To investigate thoroughly whether alleged abuse of power also constitutes an offence under criminal law;
- To protect victims from abuse of power against any further harm;
- To prevent, investigate and correct any abuse of power committed by law enforcement officials.

## Children

Law enforcement officials have specific obligations with regard to children, namely the duty to protect and provide assistance for children wherever the need arises. Whenever they have to deal with children in the exercise of their responsibilities, they must pay utmost attention to their specific needs and rights and to their specific vulnerability.

The fundamental document protecting the rights of children is the Convention on the Rights of the Child (CRC). Besides affirming that children (defined as human beings under the age of eighteen) are entitled to the same fundamental



human rights and freedoms as adults, it provides for additional protection against the abuse, neglect and exploitation of children (CRC, Articles 32-36). Law enforcement officials play a crucial role in the protection of children by preventing and thoroughly investigating child exploitation. Under the CRC, when children are deprived of their freedom – a situation which renders them even more vulnerable to abuse, exploitation or the exertion of harmful influence by adults – authorities are required to separate children from adults (CRC, Article 37) and to apply further safeguards.

Law enforcement officials may interact with children in different settings. Children may be witnesses and/or victims of crime or suspects; law enforcement officials may sometimes need to make use of force against children. Regardless of the situation, law enforcement officials are still required to exercise particular care and sensitivity when dealing with children, thus preventing the law enforcement action from traumatizing the child and causing him or her long-lasting harm.

## Women

While women should not be considered as inherently vulnerable, they all too often face discrimination, disrespect for their rights and violence. Various international human rights documents therefore provide for women to be afforded specific protection, which has particular relevance for the work of law enforcement officials. Of particular importance are the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).

Law enforcement officials are expected to provide protection and assistance for women in need of them and to take account of the specific needs and vulnerabilities of women in the exercise of their duty. It is also incumbent on them to prevent women from becoming victims of crime. This is of particular relevance in the case of violence against women, which is defined as “*violence that is directed at a woman because she is a woman or that affects women disproportionately*” and includes “*acts that inflict physical, mental or sexual harm or suffering, threats of such acts and other deprivations of liberty*” (CEDAW Committee, General Recommendation No. 19(6)). Sexual violence and forced prostitution are covered by that definition and investigating them is often a difficult and delicate task. Law enforcement officials need to be trained to identify such cases and to deal with victims of such crimes with appropriate empathy and sensitivity.

When women are deprived of their freedom, law enforcement officials must protect them from discrimination and violence. Arrest and body searches of women should be carried out by female law enforcement officials only; women

should be interrogated and detained under the supervision of or by female officials. Law enforcement agencies are expected to ensure that the treatment of women in the administration of justice does not result in degrading treatment, to respond promptly to incidents of violence and to investigate them thoroughly. The Bangkok Rules include guidance for situations in which women have become victims of sexual abuse in detention (or prior to detention).

In order to be able to give appropriate consideration to the specific situation and needs of women, law enforcement agencies should have a sufficient number of female officers in their rank and file:

- For the purpose of conducting searches;
- To ensure the safety and security of female detainees in places of detention;
- To investigate cases of domestic and sexual violence;
- For reasons of general representativity of the law enforcement agency as a whole.

It is therefore crucial for recruitment procedures not to be discriminatory and to be designed in such a way as to admit a sufficient number of female officials to the law enforcement agency.

### **People on the move**

The fact that people have to leave their place of residence for various reasons is a growing international phenomenon with serious humanitarian and human rights consequences. Regardless of the reasons why they leave their habitual place of residence, internally displaced people, refugees and migrants often find themselves in very precarious and vulnerable situations. It may be difficult for them to access the most basic means of survival and they may be exposed to hostility, discrimination and exploitation in their new environment.

It is the duty of law enforcement officials to protect and assist them and to deal with them in full respect of their rights and status, as follows.

**Refugees** are people who find themselves outside their country of nationality, having left their country of habitual residence for fear of persecution (see the Convention relating to the Status of Refugees and its Protocol). Refugees are entitled to the same protection of their rights and freedoms as all other people. In particular, they should not be discriminated against and should enjoy the same judicial guarantees as anyone else. Furthermore, they are entitled to identity documents and, under the principle of non-refoulement, they are protected from being sent back to their own country (or to another country) if their life would be at risk on account of their race, religion, nationality, membership of a particular social group or political opinion.

The phenomenon of **people being displaced** within the country of their habitual residence as a result of situations of violence, armed conflict, mass violations of human rights and/or natural disasters has increased dramatically over the past few decades. The United Nations Guiding Principles on Internal Displacement seek to address their plight and to grant them specific protection. The following principles are of particular relevance for law enforcement officials:

- Any displacement should be carried out only in accordance with the law;
- Internally displaced persons (IDPs) must be protected against crime and human rights violations;
- Arbitrary arrest and detention are prohibited;
- Return and resettlement should be facilitated and IDPs should be assisted in the recovery of property and possessions.

**Migrants**, i.e. persons who have decided to attempt to make a living in a country other than their own, often find themselves in extremely vulnerable positions, particularly with regard to exploitation. This problem is particularly acute for victims of human trafficking, who may even become victims of forced prostitution. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) seeks to decrease the suffering arising from this situation and establishes a number of rights for all migrants, whether they are in a regular, “documented” situation or in an irregular, “non-documented” situation.

Law enforcement officials are duty bound to protect migrant workers against violence, physical injury and threats and to ensure compliance with fundamental judicial guarantees. Specific rules are established in relation to arrest and detention. Collective expulsion is prohibited and any individual expulsion should take place only when based on a decision by the competent authority and in accordance with the law.

The principle of non-refoulement protects people on the move if there is a risk of their fundamental rights being violated, and, in particular, if they are exposed to the risk of persecution, torture and other forms of ill-treatment as well as arbitrary deprivation of life. They may not be sent back to their country of origin or to any other country where there is such a risk (or the risk of further refoulement to any such country).

Law enforcement officials must know, respect and protect the rights of people on the move, as established in the respective legal documents. In particular, they are required to comply with the following obligations:

- To take account of the particular vulnerability of people on the move, protecting them against crime and xenophobic violence;
- To give due consideration to their lack of legal knowledge and language skills;
- To treat them without discrimination;

- To treat them as victims and not as criminals, particularly where they have become victims of human trafficking;
- To ensure respect for their legal rights and for the due process of law in case of arrest and detention.

## **Law enforcement powers**

### **Use of force and firearms**

In order to be able to fulfil their responsibility, law enforcement officials are authorized, *inter alia*, to use force and firearms. The way in which law enforcement officials exercise this power has an immediate effect on the relationship between the law enforcement institution and the community as a whole, particularly where the use of force is arbitrary, excessive or otherwise unlawful. It is therefore of utmost importance for law enforcement officials to act in full compliance with the legal framework governing the use of force and firearms and for them to comply with the highest possible standards of discipline and professionalism in that respect. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF) provide guidance on how best to meet those standards.

The use of force is likely to affect fundamental human rights, i.e. the right to life, liberty and security (UDHR, Article 7; ICCPR, Articles 6(1) and 9(1)). The highest priority must be given to protecting those rights – also during the fulfilment of law enforcement responsibilities. Any law enforcement action affecting those rights must therefore be the result of a careful balancing act and comply with the principles that should govern the exercise of any law enforcement power, the principles of legality, necessity, proportionality and accountability.

Where law enforcement officials are authorized to use force and firearms, the domestic legal framework should determine the – legitimate – purposes and circumstances permitting the exercise of this power. Law enforcement officials must then exercise this power only as far as is necessary to achieve their objective. Law enforcement officials shall not apply force at all if the objective can be achieved without it and, where this is not possible, they shall resort only to the minimum force needed for that purpose and ensure that as little damage and injury as possible occurs.

When force needs to be used to achieve the legitimate objective, the consequences of such force shall nevertheless not outweigh the value of the objective to be achieved, which would render the use of force disproportionate. In other words, law enforcement officials may not pursue their objectives regardless of all other considerations. They will even have to consider withdrawing and thus not continuing to pursue the legitimate objective, if the negative consequences of the use of force would be too serious, given the reason for the use of such force. In particular, the utmost attention must be paid to the protection of uninvolved people.

When law enforcement officials have to resort to force, they need to be fully accountable for their actions. Adequate reporting mechanisms should therefore be established, particularly where the use of force has resulted in death or injury or where a firearm has been used (BPUFF Nos 22 and 23). Arbitrary, unnecessary or otherwise unlawful use of force and firearms needs to be investigated thoroughly. Responsibility for such use of force lies not only with the individual law enforcement officer concerned but also with superior officers who have given unlawful orders or who did not take action when they knew, or should have known, that a subordinate would resort to unlawful use of force (BPUFF No. 24). Unlawful orders are not an excuse if the law enforcement official(s) had reasonable opportunity to disobey the order (BPUFF No. 26).

Law enforcement agencies must create an operational framework that enables law enforcement officials to act in accordance with the above-mentioned principles. Measures may include operational procedures that clearly seek the peaceful settlement of conflicts, adequate training in that respect, the availability of protective clothing and equipment in order to reduce the need to resort to force, and the development and careful evaluation of less lethal weapons and equipment.

Specific provisions apply to the use of firearms, which have, after all, been specifically designed to kill. Those provisions cover the following points.

- As a firearm is potentially lethal, its use can – in a logical application of the principle of proportionality – only be acceptable if the intention is to protect against the threat of death or serious injury (BPUFF No. 9). Domestic legislation, as well as the established procedures of the law enforcement agency, should be formulated so as to ensure that firearms are used as a last resort in such situations only.
- Law enforcement officials are required to identify themselves as such and to issue a warning before resorting to the use of firearms (BPUFF No. 10), unless such warning would create too high a risk, be inappropriate or pointless. The addressee should be given sufficient time to respond to the warning.
- Regulations with regard to the control of weapons and ammunition as well as clear reporting rules for the use of firearms should ensure full accountability for any use of firearms by a law enforcement official.
- Education and training of law enforcement officials on the use of firearms must meet the highest possible standards, enabling them to give appropriate responses even in stressful and dangerous situations.
- The responsibility for the lawful and appropriate use of firearms extends to commanding officers, who have to take all possible precautions to ensure that firearms are used in accordance with the legal framework and with utmost consideration for the right to life. This refers to the immediate operational control of complex situations as well as to the formulation of appropriate procedures and training instructions.

There is no simple response to the difficult situations faced by law enforcement officials in the course of their regular duties and operational procedures. Instructions and training should therefore seek to address the full complexity of the challenges faced by law enforcement. Providing pre-established use-of-force models, without further explanation and with the aim to create automatic responses to pre-defined situations would hinder the indispensable thorough assessment of the specific situation by the individual law enforcement official, who has to take account of all available options (including negotiation, de-escalation and withdrawal) and the necessary precautions (e.g. with regard to uninvolved people).

In public assemblies, the use of force must follow the same principles as in all other situations. Priority must be given to preventing violence and to allowing for negotiation, persuasion and de-escalation before resorting to the use of force. Where an assembly that does not comply with certain domestic provisions remains entirely peaceful, the use of force should be avoided, albeit without prejudice to the subsequent prosecution of the organizers and participants for taking part in an unlawful assembly. Furthermore, isolated incidents should not lead to a decision to disperse an otherwise peaceful and lawful assembly. In such situations, the law enforcement agency should seek to deal with the violent individuals and continue to facilitate the assembly of those participating peacefully. Protective equipment should be available in order to reduce the need to resort to the use of force and – where the use of force becomes unavoidable – appropriate less lethal weapons should allow for a graduated and proportionate response which minimizes damage and protects uninvolved people. The use of firearms remains restricted to life-threatening situations in accordance with BPUFF No. 9 (see also BPUFF No. 14). It cannot be emphasized enough that a firearm is not an appropriate tool for dispersing a crowd and under no circumstances should law enforcement officials fire indiscriminately into a crowd.

The use of force in detention facilities must similarly comply with the principles of legality, necessity and proportionality. Again, the use of firearms is restricted to life-threatening situations in accordance with BPUFF No. 9 (see also BPUFF No. 16). Prison officials are even advised not to carry firearms and to limit their use to exceptional circumstances only. Instruments of restraint shall be used only for the purpose of security and never as a means of punishment (BPUFF No. 17, read in conjunction with Standard Minimum Rules for the Treatment of Prisoners (SMR) Nos 33, 34 and 54).

## **Arrest**

The right to liberty and security of person is enshrined in numerous universal and regional human rights documents and is one of the oldest basic human rights in existence. Strict procedures need to be followed and fundamental judicial guarantees must be upheld if States restrict this right. Furthermore, any such

restriction must be subject to judicial control. In this regard it is important to bear in mind that deprivation of liberty affects the exercise of many more rights of an individual beyond personal liberty and freedom of movement. The power to arrest and detain a person therefore needs to be carefully regulated by law and exercised in full conformity with the applicable international laws and standards.

The power to arrest is usually a discretionary power, according to which law enforcement officials may arrest a person under certain circumstances. It is only as an exception that the domestic law establishes an obligation for a law enforcement official to carry out an arrest. The discretion afforded to law enforcement officials must be exercised in compliance with the overarching principles governing all law enforcement actions: legality, necessity, proportionality and accountability. The following points therefore arise.

- Pursuant to Article 9(1) of the ICCPR, “[n]o one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law.” Domestic laws usually contain the following grounds for arrest: conviction, to ensure compliance with court orders or other legal obligations, and to bring a person before the competent legal authority if he or she is suspected of having committed an offence. Additional grounds may be established (e.g. to protect a person from harming himself or herself or for deportation purposes). However, such provisions need to be justified by legitimate public order or security concerns and may not be discriminatory. The arrest also has to comply with the procedures established by law, e.g. if an arrest warrant is required before an arrest can be made.
- Where a law enforcement official has established that there might be grounds for an arrest, the actual need to carry out the arrest still has to be assessed. Preference must always be given to less restrictive means of achieving the objective of the law enforcement action. For instance, the timely collection of evidence can prevent a suspect’s attempt to destroy evidence and withdrawing someone’s passport can prevent him or her from fleeing the country. The principle of necessity also governs how, when and where an arrest is carried out, e.g. limiting damage to the person’s reputation by not carrying out the arrest at his or her workplace or under full public gaze – provided, of course, that there are suitable alternatives.
- The arrest must be proportionate to the objective, i.e. the reason for the arrest. Proportionality is often already ensured through provisions in domestic law that allow arrest only for offences of a certain gravity.
- Judicial control is necessary to ensure that law enforcement officials are accountable for any arrest carried out. Law enforcement officials are obliged to present the arrested person promptly to a judicial authority to determine the lawfulness of the arrest (habeas corpus). The period allowed is usually established in domestic legislation (often between 24 or 48 hours) but should in any case not exceed a few days (CCPR, General Comment No. 8 on ICCPR, Article 9).

Full respect of these governing principles prevents arbitrary arrest. The prohibition of arbitrary arrest (ICCPR, Article 9(1)) should be interpreted broadly in the light of the circumstances of the specific case, including aspects such as injustice, unpredictability, unreasonableness, capriciousness, disproportionality or discrimination. It is for that reason that the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles) states in its Principle No. 2 that “[a]rrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose,” thus requiring that those empowered to arrest a person also have the necessary professional skills to make an objective and adequate assessment of the situation leading to the correct choices.

When carrying out an arrest, law enforcement officials must respect the fundamental rights of the arrested person, which includes informing him or her of the reasons for the arrest and of his or her rights as a result of the arrest, presenting the person to the judicial authority, ensuring access to legal counsel, notifying the family, treating the person with humanity, etc.

Finally, the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, established by the United Nations, call on the government’s responsibility to ensure strict control over all officials involved in arrest, detention, custody and imprisonment.

Where law enforcement officials encounter resistance from the person whom they are attempting to arrest, they have to decide whether and how to resort to the use of force or even firearms. The use of firearms, in particular, needs to be carefully assessed and is only justified if the person to be arrested presents a danger to the life of others (including that of the law enforcement official; see BPUFF No. 9). Where the possible damage and harm caused by the use of force outweigh the legitimate interest of the arrest, law enforcement officials should refrain from carrying out the arrest.

Such situations often occur unexpectedly and thorough and regular training of law enforcement officials based on realistic scenarios is required to enable them to take instantaneous, almost instinctive, decisions in line with those standards. In case of planned arrests, careful preparation is required, based on sound intelligence (with regard to the location, possible risks for others, etc.) and with all possible precautions being taken to protect uninvolved people, the law enforcement officials themselves and, not least, the person to be arrested.

An arrested person must be interrogated in full compliance with, in particular, the presumption of innocence, the right not to be compelled to testify against oneself, the prohibition of torture or other forms of ill-treatment. An important



safeguard in that respect is the proper recording of all relevant details of the interrogation: duration, intervals, identity of all those present (Body of Principles, No 23(1)).

## **Detention**

People who have been deprived of their freedom are in a situation of extreme vulnerability. It is therefore of particular importance to safeguard the human rights of those who are held in any form of detention or imprisonment. Ultimately, respect for those rights is also indispensable to their subsequent rehabilitation.

People who have been deprived of their freedom may be held in a variety of places, such as police stations, ordinary prisons or specific remand prisons. Police stations are usually used for short periods of detention and are not designed to detain large numbers of people for long periods of time. If that nonetheless occurs, conditions of detention tend to deteriorate quickly, leading to overcrowding, poor hygiene and lack of water, food and adequate health care, etc. Speedy decisions about release on bail or transfer to a remand prison can prevent such problems.

There are various kinds of detaining authorities across the world, although those in charge of a detention facility are usually a special prison service or the police. However, international standards regarding deprivation of liberty are applicable whatever the detaining authority. The core consideration is the responsibility of the State for the well-being of all those in its custody. This includes responsibility for the whereabouts of those people and consequently for measures to prevent enforced disappearances (CPED, Article 17).

**Pre-trial detention** should remain an exceptional measure, based only on there being reasonable grounds to believe that the person detained had committed the offence (legality). It should only take place if there are no other measures available (such as release on bail) and should not last longer than is strictly necessary (e.g. until the investigation is concluded and no further destruction of evidence can be expected). Pre-trial detention must be proportionate to the type of offence and the decision to have recourse to it must be subject to control by a judicial authority (accountability).

The fundamental principle of **humane treatment** is enshrined in Article 10(1) of the ICCPR: *"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."* This includes the prohibition of corporal punishment and adequate conditions of detention that do not amount to torture, cruel, inhuman or degrading treatment. In general, the basic conditions of detention must ensure that a person's health is not affected merely by being deprived of liberty. Guidance is provided by the Standard Minimum Rules for the Treatment of Prisoners (SMR).

The **detention regime** should distinguish between different types of detainees: unconvicted detainees and those awaiting trial are to be segregated from convicted detainees and subject to a different regime (ICCPR, Article 10(2)(a)). Owing to the presumption of innocence, unconvicted detainees should be subject to no more restrictions than are necessary to ensure the purpose of the detention and to safeguard the security and good order of the place of detention.

For convicted prisoners the detention regime should be in accordance with the basic concept underlying deprivation of liberty, i.e. to protect society against crime. This can only be achieved if the period of imprisonment is used to ensure that the convicted person adopts law-abiding behaviour in the future (SMR No. 58). That is dependent, at least in part, on the prisoner being shown fair, humane treatment during the period in detention.

**Administrative detention** is non-criminal detention based on the persuasion that a person presents a threat to State security or public order. It may take place only in accordance with the law (legality), must be based on an assessment of the individual situation and must comply fully with fundamental judicial guarantees (Body of Principles Nos 14, 17, 18, 32). Only officially recognized places of detention should be used.

**Disciplinary and punitive measures** must follow clear, pre-established rules and regulations; the measures and their application in the specific situation must be subject to control and may not be inhumane or degrading. The use of force in detention facilities should be limited to situations of self-defence, escape and resistance to lawful orders (Body of Principles No. 30; SMR 27-33 and 54(1)) and is then subject to the general principles governing the use of force (BPUFF No. 15).

**Women deprived of liberty** may not be subjected to discriminatory treatment; they must be kept separate from male detainees (SMR No. 8) and supervised by female officials; protection against sexual violence must be ensured. The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) provide guidance on how to give due consideration to the rights and needs of women in detention.

**Juveniles** should be detained as a last resort and with specific care for the needs and vulnerabilities of young persons. Article 40 of the CRC and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) emphasize the need to respect the basic rights of any person deprived of freedom, to involve parents and guardians in the process, to detain juveniles separately from adults, and to promote the juvenile's overall well-being. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty provide further guidance on possible measures.

Anyone who has been subjected to **unlawful arrest or detention** has an enforceable right to compensation (ICCPR, Article 9(5)). The Victims Declaration provides further guidance as to how States should protect and ensure respect for the rights of such victims.

The International Committee of the Red Cross (ICRC) visits people deprived of their freedom in situations of armed conflict and – based on its right of humanitarian initiative – in other situation of violence. The purposes are purely humanitarian and aim to ensure that detainees are treated with dignity and humanity and in accordance with international norms and standards. The visits are conducted on the basis of a set of preconditions and in accordance with the ICRC's specific working procedures. Findings are then shared in a constructive and confidential bilateral dialogue with the authorities concerned, with a view to improving the treatment of detainees and conditions of detention.

### **Search and seizure**

Search and seizure are two important powers available to law enforcement officials. In this Manual they are to be understood quite broadly as follows:

- Search is defined as the act of deliberately looking for a person, an object or information for a legitimate law enforcement purpose;
- Seizure is defined as the act of taking possession of an object for a legitimate law enforcement purpose.

Both these powers cover a very wide range of activities, particularly in criminal investigation. Compared to other powers of law enforcement officials – such as the use of force and firearms or arrest and detention – search and seizure might be perceived as negligible in terms of their relevance to human rights and as a routine activity by law enforcement officials. However, their impact on the personal situation of the individual affected by a search or a seizure should never be underestimated and it is therefore crucial for search or seizure activities to comply with the governing principles of legality, necessity, proportionality and accountability.

Pursuant to Article 17(1) and (2) of the ICCPR, “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family or correspondence, nor to unlawful attacks on his honour or reputation” and “[e]veryone has the right to the protection of the law against such interference or attacks.”

Each individual has the right to a protected sphere without external interference or fear of negative consequences. Interference by the State and its agents in this sphere must therefore be regulated by law and law enforcement officials may only carry out a search on grounds and in accordance with procedures established by law.

Reasons for conducting a search may be, for instance, securing a suspect, securing evidence, ensuring safety and security (in particular in the context of arrest and detention), to end an unlawful situation (e.g. with regard to illegal possession of prohibited goods), or the execution of court orders from civil or other proceedings.

Searches should not be more intrusive than absolutely necessary to achieve their purpose and should not be disproportionate in scope. In some cases the law already encompasses the balancing of interests and rights, authorizing certain types or forms of searches such as telephone tapping for more serious crimes only.

Any search must be conducted in accordance with the procedures established by law, in particular in full compliance with the relevant elements of accountability. This may mean, for instance, that a warrant established by the competent authority is required, that the person affected must be informed of the reasons for the search, that witnesses must be present or that a recording must be kept of items searched. A search must be motivated by objective, verifiable facts and not merely based on the personal "gut feeling" of a law enforcement official. Law enforcement officials have to be accountable for unnecessary searches or damage and they must ensure that all information obtained in the course of a search remains confidential.

Body searches encompass a wide range of activities such as simple "pat-down searches," strip searches, body-cavity searches, fingerprints and blood or DNA samples. They all affect a person's dignity and privacy, albeit to varying degrees, and none of them should therefore be carried out lightly. They should be carried out professionally by a person of the same sex and in the least intrusive manner possible, thus limiting as far as possible the inherently humiliating character of the search. Adequate supervision – depending on the type of search – by a superior officer or a judicial authority needs to be ensured.

Searches of premises are also often perceived as intrusive and embarrassing since they provide deep insight into the way of living and/or working of the people concerned. In most countries, a search warrant must be established by a judicial authority and searches without a warrant are usually restricted to exceptional circumstances. Additional procedural requirements, such as the presence of witnesses and recording the facts of a search, have to be respected and law enforcement officials must avoid causing unnecessary disorder or destruction when carrying out a search.

In an increasingly technical and globalized world, law enforcement agencies are tending to resort more and more to a wide range of surveillance methods such as photography, camera surveillance and the interception of letters,

telephone and internet communications. The technical means of invading a person's most private sphere without being noticed are becoming both increasingly powerful and easy to use. This implies a greater need for legal safeguards to ensure that surveillance methods are decided only on a case-by-case base, in full respect of the principles of necessity and proportionality. Domestic legislation as well as the operational procedures of a law enforcement agency should be formulated in such a way as to prevent random surveillance and violations of the presumption of innocence.

In carrying out searches, law enforcement agencies are required to respect the sphere of privileged communication. The most prominent example of this is the communication between a lawyer and his or her client. The right to effective defence ensures that an accused person is able to communicate freely and openly with his or her lawyer without fear that the content of the communication might be used against him or her. This communication must therefore take place in a protected, confidential environment not exposed to surveillance or control by law enforcement agencies. In many domestic laws, similar protection is granted to members of other professions, e.g. medical and religious personnel and journalists; domestic law usually provides for exceptions only in accordance with very strict rules and safeguards.

The fact that a person is deprived of his or her freedom does not confer a greater right to carry out a search. While authorities are justifiably concerned about safety and security in places of detention, the conduct of searches is still subject to the same rules and principles as in the outside world, i.e. the principles of legality, necessity, proportionality and accountability. Searches need to be justified by objectively verifiable facts; they may be neither excessive nor arbitrary and they must be subject to judicial control.

The seizure of an object can affect a range of human rights, e.g. the right to own property, to privacy and to exercise a profession. Consequently, law enforcement officials may seize an object only on grounds and in accordance with procedures established by law (principle of legality). Where the objective of the seizure has been achieved, e.g. an item has been examined for fingerprints without any relevant evidence being found, the item must be returned (principle of necessity). The seizure should not be disproportionate to the aim, e.g. random seizure of a massive quantity of documents indispensable for the work of a company (principle of proportionality). The observance of established procedures (e.g. obtaining judicial warrants, recording of seized objects) and due care for the seized object must be ensured (principle of accountability).

## **Command, control and accountability**

### **Command and management**

The structure of law enforcement agencies varies considerably from one country to another; some authorities may opt for a more hierarchical and centralized structure, while others may establish a more decentralized structure with a higher degree of decision-making power at intermediate and lower levels of the hierarchy. Regardless of the choice of structure, two features are common to all law enforcement agencies: a degree of hierarchy with a top-down command structure and the possibility for individual law enforcement officials to exercise their discretion in their day-to-day work. Those features reflect the need for a law enforcement agency to be able to respond appropriately to a range of needs, challenges and threats at local and at national level.

This requires the commanding leadership of a law enforcement agency to create the right blend of centralized, hierarchical structure for the establishment of policies and operational standards, while allowing for a sufficient number of decentralized responsibilities and competences. With regard to the latter, however, the leadership bears responsibility for ensuring that each law enforcement action at the local level is carried out in full compliance with the rule of law and human rights.

Law enforcement agencies rely heavily on the support and acceptance of the people. The willingness of the people to cooperate with the law enforcement agency will depend very much on whether that agency is perceived to be legitimate, professional, law-abiding and able to respond to local needs. It is for that reason that growing numbers of police agencies are becoming more decentralized, describing their work under labels such as “community policing,” “self-management” or “delegated responsibility for results.”

The representativity of a law enforcement agency – in terms of gender, religion, ethnicity, geographical origin, etc. – has proved to be another factor enhancing its acceptance by the people, as it reduces the likelihood of law enforcement action being perceived as biased or discriminatory.

In order to ensure the legitimacy of the law enforcement agency, it is the responsibility of the commanding leadership to constantly affirm the rule of law:

- The leadership must constantly recall that only law-abiding policing is good policing and prevent a “the end justifies the means” culture or attitude within the institution;
- This needs to be reinforced through complementary measures enhancing the transparency and accountability of all law enforcement actions and through the definition of ethical standards of professionalism, integrity and respect for applicable domestic and international law;

- Corruption is one of the greatest threats to the legitimacy and effectiveness of a law enforcement agency and it is the responsibility of each and every law enforcement official to play an active part in combating corruption.

Orders and procedures play an important role in ensuring compliance with the law and respect for human rights. In order to be effective and to ensure accountability at all relevant levels, a clear chain of command needs to be established, together with clearly defined responsibilities and decision-making competences and the scope for exercising discretion. The leadership should affirm the governing principles of legality, necessity, proportionality and accountability and means and measures must be taken to ensure that those principles are upheld. Supervision and control are required to ensure that orders and procedures are followed and that action is taken where that is not the case.

Law enforcement is carried out by human beings and its quality therefore depends highly on the competence and skills of those human beings. Recruitment criteria must go beyond mere physical criteria and include the required level of education, a clear police record, personal integrity and a law-abiding attitude. Despite the initially higher costs involved in such an approach, it should be borne in mind that in the long term this is more cost-effective than the mass recruitment of poorly qualified personnel. The same applies to efforts to attract the right people to the law enforcement service, which include establishing appropriate levels of pay and working conditions. At the same time, if it proves difficult to recruit a sufficient number of appropriate candidates, the length and content of education and training courses will need to be adapted to the profile of the potential recruits.

Furthermore, education and training must be continually adapted to the dynamics of the law enforcement environment with its constantly evolving challenges and therefore also take place throughout the law enforcement officials' careers rather than on entry only.

In managing human resources, the commanding leadership of a law enforcement agency has to bear in mind that full respect for the rights and dignity of the law enforcement officials themselves is an indispensable precondition if those officials are to uphold the human rights of those whom they are supposed to serve and protect. This includes adequate pay, respectful treatment, humane working conditions and social security cover. Furthermore, promotions should not be based on seniority but on merit, thus providing an incentive for good policing and compliance with the law.

Supervision and control are key responsibilities of the senior command leadership, which is required to ensure the fulfilment of the country's obligations under international law, in particular to ensure that law enforcement officials abstain

from practices which contravene human rights law. Otherwise, the State can be held accountable at the international level. Authorities must keep law enforcement procedures – including their compliance with international human rights law – under constant review and enforce compliance with those procedures.

All levels across the chain of command need to be legally accountable for compliance with the law. “Grey policing,” i.e. bending the law, cannot be tolerated. Supervision and control leads to the detection of such practices and enables corrective measures to be taken. Turning a blind eye to such practices will entail the personal accountability not only of the acting law enforcement official but also of his or her supervisor. Clear orders and standard operational procedures must therefore provide a firm basis for law enforcement action (without becoming a “straitjacket”). At the same time, adequate reporting procedures must allow for the evaluation of each action in terms of its compliance with the law and procedures. Furthermore, a culture of transparency and trust needs to be established so that law enforcement officials feel comfortable about reporting any violations of the law or procedures.

Law enforcement officials also have to be held internally accountable for complying with internal rules, regulations and procedures as well as for showing respect for the chain of command. Disrespect will have to be followed by appropriate disciplinary proceedings. However, in order to have the desired effect, i.e. future compliance with orders and procedures, the disciplinary system must be fair, transparent, timely and just. Any arbitrariness or excessive measures are likely to be counterproductive. Other measures, such as additional training, better working conditions or counselling, might sometimes be a more appropriate means of addressing the issue.

A law enforcement agency should also be held accountable to the government, the legislator and the public with regard to its overall performance, i.e. how far it meets the needs of the community that it is serving. Performance appraisal needs to go much further than merely looking at crime rates and arrest figures. It should seek to determine the level of trust existing between the law enforcement agency and the community and the extent to which the law enforcement agency is responsive to the needs of the community.

The possibility for individuals to lodge complaints about law enforcement action directly with the law enforcement agency provides the commanding and supervising leadership with opportunities to achieve the following:

- Evaluate the performance of their subordinates and of the agency as a whole;
- Assess the quality of the relationship between the agency and the public and pinpoint areas where improvement is needed;
- Win the confidence and trust of the public – which depends on the complaints being dealt with in an impartial, professional and transparent manner.



Nonetheless, such mechanisms should only be complementary to external oversight mechanisms and not replace them.

### **Investigating human rights violations**

Human rights violations undermine the government's credibility and authority and thus present a threat to peace, security and stability in a country. Law enforcement officials have an important role in the protection of human rights. However, they are also potential violators. It must be understood that where those who are supposed to uphold the law and human rights commit human rights violations, the very relationship between the organization and the community is at stake. It is therefore particularly important to ensure that isolated incidents do not influence the image and performance of the entire law enforcement agency.

Thus, it is crucial to hold law enforcement officials accountable for their acts and even a superior order cannot serve as an excuse where this order is manifestly unlawful, particularly when it comes to serious breaches of international law, such as the acts of genocide or torture. Responsibility and accountability are extended to superior officers who ordered human rights violations or failed to prevent them.

Ultimate responsibility for any law enforcement action lies with the State itself, which is held accountable at international level for acts that constitute violations of its obligations under international human rights law. In fact, accountability is in the State's own interest because, where human rights violations remain without (judicial) consequences, the very foundation and acceptance of State authority is undermined.

Depending on the nature of the human rights violation, competence, procedure and possible remedies for addressing it will differ and an effective system of checks and balances involves a combination of a range of mechanisms. Authorities should not see this as a threat: acceptance of full scrutiny of the law enforcement work will enhance their credibility and acceptance. In addition, scrutiny should help to detect where improvement is needed and how to achieve it and have a preventive effect within the whole institution. Thus, it is in the very interest of law enforcement agencies to play an active part in any investigation of human rights violations.

Where a human rights violation also constitutes a criminal offence, the law enforcement agency will be operating within its usual area of responsibility to investigate crime. It goes without saying that this needs to be carried out promptly, thoroughly and impartially. However, it remains psychologically difficult to investigate a colleague's behaviour and very close supervision is needed to ensure that the investigation is not biased. For that same reason,

some police agencies have established specialized departments responsible for carrying out such investigations. In any case, success in this area depends on the existence of an institutional culture where unlawful behaviour is clearly unacceptable and where “whistle-blowing” is not perceived as “treason.” It is within the remit of the commanding leadership to establish an appropriate code of conduct. Nevertheless, appropriate safeguards must also be created through close supervision of such investigations. External oversight remains in any case indispensable.

Finally, where a human rights violation committed by a law enforcement official does not amount to a criminal offence (e.g. disrespect of certain procedural safeguards), the law enforcement agency still needs to investigate the matter thoroughly and to ensure respect for the rights of victims regarding remedy and compensation.

Judicial control over law enforcement action should cover all relevant areas: criminal prosecution and civil and public administrative proceedings for compensation or redress. Victims must have access to it, and for judicial control to be effective in upholding the rights of victims of human rights violations, independence, impartiality and objectivity of the judiciary are indispensable.

External oversight also includes national human rights institutions in charge of promoting and defending human rights. The structure and nature of such institutions may vary considerably from one State to the other but they are all usually public bodies. They receive public funding and are accountable to such bodies for the effective accomplishment of their tasks but must nonetheless safeguard their independence and impartiality. The Principles relating to the Status of National Institutions, referred to as the Paris Principles, give guidance on how these institutions should be set up and operate, in particular with regard to the indispensable investigating powers. Although they do not usually have any executive decision-making powers, it remains important for the public to be able to turn to such institutions in full trust and confidence as to their independence and willingness to protect human rights.

The two most common human rights institutions in the world are the national ombudsperson and the national human rights commission.

- The national ombudsperson is usually tasked to receive complaints by individuals but is sometimes also entitled to act on his or her own initiative. After completion of the investigation, he or she is empowered to issue recommendations as to the response that authorities should give to the complainant or the affected person.
- National human rights commissions are mandated to ensure that laws and regulations concerning the protection of human rights are effectively applied. Sometimes they are tasked to address specific human rights

questions (e.g. discrimination). With regard to individual complaints, they usually function in a very similar manner to ombudspersons.

International mechanisms provide for additional oversight over law enforcement action. For instance, the International Criminal Court (ICC) is mandated to establish individual criminal accountability for the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Crimes against humanity are the most relevant to law enforcement work; they are more precisely defined in Article 7 of the Rome Statute and include, for instance, acts of torture. Investigations fall within the remit of the Office of the Prosecutor, who in turn is subject to control by the Pre-Trial Chamber (Rome Statute, Article 53). There are also detailed provisions covering the right of the accused as well as the involvement, rights and protection of victims.

States can be held accountable with regard to their obligations under international human rights law by means of two types of proceedings:

- Inter-State complaints: States can submit complaints about the failure of another State to honour its commitment under a specific human rights treaty to the committee in charge of monitoring implementation of and compliance with the treaty.
- Individual complaints: Where a treaty provides for the possibility of individual complaints – i.e. where individuals may complain about violations of their rights under the treaty – these are also dealt with by the relevant committee. Each human rights treaty defines the availability of and access to those mechanisms, as well as related competences and procedures within the scope of human rights issues covered by the treaty.

## **Situations of armed conflict**

### **International humanitarian law and its relevance for law enforcement officials**

Law enforcement takes place at all times – in peacetime, during armed conflict and in other situations of violence. Therefore, the international rules and standards presented in this Manual remain applicable whatever the situation. In situations of armed conflict, however, additional challenges may arise. Law enforcement officials may become targets of the hostilities, they may participate directly in the hostilities, they may have to deal with people involved in or affected by the armed conflict, or they may have to investigate possible violations of international humanitarian law. It is therefore important for law enforcement officials to understand their role and obligations in those situations.

International humanitarian law (IHL) is a body of law that seeks to limit the effects of armed conflict for purely humanitarian purposes. The first treaties were signed in the 1860s, following the initiative of a Swiss businessman, Henri Dunant, who was profoundly shocked by the unnecessary suffering of wounded soldiers on

the battlefield of Solferino. Two types of law began to emerge, the first governing the means and methods of warfare and the second seeking to protect victims of war. Both types of law were further developed after the Second World War; the four Geneva Conventions of 1949 are the most prominent result of that process.

IHL is the *lex specialis* applicable in situations of armed conflict, be it an international armed conflict, i.e. a war between two or more States, or a non-international armed conflict, i.e. hostilities of a certain degree of intensity with the involvement of at least one non-State armed group able to conduct organized and sustained military actions.

International human rights law (IHRL) remains applicable to the extent that it complements IHL or serves the interpretation of IHL rules as well as in all situations that have no link to the armed conflict.

In international armed conflicts, IHL treaties are binding on all States that have adhered to them, while customary rules of IHL are binding on *all* States. In a non-international armed conflict all parties to the conflict are bound by Article 3 common to the four Geneva Conventions, by Protocol II additional to the Geneva Conventions and by customary law. Additional Protocol II applies to situations in which a non-State armed group has control over part of a territory.

The basic rules and principles of IHL relate to the conduct of hostilities and the protection of people in the power of the enemy and are as follows:

- The principle of distinction obliges parties to the conflict to distinguish between military targets and civilians, who are protected against attack;
- The principle of proportionality prohibits attacks that would result in excessive incidental civilian casualties and damage to civilian property compared to the actual, direct military advantage anticipated;
- The principle of precaution requires all possible measures to be taken to spare the civilian population and civilian objects;
- Respect must be shown for the life, dignity and fundamental rights of people in the power of the enemy (e.g. captured or wounded combatants, civilians held by a party to the conflict).

In addition, a number of treaties prohibit or regulate means of warfare that are indiscriminate or cause superfluous or unnecessary suffering, e.g. biological weapons, chemical weapons, blinding laser weapons, anti-personnel landmines and cluster munitions.

When people are deprived of their freedom, their fundamental human rights remain applicable at all times, including during armed conflict. In addition, specific rules apply, as follows:

- In situations of non-international armed conflict, Article 3 common to the

four Geneva Conventions – a provision that is today considered to be part of customary law – provides for the absolute, non-derogable protection of fundamental guarantees similar to human rights. In addition, Additional Protocol II may impose further obligations on parties to non-international armed conflicts, provided that the criteria for its application in the specific situation in question are met.

- In international armed conflicts, the protection and rights of persons deprived of their liberty (captured members of the enemy armed forces, interned civilians, etc.) are governed by the four Geneva Conventions and Additional Protocols as well as customary law. Specific rules relate to humane treatment, basic conditions of detention and respect for the fundamental judicial guarantees of people accused of having committed criminal offences.

IHL also provides for the protection of specific groups of people such as refugees, internally displaced people, women and children as discussed below.

**Refugees and internally displaced people** are civilians and thus protected against attack, unless they are taking part directly in the hostilities. Furthermore, in international armed conflicts, States are required to provide assistance to re-establish links between separated family members (Article 26, Fourth Geneva Convention); forcible transfers and deportations from their country are prohibited (Article 49, Fourth Geneva Convention). In non-international armed conflicts, the provisions protecting civilians (Article 3 common to the four Geneva Conventions as well as Additional Protocol II, Articles 13 to 17) also apply to refugees and internally displaced people.

Specific rules addressing the situation of **women** exist in the four Geneva Conventions. Adverse distinctions based on sex are prohibited. Female combatants are protected in a similar manner to their male counterparts. For non-international armed conflicts, specific protection of civilian women is provided for in Article 3 common to the four Geneva Conventions and Article 5(2)(a) of Additional Protocol II, while for international armed conflicts, there are a number of relevant provisions in the Fourth Geneva Convention and in Additional Protocol I.

Of particular relevance is the prohibition of rape, enforced prostitution or any form of indecent assault (Fourth Geneva Convention, Article 27; Additional Protocol I, Articles 75 and 76; Additional Protocol II, Article 4). All too often rape is clearly used as a method of warfare. It should also be noted that this not only affects women and girls, but often also men and boys. Today, such acts are qualified as war crimes and may amount to crimes against humanity.

Armed conflict has devastating effects on **children** as it may lead to the separation of families, orphaning, recruitment of children into armed forces or armed groups,

death and injury. Obviously, children need special care and attention in such circumstances. In non-international armed conflicts, Article 3 common to the four Geneva Conventions also protects children and, where applicable, Article 4(3)(a) of Additional Protocol II provides for specific measures to be taken to protect children. For situations of international armed conflict, similar provisions can be found in all four Geneva Conventions and in Additional Protocol I.

Furthermore, Article 38 of the CRC and its Optional Protocol urge States Parties to ensure respect for rules of IHL in situations of armed conflict and seek to protect children from taking part in hostilities. The conscription, enlistment or use of children under the age of 15 years in direct participation in hostilities is established as a war crime (Rome Statute, Article 8(2)b)(xxvi) and (e)(vii)).

Despite the worldwide acceptance of IHL, violations still occur. They can only be prevented if impunity is effectively addressed, with regard to those having committed such violations as well as to those under whose command they have been acting. The responsibility to prosecute violations lies with the States. They are required to establish national legislation penalizing conduct prohibited under IHL and establishing court jurisdiction over these crimes.

In addition, where States fail to assume their responsibility effectively, the ICC has jurisdiction over grave breaches of the Geneva Conventions as well as other serious violations of the laws and customs applicable in international and non-international armed conflicts.

Under normal circumstances, law enforcement officials are considered civilians in situations of armed conflict. Under IHL, they are thus protected against attacks. However, if they are formally integrated into the military armed forces or are otherwise *de facto* taking part directly in hostilities, they become legitimate targets under IHL. However, the killing of a law enforcement official by a non-State armed group in a situation of non-international armed conflict may nonetheless remain punishable under domestic criminal law (murder or homicide).

When law enforcement officials participate directly in the hostilities, they need to act in compliance with the applicable legal framework. This is, for instance, relevant with regard to the use of equipment. On the one hand, certain equipment, such as expanding bullets or tear gas, is permissible in law enforcement but prohibited in armed conflict; on the other hand, sophisticated military equipment may result in heavy civilian casualties if not used correctly. Law enforcement officials must be aware that they will be held accountable for breaches of IHL.

Situations in which law enforcement officials are called to fulfil two missions simultaneously – law enforcement and the combat operations – present major

challenges. Law enforcement officials need thorough training that enables them to make the right choice in a split second, particularly when it comes to the use of force and firearms, when they will have to determine whether the situation is one in which they have to kill an enemy (conduct of hostilities) or one in which the primary focus must be to protect (and to avoid taking) the life of a citizen (law enforcement). Authorities must be careful not to blur the lines and leave their officers in uncertainty over their precise mission. Precautions also need to be taken when law enforcement officials return to normal law enforcement duties after taking part directly in the hostilities. The difficulty of reverting to the law enforcement mindset should not be underestimated.

When dealing with people deprived of their freedom in connection with the armed conflict, law enforcement officials need to know whether those people are prisoners of war, civilian internees or people charged with a crime. They must also know the rules of IHL when investigating possible violations of it and be fully aware of their responsibility and obligations with regard to vulnerable groups.

## **Conclusion**

Law enforcement officials play a fundamental role in society in serving and protecting the people and in upholding the law. That role remains valid at all times – including in times of armed conflict and other situations of violence. This places a high level of responsibility on law enforcement officials, who are required to fulfil their duties in absolute respect of the applicable national and international law, however difficult and even dangerous the circumstances might be. This Manual shows that this is far from an easy undertaking; the legal, ethical and professional requirements that have to be met are very demanding. However, this Manual also consistently argues that compliance with the international rules and standards establishes the indispensable framework enabling law enforcement officials to contribute effectively to peace, security and stability in society.





# INTRODUCTION



# INTRODUCTION

## **The ICRC – mission statement<sup>1</sup>**

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.

The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.

## **The ICRC – mandate**

The ICRC's mandate is laid down in the four Geneva Conventions, in their Additional Protocols and in the Statutes of the International Red Cross and Red Crescent Movement (hereinafter referred to as the Statutes).

In particular, the ICRC shall *“endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results”* (Statutes, Article 5(2)(d)).

Furthermore, it *“may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution”* (Statutes, Article 5(3)).

## **ICRC dialogue with police and security forces**

The ICRC may engage in dialogue with police and security forces in situations of armed conflict and in other situations of violence. This dialogue takes place in view of the crucial role that police and security forces play or may play in such situations. Their impact may be outlined as follows:

- Their duty is to protect and assist the general population, in particular to prevent people from becoming victims and to assist those who have become victims;
- They may cause victims when exercising their powers;
- They can facilitate or hamper the ICRC's humanitarian activities;

<sup>1</sup> See the ICRC website <http://www.icrc.org/eng/resources/documents/misc/icrc-mission-190608.htm> (last consulted on 30 September 2013).

- They may be able to influence those who have the power and responsibility to address the fate of people affected by such situations.

It should also be noted that police personnel may become victims themselves and thus fall within the ICRC's humanitarian remit. That may also constitute a basis for dialogue.

In times of armed conflict the ICRC may sometimes take up matters arising under international humanitarian law (IHL) with police and security forces if they are directly involved in the hostilities. However, the ICRC usually establishes contact with those forces in their capacity as law enforcement agencies and thus refers to the legal framework applicable to law enforcement, i.e. international human rights law (IHRL). In the context of law enforcement this legal framework is applicable at all times: in peacetime, situations of violence and armed conflict.

It should nonetheless be emphasized that the ICRC is not a human rights organization and does not generally refer to the full range of human rights instruments and rules. The ICRC focuses on a core set of human rights that are particularly relevant in situations of armed conflict and other situations of violence: the right to life; the right to physical and psychological integrity; rules relating to the use of force in law enforcement, the due process of law, the minimum conditions necessary for survival, respect for the family unit, missing persons and their families, and movement (e.g. the prohibition of arbitrary displacement or the principle of non-refoulement); rules prohibiting arbitrary deprivation of property and disruption of access to health care and to education; rules relating to inappropriate limitations imposed on the practice of religion; and the rules to be applied in cases of deprivation of liberty. With regard to law enforcement, the rules and standards relating to the protection of the above-mentioned rights govern, in particular, the exercise of powers by police and security forces, i.e. the use of force and firearms, arrest and detention, and search and seizure.

Two different but complementary types of dialogue can be distinguished:

1. A general dialogue that seeks to foster an environment conducive to ensuring respect for the lives and dignity of those who may be affected by armed conflicts or other situations of violence and to facilitate the ICRC's work and security in the field. This type of dialogue seeks to enhance knowledge and general acceptance of the law by police and security forces. The long-term objective is to improve the capacity of law enforcement agencies to exercise their law enforcement powers in accordance with the applicable legal framework.
2. A confidential bilateral dialogue that aims to prevent or put an end to violations of IHL or of IHRL. In this case, the ICRC will refer to very specific

situations and will ask the authorities to take specific measures – if possible, immediately – to end ongoing violations of the law or to prevent the (repeated) occurrence of violations.

## EXAMPLES OF ICRC ACTIVITIES WITH POLICE AND SECURITY FORCES

- Dialogue on ICRC security and access to people affected by armed conflict or situations of violence.
- Dialogue on respect for the medical mission, including that of the International Red Cross and Red Crescent Movement.
- ICRC visits to detainees in police custody.
- Dialogue on the use of force and firearms in the maintenance of public order.
- Dialogue as a neutral intermediary between the different sides in an armed conflict or a situation of violence, e.g. in order to obtain the release of police officials being held captive.
- Dissemination of the rules and standards of international human rights law and of the ICRC's mandate, activities and working modes among police officials in contexts in which the ICRC is operating.
- Institutional support for police authorities regarding the integration of the rules and standards of international human rights law into their doctrine, education, training and system of sanctions.

The ICRC's overall objective with police and security forces is to promote respect for the law that provides protection for people affected by situations of armed conflict and other situations of violence. This Manual is an essential tool in the achievement of that objective.

### **The concept of integration**

Ratifying IHRL treaties and implementing them in domestic law are essential steps towards compliance with a State's obligations under international law. Another important element for the creation of an environment conducive to lawful behaviour is subsequently disseminating the law as widely as possible. However, these measures alone are not sufficient to prevent violations. The law must become an *integral* part of the conduct of operations (see the explanatory box, "Integrating the law").

The ICRC may provide support for the integration process if and when authorities are genuinely committed and have the capacity to sustain this process over the long term. However, the ICRC does not provide practical training or operational advice for police forces; it focuses on the legal framework within which they have to function, helping the authorities to identify its operational implications and the actions to be taken to ensure

compliance with the law. For that purpose it has specialized delegates (with police experience) in the countries in which it operates and a support unit at its headquarters in Geneva.

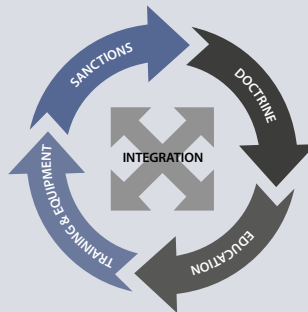
## INTEGRATING THE LAW\*

Law is actually a set of general rules, sometimes too general to serve as a guide for practical behaviour in law enforcement. It is therefore necessary to interpret it, analyse its operational implications and identify consequences at all levels. It must then be translated into practical measures, means and mechanisms conducive to compliance.

The behaviour of law enforcement officials is shaped by four main factors:

1. Operational procedures (doctrine).
2. Theoretical knowledge of the law and the doctrine (education).
3. The capacity to apply this knowledge in practice (training and equipment).
4. The effective enforcement of respect for the law and the doctrine (sanctions).

Those factors form a kind of virtuous circle. Lessons learned during operations, together with changes in the law, equipment and the nature of the threat and mission, require all elements to be revised regularly. Integrating the law into the whole process is therefore a continuous, never-ending, circular process.



Note: Examples of practical integration of the law are highlighted in special text boxes. For ease of reference, they start with a simplified version of the above diagram.

\* The above text is based on excerpts from ICRC, *Integrating the Law*, ICRC, Geneva, 2007.

## The Manual

This Manual deals with selected key aspects of international human rights law (IHRL) as relevant to law enforcement. It has a twofold focus: to provide an explanation of the relevant rules and standards of IHRL applicable to law enforcement and to discuss their practical implications for the work of law enforcement officials and the overall functioning of law enforcement agencies. It does not set out to provide a complete overview of all possible human

rights issues, but concentrates on those that are related to the core set of human rights of concern to the ICRC in situations of armed conflict and other situations of violence.

It has been written for law enforcement officials at all levels:

- Individual law enforcement officials expected to exercise their duties in accordance with international rules and standards, be it at command level or in the execution of day-to-day duties;
- Those responsible for teaching and training law enforcement officials;
- Those responsible for developing appropriate operational procedures.

The expression “law enforcement official” used in this Manual includes not only police and security forces but also military personnel whenever the latter perform law enforcement functions, e.g. the maintenance of public order (see also the Commentary on Article 1 of the Code of Conduct for Law Enforcement Officials (CCLEO)).

In this Manual, account has been taken of relevant data and developments in international law up to and including 30 September 2013 (editorial closing date).

## **The structure of the Manual**

This Manual is divided into five main parts:

- I. International law and international human rights law (Chapters 1 and 2)
- II. Law enforcement function and responsibilities (Chapters 3, 4, 5 and 6)
- III. Law enforcement powers (Chapters 7, 8 and 9)
- IV. Command, control and accountability (Chapters 10 and 11)
- V. Situations of armed conflict (Chapter 12)

The following annexes are provided at the end of the Manual:

- Annex 1: Bibliography
- Annex 2: Key legal documents: a list of international legal instruments relating to law enforcement (at global and regional levels)
- Annex 3: International jurisprudence cited in the Manual, by chapter

The Manual ends with an index which has been included for ease of reference.

Each chapter is organized as follows:

- Chapter outline.
- Key legal documents: a list of selected legal instruments of particular relevance to the chapter (for ease of reference, in Chapter 6 these documents are listed in the subsection). The documents are divided into “Treaty law” and “Non-treaty law” and are listed in order of the date of their entry into force or adoption. The key legal documents cited in the Manual are brought together in Annex 2.

- The main text, including various boxes that are used to highlight matters of particular relevance for the work of law enforcement officials (see below for a more detailed explanation of the boxes). Wherever relevant, cross-references are made to other chapters of the book.
- Selected references: a non-exhaustive list of references relevant to the specific chapter. The selected references are included in the Bibliography presented as Annex 1.

### **Boxes**

Text boxes are used in this Manual to draw attention to particular issues of interest to law enforcement officials. Three types of boxes are easily identified by their symbols, as shown in the examples given below.



#### **INTEGRATION IN PRACTICE**

Where relevant, practical integration implications are explained in the different chapters of this book, i.e. the kinds of measures, means and mechanisms relating to doctrine, education, training, equipment and sanctions that should, or may be, implemented by authorities to ensure compliance with the law.

The particular points raised in these boxes can also be traced by referring to the index.



#### **INTERNATIONAL JURISPRUDENCE**

To illustrate international human rights law in practice, examples are given of international jurisprudence concerning different countries.

The examples of international jurisprudence contained in these boxes are also listed by chapter in Annex 3.



#### **LOOKING CLOSER**

These text boxes contain reports, comments and opinions on the law by authoritative bodies and illustrations of points of law.

Other text boxes (without identifying symbols) simply serve to highlight particular concepts or issues.







**Part I**

**INTERNATIONAL  
LAW AND  
INTERNATIONAL  
HUMAN RIGHTS  
LAW**

## CHAPTER 1 OUTLINE

- 1.1 Introduction**
- 1.2 Subjects of international law**
- 1.3 The sources of international law**
  - 1.3.1 Background information
  - 1.3.2 The law of treaties
  - 1.3.3 Customary law and *jus cogens*
  - 1.3.4 Additional sources (including soft law)
- 1.4 The relationship between international law and national law**
  - 1.4.1 State sovereignty and State responsibility
  - 1.4.2 State jurisdiction
  - 1.4.3 Criminal jurisdiction
  - 1.4.4 Immunity
- 1.5 International human rights law and international humanitarian law**
- 1.6 Selected references**

## KEY LEGAL DOCUMENTS

### Treaty law

- Hague Convention for the Pacific Settlement of International Disputes (Hague Convention I, adopted in 1899, entered into force in 1900)
- Montevideo Convention on the Rights and Duties of States (Montevideo Convention, adopted in 1933, entered into force in 1934)
- Charter of the United Nations (UN Charter, adopted in 1945, entered into force in 1945)
- Statute of the International Court of Justice (ICJ Statute) – Annex to the UN Charter (adopted in 1945, entered into force in 1945)
- Geneva Conventions (adopted in 1949, entered into force in 1950)
- Vienna Convention on Diplomatic Relations (adopted in 1961, entered into force in 1964)
- Vienna Convention on the Law of Treaties (Vienna Convention, adopted in 1969, entered into force in 1980)
- Rome Statute of the International Criminal Court (Rome Statute, adopted in 1998, entered into force in 2002)

### Non-treaty law

- Universal Declaration of Human Rights (UDHR, adopted in 1948)
- Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles, adopted by the International Law Commission in 2001)

# CHAPTER 1

## INTERNATIONAL LAW

### 1.1 Introduction

In order to understand the impact of international law on the work of law enforcement officials, it is useful to look at the overall system of international law and how it governs relations between States, State agents, individuals and international organizations. However, for the intents and purposes of this Manual, not all aspects of international law need to be addressed. This chapter therefore focuses on those aspects of international law that are of direct relevance to the topics in this Manual and simply serves as a general introduction to international law.

International law is a set of rules governing:

- relations between States;
- relations between States and individuals and other non-State entities;
- the functioning of international institutions or organizations, their relations with each other and their relations with States, individuals and other non-State entities.

To give an example, international law lays down rules concerning the territorial rights of States (relating to land, sea and space), the international protection of the environment, international trade and commercial relations, the use of force by States, human rights and humanitarian law.

### 1.2 Subjects of international law

International law governs the relations between subjects of international law, which it defines, i.e. it specifies which entities have legal capacity, and the extent of that capacity in terms of competence to carry out certain acts. It also determines whether, and to what extent, natural and legal persons are bound (or can be bound) by its content or can refer to it for the protection of their specific interests. The legal competences of individual entities may therefore differ.

The term “subjects of international law” refers to:

- holders of rights and duties under international law;
- holders of procedural privileges of prosecuting a claim before an international tribunal;
- possessors of interests for which provision is made in international law;
- those competent to conclude treaties with other States and international organizations.

These qualifying characteristics are not necessarily cumulative; the possession of just one of them by an entity is sufficient to qualify that entity as a subject of international law. The three main subjects of international law are presented below.

### **States**

States are clearly subjects of international law. The Montevideo Convention on the Rights and Duties of States (Montevideo Convention) provides the following definition of a State (Article 1):

*“The State as a person [i.e. subject] of international law should possess the following qualifications:*

*(a) a permanent population;*

*(b) a defined territory;*

*(c) government; and*

*(d) capacity to enter into relations with other States.”*

With regard to population and territory, there is no lower limit in terms of size. Neither is there a necessity for State boundaries to be clearly defined or undisputed. It is enough for the territory to have sufficient cohesion, even though the boundaries have not (yet) been accurately drawn.

The existence of a government implies the existence of a stable form of political organization as well as the capacity of public authorities to assert their powers throughout the territory of the State. However, State practice in this respect suggests that the requirement of a “stable political organization” in control of the territory of the State does not apply in situations of armed conflict once a State has been established.

The required capacity to enter into relations with other States is a direct reference to the independence of States. Independence in this sense is to be understood as meaning the existence of a separate State that is not subject to the authority of any other State or group of States. This can also be described as external sovereignty, which means that a State is subject to no other authority than that of international law. Recognition (by other States) is another major additional requirement for statehood.

### **Public international organizations**

Organizations such as the United Nations Organization (UN), the European Union (EU), the African Union (AU), the Organization of American States (OAS), and the North Atlantic Treaty Organization (NATO) are generally created by multilateral treaties. They have an international personality to varying degrees in that they have a capacity (i.e. competence) to conclude treaties, enjoy certain privileges and immunities, are able to have international rights and duties and have the capacity to prosecute claims before international

tribunals. This does not make such organizations equal to States, nor does it place their rights and duties on a par with those of States.

Through the Geneva Conventions and the Statutes of the Red Cross and Red Crescent Movement, the International Committee of the Red Cross has a special *sui generis* status. It also has observer status at the General Assembly of the United Nations (resolution of the General Assembly of the United Nations of 16 October 1990).

## Individuals

The capacity of individuals to be holders of rights and duties under international law, as well as their capacity to bring claims before international tribunals, are thoroughly recognized in the practice of States. International human rights law, for instance, defines natural persons as subjects of international law, giving them rights and duties that enable them to pursue claims before international tribunals or to be brought before such tribunals, e.g. for crimes against international law. While there can be no doubt as to whether individuals are subjects of international law, it is a fact that for the most part individuals remain objects of international law, rather than subjects.

## 1.3 The sources of international law

### 1.3.1 Background information

A widely accepted listing of sources of international law can be found in Article 38(1) of the Statute of the International Court of Justice (ICJ Statute):

*“The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;*
- (b) international custom, as evidence of a general practice accepted as law;*
- (c) the general principles of law recognized by civilized nations;*
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”*

Paragraphs (a) to (c) constitute the main sources for determining what international law is; paragraph (d) is of secondary importance, as indicated by the use of the wording “subsidiary means.” From this wording it must be understood that the subsidiary means will have only a (further) qualifying and/or clarifying effect.

### 1.3.2 The law of treaties

The terms international “conventions” and “treaties” can be taken as synonymous. Article 2(1) of the Vienna Convention on the Law of Treaties (Vienna Convention) defines “treaties” as follows:

*“For the purposes of the present Convention:*

*(a) ‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”*

A treaty is either bilateral (between two States) or multilateral (between more than two States). The particular designation of a treaty (i.e. whether it is called a “covenant,” “convention,” “protocol” or “charter”) is only of relative interest. What is important, however, is that a treaty, whether bilateral or multilateral, creates legally binding obligations on the States that are party to it.

International law regarding treaties is set out in the Vienna Convention. This Convention represents a codification of rules with regard to treaties. The importance of the Convention for day-to-day transactions between States is self-evident and accepted as such by States, leaving treaty interpretation as the only likely area for dispute, if any. This chapter will consider only those parts of the law of treaties that have a direct bearing on and relevance to the subject matter of this Manual.

### **1.3.2.1 The making of treaties**

#### **Signature, ratification, accession**

Each State has the capacity to conclude treaties. How a State organizes the exercise of its treaty-making powers is its own concern, in particular with regard to those who are authorized to represent the State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty. Heads of State, heads of government and ministers of foreign affairs are considered to represent their State by virtue of their functions and without having to produce full powers, i.e. a document originating from the competent authority of a State designating a person to represent the State for any particular act in connection with a treaty.

There are different ways in which States can express their willingness to be bound by the contents of a treaty. The specific way that is applicable will depend on what is agreed in the treaty itself. The consent of a State to be bound by a treaty may be expressed *“by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by other means if so agreed”* (Vienna Convention, Article 11).

Ratification constitutes a separate act which finally binds a State to a treaty and which is required whenever a treaty so prescribes. Today it is usually a document that confirms the signature of the treaty and that is deposited with a designated body or person following the necessary national procedures for the approval of the signature of the treaty (e.g. an act of parliament or a presidential or government decision).



If a State is not among the initial signatories of a treaty, it can become party to the treaty through accession, on condition that the treaty provides for the possibility of this kind of (subsequent) accession.

### Entry into force

A treaty enters into force *“in such manner and upon such date as it may provide or as the negotiating States may agree”* (Vienna Convention, Article 24). It is common practice for a treaty to specify when and how it shall enter into force. While entry into force (particularly in bilateral agreements) may be with immediate effect upon signature, in most cases and particularly in the case of multilateral treaties, it depends on ratification by (a minimum number of) the parties to the treaty.

Before a treaty enters into force, a State is obliged to refrain from acts which would defeat the object and purpose of that treaty when:

- “(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or*
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”* (Vienna Convention, Article 18)

Every treaty in force is *“binding upon the parties to it and must be performed by them in good faith”* (Vienna Convention, Article 26). This rule – *pacta sunt servanda* – is a fundamental principle of international law and of the law of treaties and a State *“may not invoke the provisions of its internal law as justification for its failure to perform a treaty”* (Vienna Convention, Article 27).

### Reservations

On occasion, a State does not want to become party to a treaty in its entirety but wishes to be bound by parts of it only. Reservations are a tool to facilitate the conclusion of treaties and to prevent States from not signing or adhering to a treaty only because of isolated aspects of it. In that case the State will formulate one or more reservations to the treaty when signing, ratifying, accepting, approving or acceding to it.



## LOOKING CLOSER

### Reservations under the Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC, adopted in 1989) allows ratification with reservations, provided that such reservations are not incompatible with the object and purpose of the Convention (CRC, Article 51(2)).

While the CRC is the most widely ratified human rights treaty, with 193 States Parties, some States have entered reservations to particular Articles. Australia, for example, ratified the CRC in 1990 but entered a reservation to Article 37(c). The Article stipulates that children deprived of liberty must be kept separate from adult detainees.

While recognizing the general principle of Article 37, Australia did not agree to be bound by the particular provisions of paragraph (c). Taking into account the country's geography and demography, Australia stated that separation between children and adults will only be carried out if feasible and in accordance with the right of children to maintain contact with their families.

Such reservations are allowed unless:

- “(a) the reservation is prohibited by the treaty;*
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”* (Vienna Convention, Article 19)



## LOOKING CLOSER

### **Reservations under the Convention on the Elimination of All Forms of Discrimination Against Women**

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) permits ratification subject to reservations, provided that the reservations are not incompatible with the object and purpose of the Convention (CEDAW, Article 28(2)).

A number of States have entered reservations to particular Articles on the grounds that national law, tradition, religion or culture is not congruent with the Convention principles, including Article 2 of the Convention.

Under Article 2, *“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake”* to adopt certain legal and administrative means and mechanisms.

The body in charge of monitoring the Convention, the Committee on the Elimination of Discrimination against Women, has stated that Article 2 is central to the objects and purposes of the Convention and has thus called on States party to the Convention to withdraw related reservations.

### 1.3.2.2 Termination, suspension, withdrawal

Article 42(2) of the Vienna Convention states that:

*“The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.”*

The Vienna Convention sets forth the requirements for termination, suspension and withdrawal in Articles 54 to 79. For the purposes of this Manual, it is not necessary to go into detail on this particular aspect of treaties. It is important, however, to be aware of the possibility of such steps being taken, as well as of the general rule established in Article 42(2) of the Vienna Convention.

### 1.3.2.3 Arbitration and settlement of disputes, International Court of Justice (ICJ)

#### Background information

Relations between States are not always friendly or based on shared opinions or agreements reached by consensus. Disputes between States do arise and can basically be of any kind, including disputes that arise out of treaty relations between States. The settlement of such disputes, not only from the point of view of furthering friendly relations between States, constitutes an interesting area of international law. Generally, States will seek to settle their disputes through negotiation or mediation, sometimes with third-party assistance in the form of “good offices,” through conciliation or through the conduct of fact-finding inquiries. Rarely will States take their disagreements to court.

Third-party assistance is sometimes provided through the United Nations or through one of the regional organizations such as the OAS or the AU. This form of peaceful settlement of disputes allows for agreement options which are not necessarily based on international law but which have the support of the parties to a particular dispute. Settlement through arbitration or through proceedings before a court necessarily involves the application of rules of international law, which limits the available options for solving and settling the dispute. Another problem at the international level is the absence, in most cases, of a compulsory jurisdiction for the settlement of disputes between States or cases of non-observance of general rules of international law. For the purposes of this Manual the focus will be on arbitration and on the International Court of Justice (ICJ).

#### Arbitration

The Hague Convention for the Pacific Settlement of International Disputes (Hague Convention I) defines the object of arbitration as being *“the settlement of disputes between States by judges of their own choice and on the basis of*

*respect for law*" (Article 37). The International Law Commission<sup>2</sup> has defined arbitration as "a procedure for the settlement of disputes between States by a binding award on the basis of law and as a result of an undertaking voluntarily accepted." The difference between arbitration and judicial settlement concerns the selection of the members of those judicial bodies and the rules of procedure; for instance, unlike judicial decisions and judgments, proceedings and awards under arbitration are often non-public. Whereas members of arbitration panels are selected on the basis of agreement between the parties, judicial settlement presupposes the existence of a standing tribunal with its own bench of judges and its own rules of procedure, which must be accepted by the parties to a dispute. Arbitration tribunals can consist of a single arbitrator or they may be collegiate bodies – the essential aspect is the consensus of the States party to the dispute as to their composition. This consensus may have already been established in a treaty as a means of settling disputes relating to the treaty itself or it may be established on an ad hoc basis when a dispute arises between States and they decide to call for arbitration.

The outcome of arbitration, the "award" by the tribunal, is binding on the parties to the dispute, although history shows that a State may decide not to accept it.

### **The International Court of Justice (ICJ)**

The ICJ must be considered the most important international court currently in existence with jurisdiction over States. There are other international courts dealing with States' obligations, such as the African Court on Human and Peoples' Rights, the Court of Justice of the European Union, the European Court of Human Rights and the Inter-American Court of Human Rights. Each of those courts, however, has only limited jurisdiction for the adjudication of complaints submitted to them under the treaties establishing them (i.e. in terms of subjects and territory). For further information about these institutions, see Chapter 2, section 2.5. As they have jurisdiction over individuals and not over States, international criminal tribunals will be dealt with in Chapter 1, section 1.3.3.

The ICJ is the principal judicial organ of the United Nations. It was established in 1946 on the basis of Article 92 of the Charter of the United Nations (UN Charter). The ICJ is organized in accordance with its Statute (which is part of the UN Charter) and has traditionally always had its seat in The Hague (in the Netherlands). The judges of the ICJ are elected by the Security Council and the

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<sup>2</sup> The International Law Commission is a body of experts established under Article 13(1)(a) of the UN Charter to work on the codification and progressive development of international law. According to Article (2) of its Statute, the Commission is composed of 34 members "who shall be persons of recognized competence in international law." Members act as individuals and not as members of their governments. They are elected by the General Assembly of the United Nations, which "shall bear in mind that [...] in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured" (Statute of the International Law Commission, Article 8).

General Assembly according to a complicated procedure (ICJ Statute, Articles 4-14). Their appointment is usually a highly politicized exercise. The current understanding as to the distribution of the 15 seats on the ICJ (in terms of nationality and power blocs) is that they correspond to membership of the Security Council. This means, *inter alia*, that the ICJ has on its benches a national of each of the five permanent members of the Security Council (China, France, Russia, the United Kingdom and the USA). The ICJ delivers a single judgment but allows judges to give their personal opinion. The judgment of the ICJ is binding on the States party to the dispute.

The jurisdiction of the ICJ relates to deciding on contentious cases and to providing advisory opinions, neither of which powers it can exercise of its own volition. That jurisdiction "*comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force*" (ICJ Statute, Article 36(1)). States may at any time declare that they recognize the compulsory jurisdiction of the ICJ in all legal disputes concerning:

- "*the interpretation of a treaty*";
- "*any question of international law*";
- "*the existence of any fact which, if established, would constitute a breach of an international obligation*";
- "*the nature or extent of the reparation to be made for the breach of an international obligation.*"

Such declarations may be made "*unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time*" (Article 36(3)).

In addition to its jurisdiction over cases brought by States under Article 36 of its Statute, the ICJ "*may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the [UN Charter] to make such a request*" (e.g. the Security Council, the General Assembly, the Economic and Social Council (ECOSOC), specialized UN agencies).

The opinions of the ICJ are binding on the requesting body and the tendency is also for them to be accepted and adhered to by the States concerned, although history provides examples of cases to the contrary. States do not have the capacity to request advisory opinions of the ICJ, although they do have a right to take part in the proceedings before the Court and to express their particular views and comment on views expressed by others.

### **1.3.3 Customary law and *jus cogens***

Article 38(1)(b) of the ICJ Statute defines international custom as "*evidence of a general practice accepted as law.*" This definition requires closer analysis if it is to be properly understood. The first requirement for the establishment of

“custom” is the existence of a “general practice” in the relations between States. Examples of the existence of such “general practice” can be found in bilateral relations between States as well as in multilateral relations. A “general practice” needs to be of a consistent (habitual) nature for it to be recognized as such. “Consistency” in this sense means an existing frequency of repetition as well as a period of time over which the practice has occurred between States. However, the existence of a “general practice” in itself is insufficient to conclude that customary international law on a specific point actually exists. Crucial to the recognition of such a “general practice” as being part of customary international law is the existence of a belief of legal obligation on the part of the acting State(s) underlying that practice. This required legal belief is better known by its Latin formulation *opinio juris sive necessitates*. The combination of a regularly recurring practice (between States) with the underlying belief (by States) that the practice and its recurrence are the result of a compulsory rule is what constitutes customary international law.

Proof of the existence of “general practices” of States can be found, *inter alia*, through closer examination of acts or declarations by heads of State and diplomats, opinions of legal advisers to governments, bilateral treaties, press releases or official statements by government spokespersons, State law, decisions of State courts, and State military or administrative practices.

Rules of customary law are often also reflected in treaties. For example, the Vienna Convention is itself considered to represent a codification of rules of customary international law with regard to treaties.

On the other hand, rules laid down in treaties may sometimes find increasing acceptance as a result of their having a large number of signatories or by their being included in more than one treaty. This may lead to the conclusion that the rule in question – which may initially have been included in only one treaty with a limited number of signatories – has, over time, become customary law, e.g. Article 3 common to the four Geneva Conventions.

A further step in customary law is the concept of *jus cogens*.

Article 53 of the Vienna Convention states that:

*“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”*

*Jus cogens* or peremptory norms of general international law are those norms from which no derogation is allowed. Treaties and norms concluded between States must not conflict with such norms and where they do, those treaties or norms become void. Article 64 of the Vienna Convention even states that “if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

The word “emerges” must be understood as referring to a “new” rule of *jus cogens* that was previously a rule of customary international law or a rule embodied in a multilateral treaty. In that sense reference is made to the constantly ongoing process of evolution of general rules of international law, whereby usage between States can become customary international law and a rule of customary international law can evolve to the level of a peremptory norm from which no derogation is allowed. The absolute prohibition of torture may serve as an example of a rule that evolved along those lines. It could easily be argued that any treaty advocating or permitting torture would be rendered void pursuant to Article 64 of the Vienna Convention.

### **1.3.4 Additional sources (including soft law)**

“Treaties” and “custom” are not the only sources of international law. Subsidiary sources are:

- general principles of law as accepted by civilized nations;
- judicial decisions of international courts and tribunals;
- teachings of the most highly qualified publicists of various nations;
- resolutions of the General Assembly of the United Nations.

The legal significance of resolutions of the the General Assembly of the United Nations – also characterized as “soft law” – is increasingly a topic of discussion. As far as the internal working of the United Nations is concerned, those resolutions have full legal effect. The question remains, however, as to how far they are binding on member States, especially member States that have voted against them.

In principle, soft law is composed of legally non-binding instruments that are utilized for a variety of reasons, including to strengthen States’ commitment to international agreements, to reaffirm international norms and to establish a legal foundation for subsequent treaties. Such instruments are often far more specifically worded than relatively vaguely formulated treaties or conventions. An important example in the context of this Manual are the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990. The aim of that document is to build on and provide guidance for the implementation of hard law (in particular the International Covenant on Civil and Political Rights (ICCPR)) as well as of the Universal Declaration of Human Rights (UDHR).

## 1.4 The relationship between international law and national law

In general, as long as a State carries out its obligations under international law, how it does so is not the concern of international law. In some instances, however, States have agreed to carry out their obligations in a particular manner. This is often the case in the area of human rights, where States have undertaken to make certain types of conduct (e.g. torture and genocide) a crime and to punish such conduct through their national legal systems. The precise relationship between national and international law depends on the legal system in the country in question.

### IMPLEMENTATION EXAMPLE

Article 19(1) of the Convention on the Rights of the Child (CRC) stipulates:

*“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”*

Appropriate measures for implementation of this article may be, for instance:

- A law establishing specific offences under criminal law for violent or abusive treatment of children committed by persons entrusted with their care;
- The creation of administrative bodies obliged and entitled to investigate the well-being of a child;
- Labour law stipulations providing specific protection relative to the employment of minors (minimum age, working hours, etc.).

In many States, international and national law are considered to constitute one legal system. One result of this is that a norm of international law (once it has been defined as such) will automatically become part of the national law to be applied by the courts. Many such States adhere to the principle of the “superiority” of international law, i.e. international law will prevail in the event of a conflict between a rule of international law and a rule of national law. However, in other countries, the constitution retains supremacy even over international law.

Other States see international law and national law as two separate systems; although each can incorporate parts of the other, they are separate entities. In those States, an international rule will not be considered as part of national law until it has been formally incorporated into that State’s legal system (usually through enactment by the legislature). However, in many such



countries, customary international law (as opposed to treaty law) forms part of domestic law without needing to be formally incorporated into it.

### 1.4.1 State sovereignty and State responsibility

The actual implementation of international law at the domestic level will very much depend on the above-mentioned relationship between international and national law.

However, from an international perspective, it is important to bear in mind that international law is binding on States and, most importantly – as set forth in Article 27 of the Vienna Convention – a State may not invoke provisions in its constitution or national law as justification for its failure to discharge its obligations under international law. The responsibility of States also extends to ensuring that their government, their constitution and their laws enable them to fulfil their international obligations.

#### DRAFT DECLARATION ON RIGHTS AND DUTIES OF STATES, ARTICLE 13

*“Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.”*

Furthermore, States are held responsible if international law is violated by one of their agents or institutions. The international law of State responsibility regulates what happens if a State fails to honour a treaty to which it is a party. State responsibility is invoked in the event of a breach of any obligation under international law. This position is largely reflected in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles) adopted by the International Law Commission in 2001.

#### 1.4.1.1 State responsibility for internationally wrongful acts

Pursuant to the aforementioned Draft Articles (Article 2), an internationally wrongful act exists when:

- conduct consisting of an act or omission *“is attributable [imputable] to the State under international law”*; and
- that conduct *“constitutes a breach of an international obligation of the State.”*

The State is responsible not only for the acts of official State agents but also for acts of persons or bodies whose conduct can be attributed to the State. The conduct of a State body will be considered as an act of that State under international law, regardless of whether that body is part of the constituent, legislative, executive, judicial or other authorities, whether its functions are

of an international or internal character or whether it holds a superior or a subordinate position in the organization of the State.

When acts performed by public servants have resulted in injury to persons or property, the nature of the acts and of the functions performed determine whether the State can be held responsible for those acts. If the acts in question are performed in the official (public) capacity of the person(s) concerned, irrespective of their nature and their lawfulness, then the State is responsible for such actions. That responsibility even exists in situations where actions are directly contrary to orders given by superior authorities. The State concerned cannot take refuge behind the notion that, in accordance with the provisions of its legal system, those acts or omissions ought not to have occurred or ought to have taken a different form. Only where the acts committed can be said to have been performed by public servants acting in a private capacity can those acts not be imputed to the State. However, an exception applies to members of the State's armed forces. Indeed, Article 91 of Protocol I additional to the Geneva Conventions states that parties to the conflict "*shall be responsible for all acts committed by persons forming part of [their] armed forces,*" including acts performed in a private capacity.<sup>3</sup>

For the intents and purposes of this Manual the above-mentioned rules regarding State responsibility are the most relevant. They make it clear that where law enforcement officials are concerned, their actions, when performed by them in their official capacity, are imputable to the State and are therefore a matter of State responsibility. It has also been made clear that this responsibility does not cease to exist merely because internal laws proscribe the commission or omission of certain acts (by law enforcement officials) or because of the existence of superior orders with a different intent.

State responsibility cannot be engaged only through the acts of its agents but also through an act of private persons if the act is attributable to the State. For instance, pursuant to Article 5 of the Draft Articles, the conduct of a private person or entity "*empowered by the law of that State to exercise elements of the governmental authority*" can entail State responsibility if the person was acting in this specific capacity of government authority. In relation to law enforcement, this may become relevant, for instance, if private companies are contracted to deliver prison services. However, it is worth noting that private security companies providing security services for private installations, e.g. the mining industry, are usually not acting in such capacity.<sup>4</sup>

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<sup>3</sup> See also the Hague Convention IV, Article 3.

<sup>4</sup> The law of State responsibility is also addressed in the Montreux Document. For more information, see *The Montreux Document*, <http://www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm> (last consulted on 30 September 2013).

Another way in which State responsibility can be engaged is through private persons or entities acting on the instructions or under the direction or control of the State authorities (Draft Articles, Article 8). Finally, State responsibility may be engaged if, in violation of its obligations under international law, the State fails to protect people from violations of their human rights by private actors (for the “duty to protect” see Chapter 3, section 3.2).

The essential principle inherent in the notion of an illegal act is that reparation must, as far as possible, eliminate all the consequences of the illegal act and restore the situation which would, in all probability, have existed if that act had not been committed. Therefore, where a State is deemed to have committed an internationally wrongful act, it is under an obligation to attempt to remedy the consequences of said act. Such reparation can take the form of either restitution in kind or the payment of a sum equal to the restitution in kind where such restitution is impossible. In addition, a State may be required to pay compensation for damages or loss sustained by the injured party. Reparation is the indispensable complement of a failure to apply a treaty and there is no need for this to be stated in the treaty itself.

#### **1.4.2 State jurisdiction**

International law lays down rules that define the powers of individual States to govern persons and property. Taken together, those rules define what is referred to as State jurisdiction. The powers of individual States include powers of legislation (prescriptive jurisdiction) as well as powers of enforcement (enforcement jurisdiction), in both the executive and the judicial sense of the word. It naturally follows that State legislative powers and authority cover both the civil and the criminal domains. The rules of international law on State jurisdiction determine the permissible range (in terms of persons and objects) of a State’s law and its procedures for enforcing the law. Otherwise, the actual content of a State’s law is beyond the scope of international law.

#### **1.4.3 Criminal jurisdiction**

Criminal jurisdiction is first and foremost the remit of States. States exercise criminal jurisdiction according to one or more of the following five principles:

1. The territorial principle, referring to an offence committed on its territory.
2. The nationality principle, referring to the nationality of the person who committed the offence.
3. The protective principle, referring to the national interest affected by an offence.
4. The universality principle, according to which States can exercise jurisdiction regardless of the nationality of the alleged perpetrator or the place where the act was committed; this principle exists, for instance, for grave breaches of the Geneva Conventions or for the offence of piracy.

5. The passive personality principle, referring to the nationality of the person affected by the offence.

#### **1.4.3.1 International criminal tribunals**

Historically, international criminal jurisdiction began to come into play when national criminal jurisdiction was not or could not be invoked.

The first international criminal tribunals to be organized were the Nuremberg Tribunal and the Tokyo Tribunal, both created soon after the Second World War. The International Military Tribunal of Nuremberg came into being on 8 August 1945, when representatives of the governments of the Soviet Union, the United Kingdom and the USA as well as representatives of the provisional government of the French Republic signed the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, otherwise known as the London Agreement. The Agreement included the Charter of the International Military Tribunal, which laid down the substantive and procedural rules to be applied by the Tribunal. The Tokyo Tribunal (the International Military Tribunal for the Far East) was established by special proclamation of the Allied Supreme Commander in the Pacific on 19 January 1946. Until recently, these were the only international criminal tribunals ever to have been established by the international community of States.

The crimes committed in the former Yugoslavia in the early 1990s and in Rwanda in 1994 led to the establishment of two separate international criminal tribunals whose duty it is to bring individuals responsible for those crimes to trial. Both tribunals were established by a resolution of the United Nations Security Council. In enacting those resolutions the United Nations Security Council drew its authority from Chapter VII of the UN Charter.

#### **1.4.3.2 The International Criminal Court**

In order to deflect criticism of the aforementioned specially created criminal tribunals, the Rome Statute of the International Criminal Court (Rome Statute) was signed in 1998. Following a sufficient number of ratifications, the treaty entered into force on 1 July 2002. That is also the date on which the International Criminal Court (ICC) was created with its official seat in The Hague (Netherlands).

At the editorial closing date for the information provided in this Manual (30 September 2013), 122 States are parties to the Rome Statute. Other countries have signed the Rome Statute but have not ratified it. A number of States, including China, India, Russia and the USA, are not party to the treaty at all.

The contours of the Court's thematic, geographic, temporal and judicial jurisdiction are as follows:

### **Crimes within the jurisdiction of the ICC**

The following crimes may be prosecuted by the ICC (Rome Statute, Article 5):

- The crime of genocide;
- Crimes against humanity;
- War crimes;
- The crime of aggression.

The Rome Statute defines each of those crimes, which are considered to be the “*most serious crimes of concern to the international community as a whole.*”

The crime of aggression (Article 8bis) was not defined until the 2010 conference in Kampala and the definition will not enter into force until 2017. Until that time the Court will not exercise its jurisdiction over the crime of aggression.

During the same conference in Kampala, the jurisdiction of the Court over the use of prohibited weapons in international armed conflicts was extended to their use in non-international armed conflicts. The conference failed to agree on a definition of the crime of terrorism, which is thus not included in the Rome Statute.

Drug trafficking has deliberately not been included in the Rome Statute as it is considered to exceed the Court’s limited resources. The Indian initiative to include the use of nuclear weapons and other weapons of mass destruction in the definition of war crimes was rejected during the initial treaty negotiations.

### **Territorial jurisdiction**

Parties to the negotiation process could not agree to provide the Court with universal jurisdiction. Thus, geographically, the ICC may exercise jurisdiction only in the following cases:

- when the accused person is a national of a State party (or where the person’s State has accepted the jurisdiction of the Court); or
- when the alleged crime was committed on the territory of a State party (or where the State on whose territory the crime was committed has accepted the jurisdiction of the Court); or
- when a situation has been referred to the Court by the United Nations Security Council.

### **Temporal jurisdiction**

The ICC can only prosecute crimes committed after the Rome Statute entered into force (i.e. after 1 July 2002). If a State becomes party to the Rome Statute after that date, the Court has jurisdiction with respect to crimes committed from the date on which the Rome Statute entered into force for that particular State.

### Complementary jurisdiction

States have primary responsibility for the prosecution of crimes, including those defined under the Rome Statute. Only when they fail to assume this responsibility does the ICC become competent to investigate and prosecute the crimes defined in the Rome Statute. Article 17 of the Rome Statute stipulates that a case is not admissible to the ICC if:

- “(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;*
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;*
- (d) The case is not of sufficient gravity to justify further action by the Court.”*

In conformity with the *ne bis in idem* principle (i.e. not twice for the same offence), the ICC cannot try a person who has already been tried by another court, unless the proceedings in the other court:

- “(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or*
  - (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”*
- (Rome Statute, Article 20(3))

## 1.4.4 Immunity

### 1.4.4.1 State immunity

It used to be a rule in international law that States enjoyed absolute immunity from being brought before the courts of another State without their consent. With the entrance of States into areas such as trade and commerce, they have performed acts that could equally be performed by private persons and have therefore acted *de facto* as private persons. Such private acts by States are referred to as *acta jure gestionis*, as opposed to those which are performed by States in a public capacity and which could not equally be performed by private persons.

Examples of such public acts, also referred to as *acta jure imperii*, include:

- Internal administrative acts, such as the expulsion of an alien;
- Legislative acts, such as nationalization;
- Acts concerning diplomatic activity;
- Public loans.

The essential characteristic of such public acts is not merely that the purpose or motive of the act is to serve the purposes of the State but that the act is, by nature, an act of government, as opposed to an act that can be performed by any private citizen. In their current practice today, most States follow a doctrine of restrictive immunity, whereby a foreign State is allowed immunity for *acta jure imperii* only. That distinguishing criterion of *acta jure imperii* is used by the courts to decide on questions of alleged immunity by a State.

#### 1.4.4.2 Diplomatic immunity

The Vienna Convention on Diplomatic Relations sets out the privileges and immunities granted to diplomatic missions to ensure the efficient performance of their functions as representing States. The Convention distinguishes between members of the staff of a mission belonging to the diplomatic staff, to the administrative and technical staff or to the service staff (Article 1). The Convention further stipulates that the *“premises of the mission shall be inviolable”* (Article 22). The *“premises of the mission”* are to be understood as *“the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission”* (Article 1(i)). Equally, *“the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution”* (Article 22(3)). The official correspondence of the mission (i.e. all correspondence relating to the mission and its functions) is *“inviolable”* (Article 27(2)). The diplomatic bag *“shall not be opened or detained”* (Article 27(3)) and *“may contain only diplomatic documents or articles intended for official use”* (Article 27(4)). The person of a diplomatic agent, i.e. *“the head of the mission or a member of the diplomatic staff of the mission”* (Article 1(e)), shall be *“inviolable”* (Article 29); such persons cannot be liable to any form of arrest or detention. *“A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State”* (Article 31(1)). This provision, however, does not exempt the agent from the jurisdiction of the sending State (Article 31(4)). Sending States may waive the immunity from jurisdiction of their diplomatic agents (Article 32(1)). Such waiver must always be *“express”* (Article 32(2)). States tend to waive immunity of their diplomatic agents where this does not impede performance of the functions of the mission and in order to maintain good relations with the receiving State.

Quite often States apply the principle of reciprocity in this respect and will grant privileges and immunities to a sending State to the extent that this State has done so as the receiving State for diplomatic agents of the other State. At any time and without having to explain its decision, the receiving State may *“notify the sending State that the head of the mission or any [other] member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the*

*sending State shall, as appropriate, either recall the person concerned or terminate his [or her] functions with the mission” (Article 9(1)).*

History provides numerous examples of people seeking diplomatic asylum on the premises of a diplomatic mission in their country. This issue was (deliberately) not addressed in the Convention because States did not want to recognize a general right to diplomatic asylum. Nevertheless, where such incidents do occur, countries tend to grant asylum to political refugees only, basing such acts on motives of humanity in cases of instant, imminent or personal peril, and, of course, to their own nationals in times of danger. A *de facto* situation of asylum leaves the territorial State with an insoluble dilemma. Assuming that the State of refuge will not surrender the refugee, the territorial State can only apprehend that person by violating the immunity of the diplomatic premises stipulated in Article 22 or by breaking off diplomatic relations. Generally, this will be considered too high a price to be paid for apprehension of the refugee.

It has been (unsuccessfully) argued that the premises of a diplomatic mission were to be considered part of the territory of the sending State. If this had truly been the view of the parties to the Convention, it would undoubtedly have been formulated in the Convention and there would have been no need to set out the immunities of the diplomatic mission as has been done in Article 22.

Finally, it should be noted that any violations of diplomatic immunity by a law enforcement official (e.g. searching the diplomatic bag, arresting a diplomat) do not necessarily make the criminal proceedings unlawful from the perspective of national law. The holder of the rights regarding diplomatic immunity is the other State and not the individual concerned. The possibility of criminally prosecuting a diplomat or the admissibility of evidence obtained by violating diplomatic immunity will depend on whether the national legislation prohibits such prosecution or the use of such evidence and only in that case may the individual concerned file a complaint about illegal proceedings. Otherwise, the State affected may take the appropriate steps in line with the Convention and protest against the criminal prosecution or the use of evidence obtained by violating diplomatic immunity.

## **1.5 International human rights law and international humanitarian law**

International human rights law (IHRL) and international humanitarian law (IHL) are two important areas of international law that are of particular relevance in the framework of this Manual. They have some common aims, i.e. to protect people’s lives, health and dignity. It is also generally accepted that IHL and human rights law are complementary legal regimes, albeit with different scopes of application. While human rights law is deemed to apply at all times (and thus



constitutes the *lex generalis*), the application of IHL is triggered by the occurrence of armed conflict (thus constituting the *lex specialis*).

Mention should be made, however, of important differences of a general nature relating to the interplay between IHL and IHRL. The first is that IHRL is binding *de jure* only on States, whereas IHL is binding on parties to conflicts, including non-State armed groups.

IHRL explicitly governs the relationship between a State and individuals on its territory and/or subject to its jurisdiction (an essentially “vertical” relationship), thus covering the obligations of States vis-à-vis individuals across a wide spectrum of conduct. By contrast, IHL is expressly binding on both States and organized non-State armed groups. IHL establishes an equality of rights and obligations between the State and the non-State side for the benefit of all those who may be affected by their conduct (an essentially “horizontal” relationship).

Another difference concerns the issue of derogation. While no derogation from IHL norms is possible, under the explicit terms of some human rights treaties States may derogate from their obligations stipulated therein, subject to the fulfilment of the requisite conditions (see Chapter 5, section 5.3.3).

There are also differences in how the two bodies of law regulate certain activities. In particular, the regimes governing detention and the use of force differ under IHL and IHRL, with IHL taking into account the specificities of warfare. For instance, the Third and Fourth Geneva Conventions stipulate specific regimes for prisoners of war and civilian internees. As for the use of force, under IHL the use of force, including lethal force, is the norm and not the exception during hostilities, subject to specific rules on distinction, proportionality and precaution; under IHRL, on the other hand, the use of lethal force is a strictly limited last resort measure for law enforcement officials (for rules governing the use of force and firearms in law enforcement, see Chapter 7; for the fundamental differences in this regard between international human rights law and international humanitarian law, see Chapter 12).

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## CHAPTER 2 OUTLINE

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### 2.6 Selected references

## KEY LEGAL DOCUMENTS

### Treaty law

- Charter of the United Nations (UN Charter, adopted in 1945, entered into force in 1945)
- Charter of the Organization of American States (OAS Charter, adopted in 1948, entered into force in 1951)
- Pact of the League of Arab States (established in 1952)
- European Convention on Human Rights (ECHR, adopted in 1950, entered into force in 1953)
- International Covenant on Civil and Political Rights (ICCPR, adopted in 1966, entered into force in 1976) and its two Optional Protocols adopted respectively in 1966 (entered into force in 1976) and in 1989 (entered into force in 1991)
- International Covenant on Economic, Social and Cultural Rights (ICESCR, adopted in 1966, entered into force in 1976) and its Optional Protocol (OP/ICESCR, adopted in 2008 and entered into force in 2013)
- American Convention on Human Rights (ACHR, adopted in 1969, entered into force in 1978)
- African Charter on Human and Peoples' Rights (ACHPR, adopted in 1981, entered into force in 1986)
- European Social Charter (ESC, adopted in 1961, revised in 1996; the revised version entered into force in 1999)
- Arab Charter on Human Rights (ArabCHR, adopted in 1997; last version adopted in 2004, entered into force in 2008)
- Charter of the Association of Southeast Asian Nations (ASEAN Charter, adopted in 2007, entered into force in 2008)
- Charter of Fundamental Rights of the European Union (adopted in 2000, legally binding since 2009)
- Treaty of Lisbon (adopted in 2007, entered into force in 2009)

### Non-treaty law

- American Declaration of the Rights and Duties of Man (adopted in 1948)
- Universal Declaration of Human Rights (UDHR, adopted in 1948)

# CHAPTER 2

## INTERNATIONAL HUMAN RIGHTS LAW

### 2.1 Introduction

A right is an entitlement. It is a claim which one person can bring against another to the extent that by exercising that right, he or she is not preventing another person from exercising his or her right. "Human rights" are universal legal entitlements possessed by each individual human being, rich or poor, male or female. Such rights may perhaps be violated but they can never be taken away. Human rights are legal rights – which means that they are part of the law. This chapter will present the main international instruments which guarantee specific rights and which provide for redress should such rights be violated. It is also important to note that human rights are, in addition, protected by the constitutions and domestic laws of most countries in the world. The fundamental principles which underlie the modern laws of human rights have existed throughout history. However, as explained in greater detail below, it was not until the twentieth century that the international community realized the need to develop minimum standards for the treatment of citizens by their governments.

The reasons for this realization are best expressed as in the Preamble to the Universal Declaration of Human Rights (UDHR), adopted by the then newly established United Nations in 1948:

*"recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, [...] disregard and contempt for human rights have resulted in barbarous acts [...], it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."*

In order to explain the role that law enforcement officials must play in the promotion and protection of human rights, it is necessary to put human rights in context. This calls for an explanation of the origin, status, scope and purpose of human rights. Law enforcement officials must understand how international human rights law (IHRL) affects their individual task performance. This in turn requires additional explanations of the consequences for domestic law and for the fulfilment of a State's obligations under international law.

### 2.2 Historical overview

#### 2.2.1 Background information

It is important to realize that the history of human rights is older than might at first be suggested by the structure of this chapter. Consideration for principles of humanity in the conduct of States at the national and international level can be traced back over the centuries. However, the purpose of this

Manual is not to give a detailed study of the history of human rights but rather to present the realities that are of significance for current situations and future developments. To put those realities into their proper context, it is sufficient to go back in time to the period just after the First World War.

### **2.2.2 1919: The League of Nations**

Whereas eminent writers and private organizations had for years advocated the creation and development of an international organization dedicated to the maintenance of international peace, it took a world war for States to agree to the establishment of the League of Nations.

The First World War formally ended with the Treaty of Versailles concluded at the Paris Peace Conference of 1919. This treaty also created the League of Nations and the International Labour Organization. The main objective of the League of Nations was “*to promote international co-operation and to achieve international peace and security.*”<sup>5</sup> The instruments that were to serve this objective were based on notions of disarmament, pacific settlement of disputes and the outlawing of war, a collective guarantee of the independence of each member and sanctions against breaches of those principles.

The League of Nations had three principal organs, the Council, the Assembly and the Secretariat. Without entering into too much detail about the actual organization of the League it can be said that the Council was an organ of limited membership, the Assembly was the plenary organ and included States signatories to the Treaty of Versailles, while the Secretariat was the servicing organ.

Nonetheless, even the terrors of the First World War were not fearsome enough to convince States of the necessity for them to act decisively in the interest of international peace and security. The League’s disarmament programme failed completely to achieve its objectives. The actions of individual States, such as the withdrawal of Germany, Japan and Italy from the League of Nations, and their activities, though a clear and present threat to international peace and security, were not enough to induce member States of the League to act within the powers entrusted to them by the Treaty of Versailles. As for the other instruments at the disposal of the League, a brief examination of its activities reveals that it was not the quality of the instruments available that rendered its overall performance ineffective. Its failure to act in accordance with its obligations was due to the apathy and the reluctance of the member States, rather than to the apparent inadequacy of the treaty provisions.

The League of Nations never managed to acquire a universal character and consequently remained mainly a European organization with, at one time, a

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5 Covenant of the League of Nations, Preamble.

maximum membership of 59 States. Its success in the field of economics, finance, public health, the Mandate system, transport, communications and social and labour problems was overshadowed by its inability to prevent the Second World War, a failure for which individual member States can more correctly be held responsible.

The League of Nations was formally dissolved on 18 April 1946; by that time the United Nations, established on 24 October 1945, was nearly six months old.

### **2.2.3 1945: The United Nations**

At the end of the Second World War the Allied Powers decided to create one worldwide international organization devoted to the maintenance of international peace and security. Definite plans for such an organization were formulated in stages, at Teheran in 1943, at Dumbarton Oaks in 1944 and at Yalta in 1945. Finally, at the San Francisco Conference in June 1945, 50 governments participated in the drafting of the Charter of the United Nations (UN Charter). It is not only the founding instrument of the United Nations, but also a multilateral treaty which sets out the legal rights and duties of the member States of the United Nations. It formally entered into force on 24 October 1945, the date which is celebrated as the United Nations' official birthday. With the creation of the United Nations, the UN Charter has not established a "super-State" nor has it created something that resembles a world government. The prime concern of the United Nations is international peace and security. Its structure has been made subordinate to that objective and it is heavily dependent on effective cooperation between member States for its achievement. The United Nations has no sovereign powers, which logically means that the organization has no competence in matters within the domestic jurisdiction of a State (see UN Charter, Article 2(7)). A more detailed description of the United Nations and its main bodies and functions is given below; it focuses on the promotion and protection of human rights through the United Nations system.

## **2.3 International human rights standards**

### **2.3.1 Background information**

Since the end of the Second World War the international community, under the auspices of the United Nations, has engaged in an extensive exercise of human rights standard-setting in an attempt to create a legal framework for the effective promotion and protection of those rights. Nowadays, IHRL is a vast body of law consisting of universal and regional standards.

In general, such standards have been set by developing multilateral treaties which create obligations that are legally binding on States Parties. Parallel to this activity, the international community, through the United Nations, has adopted numerous instruments for the promotion and protection of human

rights that fall into the category of “soft law.” The latter constitutes a category of instruments that can be understood as giving recommendations to States or as providing authoritative guidance on specific issues relating to human rights. This section will present an overview of the most important instruments in both categories, with particular reference being made to instruments relevant to law enforcement.

### 2.3.2 The Charter of the United Nations

During the drafting of the Charter of the United Nations (UN Charter) there was great discussion as to how much should actually be said about “human rights” and in what form. Initial fervour for the inclusion of a complete bill of rights in the Charter rapidly diminished, leading to the mere inclusion of a general statement on human rights, a compromise that was contested by several of the major Allied powers. The lobbying capacity of non-governmental organizations (NGOs) pleading for more explicit and elaborate attention to human rights (as well as for the United Nations to have a role in countering human rights abuses) was influential in persuading reluctant States to include them in the Charter. Article 1 of the Charter of the United Nations’ states that the:

*“Purposes of the United Nations are:*

*[...]*

3. *To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion [...].”*

Articles 55 and 56 of the Charter establish the primary human rights obligations of all United Nations member States. Article 55 reads:

*“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:*

- a. *higher standards of living, full employment, and conditions of economic and social progress and development;*
- b. *solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and*
- c. *universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”*

Article 56 reads:

*“All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”*



### 2.3.3 The International Bill of Human Rights

The International Bill of Human Rights is the term used to refer collectively to three major human rights instruments and two optional protocols:

- Universal Declaration of Human Rights (UDHR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>6</sup>
- International Covenant on Civil and Political Rights (ICCPR);
- First Optional Protocol to the ICCPR, establishing a complaint mechanism;
- Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty.

Adopted by the General Assembly in 1948, the UDHR is not a treaty but was intended to be a framework document that would give guidance and interpretation as to the human rights provisions and obligations contained in the Charter of the United Nations. It is the subsequent history of human rights law-making that has in fact helped to establish the remarkable position of the UDHR in IHRL today. It was not until 1966 that the Commission on Human Rights completed the drafting of the two major Covenants indicated above and the First Optional Protocol to the ICCPR. It then took a further ten years – until 1976 – for those major human rights treaties to enter legally into force.

Many of the provisions of the UDHR have found their way into the Constitutions and national laws of United Nations member States. The general practice of States in the field of human rights since 1948 has been based on it and certain of those practices can be said to have gained *opinio juris* on the part of States, i.e. a belief of legal obligation. Many of the provisions of the UDHR (i.e. the prohibition of racial discrimination, the prohibition of torture and other forms of ill-treatment and the prohibition of slavery) can consequently be considered to form part of customary international law.

The two major Covenants address the two broad areas of human rights: civil and political rights, and economic, social and cultural rights. Both documents, built on the provisions contained in the UDHR, are multilateral treaties. The ICCPR has been ratified or acceded to by 167 States and the ICESCR has been ratified or acceded to by 160 States (data as on the editorial closing date). Of those States, 115 have ratified or acceded to the Optional Protocol to the ICCPR, thereby recognizing the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of a violation, by a State Party, of rights set forth in the Covenant (see below). Only 78 States have ratified or acceded to the Second Optional Protocol to the ICCPR, whose aim is to obtain the abolition of the death penalty.

<sup>6</sup> The Optional Protocol to the ICESCR, which was adopted in 2008 and establishes a communication, inquiry and complaint mechanism, entered into force only very recently, on 5 May 2013.

### 2.3.4 Other major human rights treaties

Taking the International Bill of Human Rights as the starting point and reference, the international community has continued to draft treaties that focus on specific areas or topics within the field of human rights. These instruments can be referred to as specialized instruments. Like the two Covenants, they are treaties which create obligations that are legally binding on States party to them. Sometimes they reflect principles of international law or rules of customary international law by which States that are not parties to the particular treaties are also bound. Treaties that are drafted along the lines set out above are subject to interpretation in accordance with the relevant rules in the Vienna Convention on the Law of Treaties.

The most important specialized treaties include:

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Optional Protocol;
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Optional Protocol;
- Convention on the Rights of Persons with Disabilities (CPRD) and its Optional Protocol;
- Convention on the Rights of the Child (CRC) and its Optional Protocols on involvement of children in armed conflict and on the sale of children, child prostitution and child pornography;
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- International Convention for the Protection of All Persons from Enforced Disappearance (CPEd);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW);

All these treaties have a committee entrusted with the task of overseeing the effective implementation of their provisions by States Parties. These committees are generally referred to as “treaty-monitoring bodies.” Their role and function is described in greater detail in section 2.4.6.

### 2.3.5 Reservations to human rights treaties

As explained in Chapter 1, a State may formulate a reservation on certain provisions of a treaty (Vienna Convention, Article 2(1)(d)), within the limits imposed by Article 19 of the Vienna Convention. The effect of a reservation is to modify relations between the State making the reservation and other States party to the treaty to the extent of the reservation. When a State Party objects to a reservation made by another State but does not oppose “*the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation*” (Vienna Convention, Article 21(3)).

Reservations to human rights treaties are quite frequent, a situation that may negatively affect the overall acceptance and functioning of such treaties, e.g. the International Covenant on Civil and Political Rights (ICCPR) or the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

In response to that situation, in November 1994 the Human Rights Committee issued a General Comment, in accordance with its power under Article 40 of the ICCPR, criticizing the increasing number of reservations made by States to human rights treaties before consenting to ratify them.<sup>7</sup> After noting that, as of 1 November 1994, 46 out of 127 parties to the ICCPR had entered between them a total of 150 reservations, the Committee concluded that “[t]he number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties.” The Committee did acknowledge that reservations “serve a useful function” in that they enable States that might otherwise have difficulty guaranteeing all the rights in the Covenant to ratify it nonetheless. However, it stressed the desirability for States to accept the full range of obligations imposed by the treaty.

The problem here is that action against (excessive) reservations made by States Parties must primarily be taken by other States Parties. In that connection States will often consider much more than the mere object and purpose of the treaty in question. Politics do play an important role in the field of human rights, including in the area of reservations to human rights treaties. First of all, States readily allege interference in domestic affairs where international human rights norms (threaten to) assert influence at the national level. Second, an individual objection to the intentions of a State with reservations might well trigger a reciprocal response in the future in response to a reservation that the State now raising an objection might wish to make.

### **2.3.6 Important soft law instruments for law enforcement**

While treaties set out the fundamental rights that must be respected during law enforcement (such as the right to life or the prohibition of ill-treatment), soft law instruments complement these fundamental rights with more specific law enforcement standards, for instance on the use of force or detention. Most of those instruments offer guidance to States on the interpretation of certain treaty obligations, setting standards for the conduct of law enforcement officials in specific situations or stating principles for the treatment of specific categories or groups that fall within the scope of law enforcement responsibility, for example:

- Standard Minimum Rules for the Treatment of Prisoners (SMR), adopted by the First United Nations Congress on the Prevention of Crime and the

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<sup>7</sup> Human Rights Committee, General Comment No. 24, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994).

- Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council in 1957 and in 1977;
- Code of Conduct for Law Enforcement Officials (CCLEO), adopted by the General Assembly of the United Nations in 1979;
  - Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration), adopted by the General Assembly of the United Nations in 1985;
  - United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), adopted by the General Assembly of the United Nations in 1985;
  - Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), adopted by the General Assembly of the United Nations in 1988;
  - Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, in 1990;
  - Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly of the United Nations in 2005.

## **2.4 The United Nations and human rights**

### **2.4.1 Background information**

The UN Charter has effectively established human rights as a matter of international concern. The United Nations itself regards the promotion and protection of human rights as one of its principal purposes and embarked on this task through the extensive standard-setting exercise described in section 2.3. The promulgation of a multitude of international instruments relating to human rights was intended to clarify the human rights obligations of United Nations member States. At the same time, however, all those instruments require implementation as well as certain forms of monitoring and control over their application at the national level, which is where disputes over the interpretation of treaty obligations frequently arise. The description of the United Nations provided below will be limited to the description of those of its organs that are of direct and primary importance to the field of human rights. The mechanisms and machinery at their disposal to ensure promotion and protection of human rights are presented after that description.

### **2.4.2 Security Council and General Assembly**

The Security Council and the General Assembly are both principal organs of the United Nations, established in accordance with Article 7.1 of the UN Charter. Both have the capacity to establish such subsidiary organs as they deem necessary for the performance of their functions (UN Charter, Articles 22 and 29).

### 2.4.2.1 Security Council

The Security Council consists of fifteen members of the United Nations. The People's Republic of China, France, Russia, the United Kingdom and the USA are the Council's five permanent members. The other ten seats are allocated on a non-permanent basis for a term of two years (by the General Assembly), with due regard for the contribution of members of the United Nations to the maintenance of international peace and security and to the other purposes of the organization, as well as for equitable geographical distribution (UN Charter, Article 7(1) and 7(2)). The Security Council acts on behalf of member States and in order to ensure prompt and effective action by the United Nations and has primary responsibility for international peace and security. The member States *"agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"* (UN Charter, Article 25). The Security Council is the executive organ of the United Nations and works on a permanent basis.

The Security Council's voting procedure is stated in Article 27 of the UN Charter:

1. *Each member of the Security Council shall have one vote.*
2. *Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.*
3. *Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."*

One of the main problems with this voting procedure is that no clear distinction is made under the UN Charter as to what are to be considered *"procedural matters"* and *"all other matters."* This distinction is, of course, of great importance with regard to the "veto" granted to each of the permanent members under Article 27(3) of the UN Charter. Generally, the question of what is meant by *"procedural"* will be answered with reference to the UN Charter itself (N.B. the heading *"Procedure"* is given to various articles in Chapters IV, V, X and XIII). Furthermore, the rules of procedure of the Security Council give its President the power to rule a matter *"procedural,"* provided that such a ruling is supported by nine of its members.

As mentioned above, the primary responsibility of the Security Council lies in the area of international peace and security. The Security Council is obliged to work towards the pacific settlement of such international disputes that are likely to endanger international peace and security. However, should peaceful settlement fail or be impossible, the Security Council is able, under certain circumstances, to take enforcement action. The specific powers and authorities with regard to those two approaches are set out in Chapters VI

and Chapter VII respectively of the UN Charter. As to enforcement action, the determination (by the Council) of a “*threat to the peace, breach of the peace, or act of aggression*” under Article 39 of the UN Charter must precede the use of the enforcement powers under Articles 41 and 42. As seen in Chapter 1 with respect to international criminal tribunals, the competence and power of the Security Council have proved to be far-reaching in practice and certainly not limited to measures explicitly referred to in Articles 41 and 42 of the UN Charter.

Much has been said and written about the effectiveness of the Security Council in maintaining international peace and security. In the past, East-West tensions and other political factors often have prevented the Security Council from taking effective action because one (or more) of its permanent members made such action impossible by casting their veto.

Accordingly, until the end of the Cold War era, history can provide only very few examples of enforcement action instigated by the Security Council. However, since the end of that era, there have been an increasing number of such resolutions, as is shown by the following (non-exhaustive) list of examples:

- Afghanistan: resolution 1386, 20 December 2001, and resolution 1510, 13 October 2003;
- Bosnia: resolution 770, 13 August 1992;
- Central African Republic (CAR): resolution 1125, 6 August 1997;
- Chad/CAR: resolution 1778, 25 September 2007;
- Côte d’Ivoire: resolution 1464, 4 February 2003;
- Great Lakes/Democratic Republic of the Congo: resolution 1671, 25 April 2006;
- Haiti: resolution 1529, 29 February 2004;
- Iraq: resolution 687, 3 April 1991;
- Kosovo: resolution 1244, 10 June 1999;
- Liberia: resolution 1497, 1 August 2003;
- Libya: resolution 1973, 17 March 2011;
- Sierra Leone: resolution 1132, 8 October 1997;
- Somalia: resolution 794, 3 December 1992, and resolution 1744, 20 February 2007;
- Timor-Leste: resolution 1264, 15 September 1999.

Political obstruction of the Security Council’s work was also the reason why the General Assembly passed the Uniting for Peace resolution (3 November 1950). That resolution enables the Assembly to determine the existence of a “*threat to peace, breach of the peace, or act of aggression*” in those cases in which the Security Council fails (because of a lack of unanimity) to exercise its primary responsibility for the maintenance of international peace and security. A second consequence of the relative weakness of the Security

Council has been the development of powerful regional security systems outside the United Nations, such as NATO. The third development is that of “peacekeeping” operations that can, technically speaking, be set up under either Chapter VI or Chapter VII or under both.

#### 2.4.2.2 General Assembly

The General Assembly is the plenary organ of the United Nations, consisting of all member States, each with one vote and each with permission to have a maximum of five representatives in the General Assembly (UN Charter, Article 9). It is a deliberative body which proceeds via recommendation rather than binding decision. It cannot legislate directly for the member States. The powers of the General Assembly are stated in Chapter IV of the UN Charter and include the power to “*discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter*” (Article 10). Although this creates a general supervisory role for the Assembly, its powers as to the domain of the Security Council are limited to those instances in which the Council either requests the opinion of the General Assembly (Article 12(1)) or refers an issue to it (Article 11(2)), or to the implementation of the Uniting for Peace resolution. The General Assembly nonetheless has the right to discuss any questions relating to international peace and security, the principles of disarmament and the regulation of armaments (Article 11(1) and (2)). Where action is considered necessary the question must be referred to the Security Council by the General Assembly either before or after discussion.

The voting procedure of the General Assembly is laid down in Article 18 of the UN Charter. It consists essentially of one vote for each member, with decisions on “*important questions*” being taken by a two-thirds majority of the members present and voting, and decisions on “*other questions*” by a simple majority of the members present and voting. An indication as to the definition of “*important questions*” can be found in the remainder of Article 18(2), which stipulates that those questions shall include “*recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.*”

The General Assembly has the power to identify, by majority vote, “*additional categories of questions to be decided by a two-thirds majority.*” It is mainly because of the demonstrated inability of the Security Council during the Cold War era to

accomplish the purposes of the UN Charter and act in accordance with the principles enshrined within it that the General Assembly assumed more and more political power. The General Assembly sought to justify those developments by reference to those principles and purposes. In the process it did not necessarily abide by the strict legal interpretation of articles of the UN Charter.

### 2.4.3 The Economic and Social Council

Like the Security Council and the General Assembly, the Economic and Social Council (ECOSOC), established under Article 7 of the UN Charter, is one of the principal organs of the United Nations. ECOSOC is composed of 54 members, elected by the General Assembly by “staggered” elections so as to ensure some continuity. In those elections an attempt is always made to represent a variety of social, economic, cultural and geographical interests. Unlike the Security Council, ECOSOC does not recognize permanent membership as a right, although by tacit agreement the five major powers are always elected. It has the power to set up “*commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions*” (UN Charter, Article 68). ECOSOC’s voting procedure is by simple majority vote of members present and voting, with each of the members having one vote. It operates under the responsibility of the General Assembly (UN Charter, Article 60).

Articles 62 to 66 of the UN Charter set out the functions and powers of ECOSOC, which include the initiation of “*studies and reports with respect to international economic, social, cultural, educational, health and related matters*” and the making of recommendations “*with respect to any such matters to the General Assembly, to the Members of the United Nations and to the specialized agencies concerned.*” ECOSOC may also “*make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all*” (UN Charter, Article 62). It “*may prepare draft conventions for submission to the General Assembly*” on matters falling within its competence and it may call international conferences on those matters.

Other main functions of ECOSOC are to assist other United Nations organs, States and specialized agencies, to coordinate work with and between the specialized agencies, and to maintain relations with other inter-governmental and non-governmental organizations. Under Article 68 of the UN Charter, ECOSOC has established a number of subsidiary bodies required for the performance of its functions. These subsidiary bodies include:

- Commission on Crime Prevention and Criminal Justice;
- Commission on Human Rights; the Commission on Human Rights was established by ECOSOC resolution 5(l) of 16 February 1946. The Commission met in annual and, when required, special sessions and reported to the ECOSOC. The Commission on Human Rights had its 62nd and final session



on 27 March 2006; its work has since been continued by the Human Rights Council as a subsidiary organ of the General Assembly (see section 2.4.4);

- Commission on the Status of Women;
- Committee on Economic, Social and Cultural Rights.

#### **2.4.3.1 The Commission on Crime Prevention and Criminal Justice**

Following a recommendation of the General Assembly, ECOSOC established the Commission by virtue of its resolution 1992/1 (Establishment of the Commission on Crime Prevention and Criminal Justice). The Commission's mandates and priorities were defined in ECOSOC resolution 1992/22 (Implementation of General Assembly resolution 46/152 concerning operational activities and coordination in the field of crime prevention and criminal justice) and include:

- international action to combat national and transnational crime, including organized crime, economic crime and money laundering;
- promotion of the role of criminal law in protecting the environment;
- crime prevention in urban areas, including juvenile crime and violence; and
- improvement of the efficiency and fairness of criminal justice administration systems.

An important example of the work of the Commission is its drafting of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF), which was adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba, in 1990.

#### **2.4.3.2 The Commission on the Status of Women**

The Commission on the Status of Women was established by ECOSOC in 1946 and is composed of representatives from 45 United Nations member States, who are each elected by ECOSOC for four-year terms. Its functions are to prepare recommendations and reports for ECOSOC on the promotion of women's rights in political, economic, civil, social and educational fields. It may also make recommendations to ECOSOC on problems in the field of women's rights that require immediate attention. Although the Commission has a procedure for receiving confidential communications on human rights violations, it is not very often used. This is mainly due to the fact that the procedure as such is not very efficient, nor has it been very well publicized.

#### **2.4.4 The Human Rights Council**

In its 60th session, the General Assembly of the United Nations adopted resolution A/RES/60/251 for the creation of the Human Rights Council as a subsidiary organ of the General Assembly (assuming the role and responsibilities of the Commission on Human Rights).

The Council comprises 47 members, who are each elected for a three-year term of office. Membership is distributed among the United Nations regional groups: 13 for Africa, 13 for Asia, 6 for Eastern Europe, 8 for Latin America and the Caribbean, and 7 for the Group of Western European and other States. Its office, the Bureau, is composed of the President of the Human Rights Council and four Vice-Presidents and deals with procedural and organizational matters. An Advisory Committee, composed of 18 experts, functions as a think-tank for the Council, providing expertise as requested by the Council. It replaces the Sub-Commission on the Promotion and Protection of Human Rights, a subsidiary body of the Commission on Human Rights.

## THE FUNCTIONING OF THE HUMAN RIGHTS COUNCIL

(See <http://www.ohchr.org/>)

### The Universal Periodic Review

This process is used to assess the human rights situation in each of the 192 member States of the Human Rights Council over a four-year period (48 countries each year). Groups of three States, serving as rapporteurs, are responsible for conducting the review process, which is based on reports from different sources, including non-governmental organizations (NGOs).

### Complaint procedure

A new complaint procedure, adopted on 18 June 2007, was established to *“address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.”* This procedure – illustrated in the diagram entitled *“Complaint Procedure”* – replaces the previous mechanism, established under resolution 1503 of 1970. The confidentiality of its work is intended to enhance cooperation with the State concerned.

Two distinct working groups – the Working Group on Communications and the Working Group on Situations – have a mandate to examine communications and to bring to the attention of the Council *“consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms.”* Communications on such violations may be submitted by individuals and groups, including non-governmental organizations (NGOs). Communications that are not *“manifestly ill-founded”* are transmitted to the State concerned. Once feedback has been received from the State, the communication is then passed on to the Working Group on Communications.

### Working Group on Communications (WGC)

This group is *“designated by the Human Rights Council Advisory Committee from among its members for a period of three years (mandate renewable once). It consists of five independent and highly qualified experts and is geographically representative of the five regional groups.”*

*The Working Group meets twice a year for a period of five working days to assess the admissibility and the merits of a communication, including whether the communication alone or in combination with other communications, appears to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms. All admissible communications and recommendations thereon are transmitted to the Working Group on Situations."*

### **Working Group on Situations (WGS)**

This group "comprises five members appointed by the regional groups from among the States members of the Council for the period of one year (mandate renewable once). It meets twice a year for a period of five working days in order to examine the communications transferred to it by the Working Group on Communications, including the replies of States thereon, as well as the situations which the Council has already taken up under the complaint procedure. The Working Group on Situations, on the basis of the information and recommendations provided by the Working Group on Communications, presents the Council with a report on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and makes recommendations to the Council on the course of action to take." Subsequently, the Council must take a decision concerning each situation thus brought to its attention.

### **Special procedures**

In continuation of the system of special procedures employed by the former Commission on Human Rights, Special Rapporteurs, Independent Experts or special working groups are established to monitor human rights violations in specific countries or to examine global human rights issues. There are six working groups: on people of African descent, on arbitrary detention, on enforced or involuntary disappearances, on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, on the issue of human rights and transnational corporations and other business enterprises, and on the issue of discrimination against women in law and in practice (see <http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx> for a list of the different special procedures).

## COMPLAINT PROCEDURE

Individual communications regarding consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms received by the Office of the High Commissioner for Human Rights (OHCHR) under Council resolution 5/1 in accordance with General Assembly resolution 60/251.

The Working Group on Communications screens out all inadmissible communications, including those that are manifestly ill-founded or anonymous.

Communication transmitted to the State concerned to obtain its views.

Case dismissed

The Working Group on Situations presents the Council with a report on the violations and makes recommendations to the Council on the course of action to be taken.

Human Rights Council

Case dismissed

### Possible measures

- To discontinue reviewing the situation when further consideration or action is not warranted.
- To keep the situation under review and request the State concerned to provide further information within a reasonable period of time.
- To keep the situation under review and appoint an independent and highly qualified expert to monitor the situation and report back to the Council.
- To discontinue reviewing the matter under the confidential complaint procedure in order to take up public consideration of the same.
- To recommend that OHCHR provide the State concerned with technical cooperation, capacity-building assistance or advisory services.

### Criteria of admissibility of communication relating to violation of human rights and fundamental freedoms

- It is not manifestly politically motivated and its object is consistent with the UN Charter, the UDHR and other applicable instrument in the field of human rights law;
- It gives a factual description of the alleged violations, including the rights which are allegedly violated;
- Its language is not abusive. However, such communications may be considered if they meet the other criteria for admissibility after deletion of the abusive language;
- It is submitted by a person or a group of persons claiming to be victims of violations of human rights, or by any person or group of persons, including NGOs acting in good faith and claiming to have direct and reliable knowledge of the violations concerned. Nonetheless, reliably attested communications shall not be inadmissible solely because the knowledge of the individual authors is second-hand, provided that they are accompanied by clear evidence;
- It is not exclusively based on reports disseminated by mass media;
- It does not refer to a case that appears to reveal a consistent pattern of gross and reliably attested violations of human rights already being dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights;
- Domestic remedies have been exhausted, unless it appears that such remedies could be ineffective or unreasonably prolonged.

### 2.4.5 The Office of the High Commissioner for Human Rights

The High Commissioner for Human Rights is the principal human rights official of the United Nations. The post was created in 1993 by the General Assembly, which conferred on the High Commissioner "*principal responsibility for United Nations human rights activities under the direction and responsibility of the Secretary-General*" (General Assembly resolution 48/141, 1993).

The High Commissioner has far-reaching powers that permit him or her to address any contemporary human rights problem and to be actively engaged in efforts to prevent human rights violations around the world.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) is mandated to promote and protect all human rights. It also supports the work of the United Nations human rights mechanisms, such as the Human Rights Council and the core treaty bodies set up for monitoring State Parties' compliance with international human rights treaties, promotes the right to development, coordinates United Nations human rights education and public information activities, and strengthens human rights across the United Nations system.

The main tasks of OHCHR are to:

- serve as the Secretariat of the Human Rights Council and its Advisory Committee;
- provide support for the various investigatory, monitoring and research procedures established by the General Assembly and the Council;
- service the treaty-monitoring bodies;
- conduct research into various human rights topics as requested by the Council and the Advisory Committee;
- implement a programme of technical assistance to give governments help to implement human rights at the national level (through, *inter alia*, training, legislative assistance and information dissemination).

OHCHR is located in Geneva. It has a liaison office in New York and an increasing number of temporary field offices which are established to monitor the human rights situation in a particular country and/or to provide technical assistance for its government.

### 2.4.6 Monitoring mechanisms and machinery

Besides the Human Rights Council, which is based on the UN Charter, there are a number of treaty-based bodies in charge of monitoring the implementation of specific international human rights treaties.

There are 10 human rights treaty monitoring bodies with the following tasks:

- Committee Against Torture, which monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment established under the Optional Protocol to the Convention against Torture (OPCAT), which has an operational function, that of visiting places of detention in State Parties;
- Committee on Economic, Social and Cultural Rights, established under ECOSOC resolution 1985/17, which monitors implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol (OP/ICESCR);
- Committee on the Elimination of Discrimination Against Women, which monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol (OP/CEDAW);
- Committee on the Elimination of Racial Discrimination, which monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- Committee on Enforced Disappearances, which monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (CPEd);
- Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, which monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW);
- Committee on the Rights of Persons with Disabilities, which monitors implementation of the Convention on the Rights of Persons with Disabilities (ICRPD);
- Committee on the Rights of the Child, which monitors implementation of the Convention on the Rights of the Child (CRC) and its Optional Protocols;
- Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocols.

Each Committee consists of a number of independent experts (between 10 and 23, depending on the treaty). They are elected by the States party to the relevant instrument.

All aforementioned instruments make specific reference to a system of State-Party reporting. This requires the States party to the treaty to submit reports on the measures that they have taken to give effect to the provisions of the treaty and on any progress made in this regard. Each treaty specifies a time frame and periodicity for these reports.

Five instruments contain provisions allowing States Parties to make complaints about treaty violations, namely the ICCPR, CERD, CAT, ICRMW and CPED.

Six instruments (Optional Protocol to the ICCPR, CERD, CAT, Optional Protocol to the ICRPD, CPED and the Optional Protocol to the ICESCR) also provide for individual complaints about alleged violations of rights by States Parties. The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families will also be able to consider individual complaints or communications on violations as soon as 10 State parties have accepted this procedure (as of 30 September 2013: only 3).

Finally, the treaty monitoring bodies may provide interpretations of human rights provisions with regard to thematic issues or working methods. These interpretations are published as “General Comments” or “General Recommendations” of the treaty-monitoring body. The Committee on the Rights of Persons with Disabilities and the Committee on Enforced Disappearances have not yet issued such comments or recommendations. The Committee on Migrant Workers published its first “General Comment” in February 2011, on the issue of migrant domestic workers.

## **2.5 Regional arrangements**

### **2.5.1 Background information**

Thus far only the global instruments, mechanisms and machinery in the field of human rights have been considered. This does not provide a complete picture, as various regional systems and arrangements in that field have also been established and deserve closer examination. Although the responsibilities of regional institutions such as, the African Union (AU), the Council of Europe, the European Union or the Organization of American States (OAS) clearly extend beyond human rights, this Manual will confine itself to exploring their main features only insofar as they relate to human rights. It is important for instructors in human rights to be familiar with the existing regional human rights instruments to which a State can be party at the same time as being party to the global instruments referred to in the previous section

### **2.5.2 Africa**

The Organization of African Unity (OAU) was established in 1963 as a regional intergovernmental organization and had 53 member States. It was replaced by the African Union (AU) in 2001, still with 53 members. The most important decisions of the AU are made by the Assembly of the African Union, a biannual meeting of the heads of State and government of its member States. The AU’s secretariat, the African Union Commission, is based in Addis Ababa, Ethiopia.

The African Union comprises political and administrative bodies. The highest decision-making organ of the African Union is the Assembly, which is composed of all the heads of State or heads of government of the AU member

States. The AU representative body is the Pan-African Parliament, which has 265 members. They are elected by the national parliaments of the AU member States. Other political institutions of the AU include the Executive Council (made up of ministers or authorities designated by the governments of member States), which prepares decisions for the Assembly, the Permanent Representatives Committee (made up of the permanent representatives of the member States of the AU and other duly accredited plenipotentiaries of member States resident in Addis Ababa, AU headquarters), and the Economic, Social and Cultural Council, a civil society consultative body.

The African Charter on Human and Peoples' Rights (ACHPR) was adopted by the Organization of African Unity (OAU) in 1981 and entered into force in 1986. The ACHPR has some characteristics that make it quite different from most other human rights treaties: the Charter proclaims not only rights (e.g. the right to life, liberty and security of the individual) but also duties (e.g. duties towards the family and society, the duty to "*respect and consider fellow beings without discrimination*") and codifies not only individual rights but also rights of peoples (equality, the right to existence, the right to selfdetermination, etc.). In addition to civil and political rights, the ACHPR also contains economic, social and cultural rights.

The ACHPR (Article 30) provided for the creation of the African Commission on Human and Peoples' Rights hereinafter referred to as the Commission). The Commission is based in Banjul, Gambia, and represents a mechanism for monitoring the implementation of the ACHPR by the State Parties. It has been operating since 2 November 1987.

The Commission's mandate is to promote human rights issues but it can also receive communications from State Parties, NGOs with observer status before the Commission, or individuals regarding alleged human rights violations perpetrated by a State Party. The procedures to be followed are mandatory for the States Parties. The competence to consider inter-State complaints rests with the Commission; with respect to other communications, the Commission may decide, pursuant to Article 55 of the ACHPR, by majority vote of its 11 members which of those communications it will consider on the basis of the criteria of admissibility stipulated in Article 56 of the ACHPR.

Other competences of the Commission include examining the reports of the States on the legislative or other measures taken with a view to giving effect to the protection of the rights guaranteed by the ACHPR and appointing Special Rapporteurs on a specific country or subject. The Commission also has jurisdiction for the interpretation of the provisions of the ACHPR in response to a request by a State party, an AU institution or an African organization recognized by the AU.



The 1997 Protocol to the ACHPR provided for the creation of an African Court on Human and Peoples' Rights. In a parallel process in 2006, the African Union established the African Court of Justice as the "*principal judicial organ of the Union*" with authority to rule on disputes over the interpretation of AU treaties. In 2008 a further Protocol merged the two courts into the African Court of Justice and Human Rights. Provision was made for the Court to have two chambers, one for general legal matters and one for rulings on the human rights treaties.

The relationship between the Court and the Commission is described in the Protocol establishing the Court (Protocol on the Statute of the African Court of Justice and Human Rights). It gives the Court a complementary role with regard to the Commission. In particular, the Commission is entitled to submit to the Court cases of alleged human rights violations (Statute, Article 30(b), annexed to the Protocol); the Commission may also ask the Court to give an advisory opinion (Article 53). The Court shall also establish its own rules, with due consideration being given to the complementarity between the Commission and the Court (Article 27(1)). However, all this has yet to be put in place and meetings on the harmonization of relations and work between the two institutions are still ongoing.

Furthermore, as the Protocol has not yet been ratified by a sufficient number of States, the African Court on Human and Peoples' Rights continues to operate formally but, in contrast to the African Commission on Human and Peoples' Rights, almost no real activity can be noted.

Besides the ACHPR, the African Union has adopted the following human rights documents:

- OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted in 1969, entered into force in 1974);
- African Charter on the Rights and Welfare of the Child (adopted in 1990, entered into force in 1999);
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted in 2003, entered into force in 2005);
- African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention, adopted in 2009, entered into in force in 2012).

### **2.5.3 The Americas**

The inter-American human rights system has two distinct legal sources. One has evolved from the Charter of the Organization of American States (OAS). The other is based on the American Convention on Human Rights (ACHR).

The OAS has 35 members, comprising all sovereign States of the Americas. It performs its functions through various organs, including the General

Assembly, the Meeting of Consultation of Ministers of Foreign Affairs and the Permanent Council. The General Assembly meets once a year in regular session and as many times in special sessions as necessary. It is the supreme policy-setting organ of the OAS. Each member State is represented in it and has one vote. The Meeting of Consultation of Ministers of Foreign Affairs is the forum in which problems of an urgent nature are discussed; it can be convened by the Permanent Council. The latter, a plenary body subordinate to the Assembly and the Meeting of Consultation, is composed of the permanent representatives of the member States of the OAS. The Permanent Council's role includes supervision of the Secretariat, cooperation with the United Nations and other international organizations, the fixing of budget quotas and the formulation of statutes for its own subsidiary organs.

The OAS human rights system is based on the 1948 OAS Charter and its subsequent amendments of 1967, 1985, 1992 and 1993, which had a major impact in the field of human rights. The amendments led to the establishment of the Inter-American Commission on Human Rights (IACHR) as a Charter-based organ, its principal function being *"to promote the observance and protection of human rights"* in the Americas (OAS Charter, Article 106). They also strengthened the normative character of the American Declaration of the Rights and Duties of Man, the instrument which embodies the authoritative interpretation of the *"fundamental rights of the individual"* proclaimed in Article 3(l) of the OAS Charter. In an advisory opinion, the Inter-American Court of Human Rights found that *"for the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. [...] [T]he American Declaration is for these States a source of international obligations related to the Charter of the Organization."*<sup>8</sup> The Court found strong support for its argumentation in the human rights practice of the OAS and its member States, which it reviewed in considerable detail in its advisory opinion.

With the entry into force of the American Convention on Human Rights (ACHR), the expanding roles and responsibilities of the IACHR (provided for by the Convention) required the OAS General Assembly to adopt a new Statute for the reconstituted Commission. The Commission has retained the powers and authorities assigned to it by the OAS Charter, which is binding on all member States, and has additional powers and competences under the Convention, which are binding only on the States party to that instrument. By virtue of its Charter-based competences the Commission may conduct country studies and on-site investigations and receive individual petitions alleging violations of rights stated in the Declaration. In accordance with the Convention it can examine inter-State complaints and individual petitions.

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8 Advisory Opinion OC-10/89, 14 July 1989, Inter-American Court of Human Rights, Series A. No. 10 (1989).

Acceptance of the Commission's jurisdiction for individual petitions is mandatory. However, for its jurisdiction over inter-State complaints, additional acceptance by the States concerned is required.

Cases may be referred to the Inter-American Court of Human Rights by both the Commission and States concerned whenever a friendly settlement cannot be reached or if the State does not comply with the Commission's recommendations. Individuals do not have direct access to the Court but they may refer cases to the Commission, which may then decide to submit the case to the Court. The Court has contentious jurisdiction and the jurisdiction to give advisory opinions (ACHR, Article 64). In contentious cases, the judgment of the Court is final and not subject to appeal. States party to the Convention undertake to "*comply with the judgment of the Court in any case to which they are parties*" (ACHR, Article 68(1)). The Court is empowered to award financial compensation for injured rights and/or freedoms, as well as to order remedy of the situation that constituted the breach of such right or freedom (ACHR, Article 63(1)).

The ACHR was adopted in 1969 and entered into force on 18 July 1978. It has been ratified by 24 of the 35 members of the OAS (the USA, Canada and several anglophone Caribbean States have not ratified it). The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights oversee the compliance of States Parties with the provisions of the Convention. The ACHR is the only major human rights treaty that expressly authorizes the issuance (by the Court) of temporary restraining orders (see Article 63(2)) in cases pending before it and in cases that have been lodged with the Commission but not yet referred to the Court. This authority is limited to "*cases of extreme gravity and urgency, and when necessary, to avoid irreparable damage to persons.*"

Other important human-rights-related legal instruments of the OAS include:

- Inter-American Convention to Prevent and Punish Torture (adopted in 1985, entered into force in 1987);
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, adopted in 1988, entered into force in 1999);
- Protocol to the American Convention on Human Rights to Abolish the Death Penalty (adopted in 1990, entered into force in 1991);
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará, adopted in 1994, entered into force in 1995);
- Inter-American Convention on the Forced Disappearance of Persons (adopted in 1994, entered into force in 1996);
- Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities (adopted in 1999, entered into force in 2001);

- Principles and Best Practices on the Protection of Persons deprived of Liberty in the Americas (approved by the Commission in March 2008).

#### **2.5.4 The League of Arab States**

The Pact that established the League of Arab States (Arab League) entered into force in 1952 and formally established a regional arrangement within the meaning of Chapter VIII of the UN Charter (cooperation between sovereign States aiming for regional peace and security, in accordance with the Charter's principles). The League, composed of 22 member States, has very broad aims. The main aim is to coordinate the political programme of members *"in such a way as to effect real collaboration between them, to preserve their independence and sovereignty"* (Pact, Article 2). Consequently, the main areas of cooperation are of an economic nature or relate to financial affairs, customs, currency, agriculture, communications, industry, and social and health matters.

The League has a Council which comprises all member States and aims for consensus decision-making as a general rule. In the case of a consensus decision, members are obliged to implement any such decision within the framework of their respective constitutions. A consensus decision is required for issues of peace and security threatening the League. Other issues (such as budget, personnel, etc.) can be decided by majority vote. It also has a General Secretariat; the Secretary General is elected by a two-thirds majority vote of the Council.

The Arab Charter on Human Rights (ArabCHR) was adopted by the Council in 2004.<sup>9</sup> In its preamble, it affirms the principles contained in the UN Charter, the UDHR, the ICCPR, the ICESCR and the Cairo Declaration on Human Rights in Islam. It has been in force since 15 March 2008 and includes the right to liberty and security of person, equality of persons before the law, protection against torture, the right to own private property, freedom of religious practice and freedom of association and peaceful assembly.

There is also a monitoring mechanism established in the form of a seven-member Human Rights Committee to consider States' reports (ArabCHR, Article 45). The members of the Committee are elected by secret ballot by the States Parties and must be nationals of the State Parties. However, they serve in their personal capacity and must be independent and impartial. State Parties are required to submit regular reports to the Secretary General on the measures taken to give effect to the provisions of the Charter; the Secretary General transmits them to the Committee for discussion, comment and

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<sup>9</sup> The Arab Charter on Human Rights is a revised version of the Charter that had already been adopted by the Council in 1994. However, the 1994 version was extremely controversial and seven governments issued objections to it. In the end, it was never ratified by any member State of the Arab League and therefore never entered into force.

recommendations. The Committee's reports, concluding observations and recommendations are public and must be widely disseminated.

### **2.5.5 Asia and the Pacific**

"Asia and the Pacific" is a UN-defined geographical region without a regional political grouping (consequently without its own human rights system) such as the OAS in the Americas, the Council of Europe, the European Union or the African Union. In the Americas, Europe and Africa, it is the regional organization that has given the impetus for the creation and supervision of a human rights system. An equivalent organization does not exist in the vast and diverse Asia-Pacific region.

However, different multilateral platforms for dialogue continue to emerge.

#### **2.5.5.1 ASEAN**

The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967. The member States of the Association are Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam. Its aims include the acceleration of economic growth, social progress and cultural development among its members, the promotion of peace and stability in the region and the provision of opportunities for member countries to discuss differences peacefully. ASEAN's statutory document is its Charter (ASEAN Charter).

The ASEAN organs are the Summit (ASEAN Charter, Article 7), the Coordinating Council (Article 8), the Community Councils (Political-Security Community Council, Economic Community Council and Socio-Cultural Council (Article 9)), Sectoral Ministerial Bodies (Article 10), the Secretary-General and the ASEAN Secretariat (Article 11), the Committee of Permanent Representatives (Article 12), the National Secretariats (Article 13), the ASEAN Human Rights Body (Article 14) and the ASEAN Foundation (Article 15).

Without enumerating specific human rights, the ASEAN Charter states as one of its objectives the promotion and protection of human rights and fundamental freedoms (Article 1(7)). Article 14 of the ASEAN Charter provides for the creation of an ASEAN human rights body. The Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (AICHR) were adopted in 2009 and the AICHR was formally established during the ASEAN Summit in the same year. The purposes of the AICHR include, *inter alia*, the following:

*"To promote and protect human rights and fundamental freedoms of the peoples of ASEAN;*

*To uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity;*

*To contribute to the realisation of the purposes of ASEAN as set out in the ASEAN Charter.” (Terms of Reference)*

The AICHR is an inter-governmental consultative body and an integral part of the ASEAN organizational structure and is based on the principles of consultation, consensus and non-interference. It is, *inter alia*, mandated to develop strategies for the promotion and protection of human rights and fundamental freedoms, to develop an ASEAN Human Rights Declaration and to provide advisory services (see Terms of Reference).

Furthermore, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) was inaugurated on 7 April 2010. The ACWC was established *“to promote and protect the human rights and fundamental freedoms of women and children in ASEAN.”* The functions of the ACWC are, *inter alia*, *“to promote the implementation of international instruments, ASEAN instruments and other instruments related to the rights of women and children and to develop policies, programs and innovative strategies to promote and protect the rights of women and children to complement the building of the ASEAN Community.”* It also sets out to *“promote public awareness and education of the rights of women and children in ASEAN.”* On the international front, all ASEAN member States have ratified and are parties to the CEDAW and the CRC.

### **2.5.5.2 ASEAN Regional Forum (ARF)**

The ASEAN Regional Forum (ARF) is a platform for formal, official, multilateral dialogue in the Asia-Pacific region. The ARF’s objectives are to foster dialogue and consultation and to promote confidence-building and preventive diplomacy in the region. The ARF met for the first time in 1994. It has 27 participants: all the ASEAN members, Australia, Bangladesh, Canada, the People’s Republic of China, the European Union, India, Japan, Mongolia, New Zealand, North Korea, South Korea, Pakistan, Papua New Guinea, Russia, Sri Lanka, Timor-Leste and the United States.

The ARF organizes regular seminars, workshops and conferences on a wide range of subjects, many of which relate to law enforcement (e.g. crime prevention, small arms, etc.). It may influence related policies of the participating countries or the AICHR but it is not a body working on human rights issues.

## **2.5.6 Europe**

### **2.5.6.1 Council of Europe**

The Council of Europe (not to be confused with the European Union or one of its major institutions, the European Council, see below), was founded in 1949 with the mission to develop throughout Europe a democratic and legal area with respect for human rights, democracy and the rule of law. It now has 47 member countries (European States).

In 1950, the Council of Europe promulgated the European Convention for the Protection of Human Rights and Fundamental Freedoms, which came into force in 1953. Following amendment in 2010, the Convention is now referred to as the European Convention on Human Rights (ECHR).<sup>10</sup> All member States of the Council of Europe are required to be party to the ECHR and subject to the jurisdiction of the Court.

The ECHR created two important bodies for the implementation of human rights and fundamental freedoms, the European Commission of Human Rights and the European Court of Human Rights.

The European Commission of Human Rights was a preliminary panel to which individuals had to apply. In November 1998 the European Court of Human Rights was established as a permanent body. The Commission was subsequently dissolved in 1999. Individuals may now apply directly to the Court.

### **Commissioner for Human Rights**

The objective, mandate and tasks of the Commissioner for Human Rights are set forth in Resolution (99) 50 on the Council of Europe Commissioner for Human Rights. According to this resolution (Article 3), the Commissioner is mandated specifically to:

- “(a) promote education in and awareness of human rights in the member States;*
- (b) contribute to the promotion of the effective observance and full enjoyment of human rights in the member States;*
- (c) provide advice and information on the protection of human rights and prevention of human rights violations [...];*
- (d) facilitate the activities of national ombudsmen or similar institutions in the field of human rights;*
- (e) identify possible shortcomings in the law and practice of member States concerning the compliance with human rights [...].”*

The Commissioner shall encourage measures intended to make improvements in the area of human rights. The Commissioner’s Office cannot take up individuals’ complaints. However, the Commissioner can draw conclusions and take more general initiatives on the basis of information about violations of individual human rights.

### **European Court of Human Rights**

The Court currently has 47 judges (equal to the number of member States of the Council of Europe). They are elected by the Parliamentary Assembly of the Council of Europe for a nine-year term and may not be re-elected. While

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<sup>10</sup> The European Convention on Human Rights (ECHR) does not contain provisions on economic, social and cultural rights; these are laid down in the European Social Charter and its Additional Protocol.

election is in relation to each of the State Parties, there are no nationality requirements for judges, i.e. a national of one country may be elected on behalf of another country. The judges are nonetheless not considered as representatives of a specific country but are to act impartially.

The Court was established to *“ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”* (ECHR, Article 19). Any High Contracting Party (i.e. States Parties) may refer to the Court *“any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party”* (ECHR, Article 33). The Court may also *“receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right”* (ECHR, Article 34).

At the request of the Committee of Ministers, the Court may also *“give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto”* but not on questions relating to *“the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto”* or on *“any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention. [...] Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee”* (ECHR, Article 47).

Other important treaty and non-treaty instruments of the Council of Europe that are relevant to the concerns of this Manual are as follows:

- European Convention on the Legal Status of Migrant Workers (adopted in 1977, entered into force in 1983);
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted in 1987, entered into force in 1989);
- European Social Charter (adopted in 1961, revised in 1996; the revised version entered into force in 1999);
- European Code of Police Ethics (Committee of Ministers of the Council of Europe, adopted in 2001);
- European Prison Rules (Committee of Ministers of the Council of Europe, adopted in 2006).

### **2.5.6.2 European Union**

The European Union (EU) is an economic and political union of 28 member States created under the Treaty of Lisbon of 2007 (entry into force 1 December 2009). Its creation is the result of a process that started in 1951 with the



establishment of the European Coal and Steel Community. The creation of the European Economic Community (1957 – Treaty of Rome) and of the European Community (1993 – Treaty of Maastricht) were other significant steps towards the establishment of the EU.

The EU currently has seven institutions, the European Commission (the executive body of the EU comprising 28 commissioners), the European Parliament (directly elected every five years by EU citizens), the Council of the European Union (generally referred to as the Council and comprising the ministers of the member States), the European Council (comprising the heads of State or government of the EU member States; not to be confused with the Council of Europe), the Court of Justice of the European Union (reviews the legality of the acts of the EU institutions, ensures that member States comply with obligations under the treaties and, at the request of national courts and tribunals, interprets EU law), the European Central Bank (defines and implements the monetary policy of the euro-area member States) and the European Court of Auditors (audits EU finances).

In 2000, the European Parliament, the EU Council and the European Commission proclaimed the Charter of Fundamental Rights. However, its legal status remained unclear. It was not until 2009 that it was given legal force by virtue of the Treaty of Lisbon, i.e. making it as binding an instrument as any other EU treaty. It covers political, social and economic rights for EU citizens and residents and enshrines them in EU law. It obliges the EU to act and legislate in compliance with the Charter. Member States must act and legislate in accordance with the Charter when implementing EU law. However, some member States (the Czech Republic, Poland and the United Kingdom) obtained a Protocol that contains certain restrictions as to the legal status and/or full application of the Charter in those countries.

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**Part II**

**LAW  
ENFORCEMENT  
FUNCTION AND  
RESPONSIBILITIES**

## CHAPTER 3 OUTLINE

- 3.1 Introduction
- 3.2 Law enforcement and human rights
- 3.3 Law enforcement responsibilities and powers
- 3.4 Ethics in law enforcement
  - 3.4.1 The relevance of ethics in law enforcement
  - 3.4.2 Personal ethics, group ethics, professional ethics
- 3.5 Law enforcement and international soft law standards
  - 3.5.1 Code of Conduct for Law Enforcement Officials (CCLEO)
  - 3.5.2 Basic Principles on the Use of Force and Firearms (BPUFF)
- 3.6 Orders, procedures and sanctions in law enforcement
- 3.7 Selected references

## KEY LEGAL DOCUMENTS

### Treaty law

- International Covenant on Civil and Political Rights (ICCPR, adopted in 1966, entered into force in 1976)

### Non-treaty law

- Code of Conduct for Law Enforcement Officials (CCLEO, adopted in 1979)
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF, adopted in 1990)

# CHAPTER 3

## LAW ENFORCEMENT ORGANIZATION, CONCEPTS AND GOVERNING PRINCIPLES

### 3.1 Introduction

Law and order, peace and security are matters of State responsibility and the need for enforcement of national laws, in terms of ensuring respect for the law and of consequences for offences against those laws, is probably as old as the law itself. However, the nature, structure and organization of law enforcement agencies vary considerably throughout the world.

In the majority of States the law enforcement bodies are civilian in origin and nature and are usually attached to the Ministry of the Interior or of Justice. Other States entrust law enforcement responsibility to military or paramilitary bodies, which operate under the responsibility of the Ministry of Defence.

Structure and organization will also depend on the political organization of the State. In a centralized State the law enforcement body will usually be an equally centralized monolithic body with a vertical chain of command extending from the top central level to the lowest local level. In a federal State, there are usually several structures each with their own lines of command: at federal level, at regional/State level and sometimes even at municipal level. This often goes hand in hand with decentralized legislative powers and hence different laws governing the responsibilities and powers of the different structures at the federal, regional/state and municipal level.

In addition, States may choose either to have one main law enforcement agency or to create a number of specialized structures (e.g. border guards, interior troops, special intervention forces in charge of public order), which may even be accountable to different government ministries.

Finally, there are many different concepts or philosophies of law enforcement or "policing." These may be evident from the choice of terminology, i.e. calling the relevant body a "force" or a "service." Consequently, the structure may be very top-down oriented and hierarchical or it may try to establish a close link to the local population.

There are numerous policing models, such as "community policing," "problem-oriented policing" and "intelligence-led policing" to name but a few, and different models can also be combined or mixed. A closer look at the practical reality will always be needed in order to assess whether the name given to the model effectively corresponds to the policing concept in a country. The concept of "community policing," for instance, is open to very varying interpretations.

Sometimes greater visible patrolling in the streets may be called “community policing,” while the more sophisticated concept of “community policing” calls for the establishment of a partnership between the local community and the police, the two parties combining their efforts to identify existing concerns and challenges and to find solutions.

There is not one single “right” policing model. The concept, structure and organization of the police agency are the result of choices made by the State authorities. Moreover, it cannot be assumed that certain policing models are more likely to be human rights compliant than others. This will always depend on the practical implementation of the concept. Even in “community policing,” human rights violations can frequently occur, while a hierarchical top-down concept of policing can comply fully with human rights law, if respect for the rule of law is ensured.

It is not within the scope of this Manual to comment on the different structures, models or philosophies of law enforcement. Whatever the choices made by a country’s legislative and executive authorities, every effort must be made to ensure that law enforcement is carried out in such a way as to comply with the State’s obligations under international human rights law.

### **3.2 Law enforcement and human rights**

The relationship between international law on the one hand and law enforcement – based on national law – on the other requires explanation. The obligations of States under international law begin with the adaptation of national legislation to the provisions of the treaties concerned. Responsibility, however, does not end there. State practice vis-à-vis the people in its territory must be seen to be both aware and respectful of requirements under international law (irrespective of the actual status of incorporation into national legislation).

More precisely, the obligations of States under international human rights law are often broadly categorized as follows:

- The duty to respect, i.e. the duty not to violate human rights and not to impose more restrictions of rights than necessary to fulfil its obligations as a State and to protect the rights of others;
- The duty to protect, i.e. to protect, to the extent possible, all persons against violations of rights by others or by otherwise dangerous situations;
- The duty to ensure and to fulfil human rights, i.e. to provide, to the extent possible, all persons with basic services and living circumstances that allow them full enjoyment of their rights;
- The duty not to discriminate, i.e. the duty to ensure at all times equal treatment of all persons before the law.



Law enforcement officials form one group of State actors who are expected to observe these State obligations under international law. They are required to promote, protect and respect the human rights of all people without any adverse distinction. Limitations to personal rights and freedoms can derive only from limitations inherent in the right itself or from lawful limitations and/or derogations permissible in times of emergencies. They must never be the result of unlawful and/or arbitrary law enforcement practices and must take place in full respect of the rule of law.

The existence of and respect for the rule of law implies a situation where rights, freedoms, obligations and duties are laid down in the law for all people in equality and with the guarantee that people will be treated equally in similar circumstances. One fundamental aspect of this right can also be found in Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which states that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law [...]”

This has clear implications for the functioning of a law enforcement agency. Procedures, standings orders, tactics and techniques, including the choice of equipment, must comply with the legal framework. Law enforcement officials must have adequate knowledge of both national law and international law. They also need to acquire and maintain appropriate skills, techniques and tactics to ensure the adequate and constant application of requirements laid down in law in order to be able to respect and protect individual rights and freedoms.

### **3.3 Law enforcement responsibilities and powers**

The responsibilities of law enforcement organizations, irrespective of their origin, structure or attachment, are generally linked to:

- prevention and detection of crime;
- maintenance of public order; and
- aid and assistance for people and communities in need.

In some countries, in addition to the prevention and detection of crime, the police are also in charge of the prosecution of crime, while in other countries this task is entrusted to a separate body such as a State prosecutor or an examining magistrate.

To fulfil their duties and to achieve legitimate law enforcement objectives, law enforcement officials are given a variety of powers. Among those most commonly known and used are the powers of arrest and detention and the authority to use force where such is necessary for the achievement of legitimate law enforcement objectives. In addition to the powers of arrest, detention and the use of force, a variety of other powers and authorities are vested in law

enforcement officials for the effective performance of their tasks and duties. A number of those powers relate to the prevention and detection of crime and include powers of entry, search and seizure, i.e. the right to enter places, localities and homes where crimes have been committed or have left traces, to search those places for evidence and to confiscate such evidence for the purposes of prosecution, and to search persons and/or objects related to a crime that has been committed or is about to be committed. Each of those powers is unique to the law enforcement function and must be clearly defined in law. They may be exercised for legitimate law enforcement purposes only.

The use of force and firearms, arrest and detention, as well as search and seizure are addressed in separate chapters of this Manual. Part III should therefore be consulted for a more detailed account of the implications of each of those topics for law enforcement practice.

Essential in connection to the use of any power or authority are the questions of legality, necessity, proportionality and accountability.

### **Legality**

The supreme authority for all law enforcement officials is the law. Any law enforcement action must be based on a provision in the law and carried out in compliance with it, i.e. the objective of the law enforcement action must be in accordance with and based on provisions of the law and the specific power or authority used in a particular situation must be founded in law.

### **Necessity**

Law enforcement officials may exercise their powers and authority only as far as strictly necessary for the exercise of their duty. Where the objective of a law enforcement action can be achieved without resorting to the exercise of a power (e.g. the use of force), law enforcement officials shall not make use of that power. Furthermore, where it may be necessary to exercise such power, the extent to which it is used should not go beyond what is required for the achievement of the objective. This refers both to the intensity of the power and the length of time during which it is used. For example, no more force than is necessary should be used to overcome resistance and searches for a given object should not be more intrusive than necessary. It also implies ceasing to use the power or authority as soon as the objective has been achieved (e.g. the person in question has stopped offering any resistance or the object sought has been found).

### **Proportionality**

The power or authority used must be in proportion to the seriousness of the offence and/or the legitimate law enforcement objective to be achieved. Where a law enforcement action negatively affects a person's rights, the consequences

of such restrictions should not outweigh the objective of the law enforcement action. This is a balancing exercise inherent in the State's duty to respect human rights. Human rights are not unlimited and the State may restrict those rights for legitimate reasons. However, this possibility itself is not unlimited either. Restrictions of human rights may not be disproportionate. Where the State has a legitimate interest (in this case, a law enforcement interest), this interest must be balanced against the importance of the human right that may be affected and the intensity of the restriction. Where law enforcement action would have disproportionate negative consequences, the law enforcement officials must refrain from taking that action. Although the aim might be legitimate, law enforcement action cannot be carried out regardless of all other considerations; the end does not justify all means.

### **Accountability**

Law enforcement takes place in a clear legal framework, which defines the duties and obligations of a law enforcement agency and of each individual officer as well as the powers and authorities granted for that purpose. Law enforcement officials have to be accountable for the effective fulfilment of their duties and obligations and for compliance with the legal framework in the exercise of their powers and authorities. Accountability is to be understood in a broad sense, as explained in the following paragraphs.

Accountability is directly related to the required transparency of all law enforcement action, i.e. the need to ensure that law enforcement action takes place in such a way that it can be properly assessed by all relevant actors: the judiciary, the legislative, the government and other political authorities, the public, etc. Reporting and control mechanisms need to be in place to ensure an appropriate level of transparency.

Furthermore, accountability is bound up with the assumption of responsibility for law enforcement work. This includes, in particular, individual or State liability for violations of the law with the possible consequences under criminal, civil or public law. Effective mechanisms need to be in place to ensure that those responsible for violations may be held accountable for their acts or omissions and that impunity does not prevail.

Lastly, accountability refers to the effective fulfilment of law enforcement duties beyond mere legal stipulations, i.e. whether a law enforcement agency is actually maintaining order, preventing and detecting crime and assisting those in need. This includes, among other things, accountability for the conduct and quality of law enforcement, policy choices and the use of resources.

Understood in this sense, accountability covers all levels of a law enforcement agency: the individual law enforcement officer, his or her superiors, the

leadership of the law enforcement agency, and the law enforcement agency as a State body. The issue of accountability will be addressed in all following chapters but will be dealt with more specifically and in greater depth in Part IV (Chapters 10 and 11) of this Manual.

These four principles – legality, necessity, proportionality, accountability (for didactical reasons often referred to as P-L-A-N) – must permeate law enforcement work. Their practical implications will be further developed in all subsequent chapters of this Manual.

### **3.4 Ethics in law enforcement**

The law enforcement function is a public service created by law, with responsibilities for maintaining and enforcing the law, including the prevention and detection of crime, the maintenance of public order and the provision of aid and assistance for people and communities in need. The powers and authorities that are required for the effective discharge of law enforcement responsibilities are granted by national law. However, these legal foundations in themselves are insufficient to guarantee lawful and non-arbitrary law enforcement practices; they merely establish a framework and create potential.

The effective and correct task performance of law enforcement agencies depends on the quality and the performance capacities of each of their law enforcement officials. Law enforcement is not a profession that consists of applying standard solutions to standard problems occurring at regular intervals in time. Rather, it is the art of understanding both the letter and the spirit of the law as well as the unique circumstances of a particular problem at hand. In view of the great variety of situations that law enforcement officials face on a daily basis, they are expected to be able to distinguish between innumerable shades of grey, rather than to make a simple distinction between black and white. Although it is rare for the perfect answer to exist in a given situation, the decision taken by the law enforcement official must nonetheless comply fully with the law and demonstrate the correct and reasonable use of the powers and authorities granted by law. Law enforcement cannot be founded on illegal, discriminatory or arbitrary practices on the part of law enforcement officials. Such practices will destroy public confidence, trust and support and will serve to undermine the very authority of the law enforcement organization.

#### **3.4.1 The relevance of ethics in law enforcement**

It is not sufficient for law enforcement officials merely to know the powers and authorities given to them by law; they must also understand their potentially harmful (and potentially corrupting) effects. In the course of law enforcement, many different situations arise in which law enforcement officials and the citizens they serve find themselves on opposing sides. More often than not, law enforcement officials will be forced to act in order to prevent – or to follow

up – a clear breach of the law. Nonetheless, the action taken must be totally lawful and non-arbitrary. In such situations law enforcement officials may experience or perceive a sense of imbalance or unfairness between “criminal liberty” and law enforcement duty. However, they must understand that this very perception is what distinguishes those who enforce the law from (criminal) offenders. If law enforcement officials were to resort to practices that are against the law or that go beyond the powers and authorities granted to them by the law, the distinction between the two could no longer be made. Public safety and public security would subsequently be at risk, with potentially devastating consequences for society. The human factor in law enforcement must not be allowed to jeopardize the requirements of lawfulness and non-arbitrariness.

To that end, law enforcement officials must develop ethical attitudes and behaviour to a level that will enable them to perform their tasks correctly. Not only must law enforcement officials possess law-abiding characteristics as individuals, they must also work collectively to cultivate and to preserve an image of the law enforcement organization that instils trust and confidence in the society that they are serving and protecting.

The term “ethics” is generally understood to refer to:

- the discipline dealing with what is good and bad and with moral duty and obligation;
- a set of moral principles or values;
- the principles of conduct governing an individual or (professional) group;
- the study of the general nature of morals and of specific moral choices;
- the rules or standards governing the conduct of the members of a profession;
- the moral quality of a course of action, i.e. propriety.

### **3.4.2 Personal ethics, group ethics, professional ethics**

The definitions set out above can be applied at three different levels with different consequences. “Personal ethics” means the morals, values and beliefs of the individual. It is initially the personal ethics of the individual law enforcement official that will decide the course and type of action taken by that official in a given situation. Personal ethics can be positively and negatively influenced through experience as well as through education and training. Peer group pressure also plays an important part in shaping the personal ethics of the individual law enforcement official. It is important to understand that it is not enough for a law enforcement official to know that his or her action must be lawful and non-arbitrary; mere knowledge of the law does not necessarily lead to lawful behaviour.

The personal ethics (the personal perception of what is good and bad, right and wrong) of the individual law enforcement official need to be in consonance with the legal requirements if any action taken is to be correct.

Law enforcement officials are rightly convinced that they are serving “the right cause,” i.e. the law, while they often have to deal with persons who have or who are suspected of having violated the law. They may find themselves in dangerous situations, risking their health and lives in the exercise of their duty, and may even end up becoming victims themselves. What should not be overlooked is that the result of ongoing exposure to this working environment may lead law enforcement officials to justify unlawful behaviour even though they are perfectly aware of the legality or illegality of a specific act. In particular, they may start to view the “other side” negatively, i.e. as “criminals” who do not ultimately deserve to be treated humanely and in accordance with the law, since they have placed themselves outside the law. The perception may be that “they deserve what they get.”

Consequently, while they may concede that a certain kind of behaviour is contrary to the law, law enforcement officials may argue that circumstances render infringement of the law not only admissible but also necessary. It is indeed possible for law enforcement officials to know that a particular act is unlawful but to consider it legitimate. This moral disengagement can actually often be found when people try to justify torture in a specific situation for an aim considered more important than the respect of the prohibition of torture, i.e. “the end justifies the means.” Negative public opinion with regard to certain groups (e.g. foreigners or other minorities) or patterns of crime (“terrorists”) may further nurture such attitudes.

The fact that the police are increasingly subject to public scrutiny and are readily blamed for negative consequences of their action (e.g. either for not being effective in combating crime or for making excessive use of their powers) increases group cohesion among law enforcement officials.

All these different factors can easily lead to the development of group behaviour, sub-cultural patterns (i.e. group language, rituals, “we” versus “them,” etc.), a phenomenon that is further strengthened by the fact that law enforcement usually involves working with individual colleagues or in groups (e.g. in public order situations) in often difficult and/or dangerous circumstances, twenty-four hours a day, seven days a week.

Subsequent pressure on group members (especially new ones) may lead the individual law enforcement official to conform to the group culture. In that way the individual, working in accordance with his or her personal ethics, may be confronted with established and possibly conflicting “group ethics” and subsequent pressure to accept or reject them. It should be clear that group ethics are not necessarily of a better moral quality than the personal ethics of the individual or vice versa.

For responsible management officials in law enforcement organizations it is therefore indispensable to evaluate attitudes and behaviour in terms not only of personal ethics but also of group ethics. Guidance, monitoring and performance reviews are important instruments in that connection.

Law enforcement history provides a variety of examples from different countries on how questionable group ethics can lead to the discrediting of an entire law enforcement organization. Scandals relating to endemic corruption, widespread involvement in organized crime, racism and discrimination frequently shake the foundations of law enforcement agencies around the world.

It is for that precise reason that it becomes crucial to develop an “institutional” ethical standard, a code of conduct at the domestic level with a clear statement of what is right or wrong, what is good or bad, the aim being to prevent individual or group ethics from yielding to the process of moral disengagement described above. Providing for such an “institutional culture” will also give underlying support in the manifold situations in which law enforcement officials are required to use their discretion (to arrest or not, to use force or not, etc.) and ensure that this discretion is used in accordance with the guiding principles of their profession and of international human rights law.

### **3.5 Law enforcement and international soft law standards**

The United Nations developed specific guidance for ethical standards in two important “soft law” instruments, which are discussed below.

#### **3.5.1 Code of Conduct for Law Enforcement Officials (CCLEO)**

The issue of professional ethics for law enforcement has been given some thought in international instruments on human rights and criminal justice, and most prominently in the Code of Conduct for Law Enforcement Officials (CCLEO) adopted by the General Assembly of the United Nations in its resolution 34/169 of 17 December 1979. This resolution states that the nature of the functions of law enforcement in the defence of public order, and the manner in which those functions are exercised, have a direct impact on the quality of life of individuals as well as of the society as a whole. While stressing the importance of the tasks performed by law enforcement officials, the General Assembly also underlined the potential for abuse which the exercise of such duties entails.

The CCLEO consists of eight articles. It is not a treaty but belongs to the category of instruments that offer guidance to governments on issues related to human rights and criminal justice. It is important to note that (as was recognized by the drafters) such standards lack practical value unless their

content and meaning, through education, training and monitoring, become part of the creed of every law enforcement official.

## CODE OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS (CCLEO)

### Article 1

states that “[l]aw enforcement officials shall at all times fulfil the duty imposed upon them by law [...]” In the commentary to this article the term “law enforcement officials” is defined as including “all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.”

### Article 2

requires law enforcement officials, in the performance of their duty, to “respect and protect human dignity and maintain and uphold the human rights of all persons.”

### Article 3

limits the use of force by law enforcement officials to situations in which it is “strictly necessary” and “to the extent required for the performance of their duty.”

### Article 4

states that “[m]atters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.” With regard to this article, it is important to acknowledge the fact that the nature of law enforcement duties places law enforcement officials in a position where they may obtain information relating to the private life of individuals or information that could be harmful to the interests or reputation of others. The disclosure of such information other than for the needs of justice or the performance of duty is improper and law enforcement officials must refrain from making any such disclosure.

### Article 5

reiterates the prohibition of torture or other cruel, inhuman or degrading treatment or punishment.

### Article 6

relates to the duty to protect the health of persons deprived of their liberty and to provide medical care whenever necessary.

### Article 7

forbids law enforcement officials to commit any act of corruption and enjoins them to “rigorously oppose and combat” any such act.

### Article 8

is the closing provision urging law enforcement officials (once more) to respect the law and the Code and to prevent and oppose any violations of them. In cases where a violation of the Code is (or is about to be) committed, law enforcement officials must “report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.”



### 3.5.2 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF)

The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF) were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from 27 August to 7 September 1990. Although not a treaty, the instrument aims to offer authoritative guidance to *“Member States in their task of ensuring and promoting the proper role of law enforcement officials.”* It recommends that the principles set out in it *“be taken into account and respected by Governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public.”*

The Preamble to this particular instrument, which will be discussed in greater detail in Chapter 7, further recognizes the importance and complexity of the tasks of law enforcement officials, acknowledging their vital role in the protection of life, liberty and security of all persons. Particular emphasis is placed on the task of maintaining public safety and social peace and on the importance of the qualifications, training and conduct of law enforcement officials. The Preamble ends by stressing the need for national governments to take the principles enshrined in this instrument into account by adapting their national legislation and practice accordingly. Furthermore, governments are encouraged to *“keep the ethical issues associated with the use of force and firearms constantly under review”* (BPUFF No. 1).

In the BPUFF, governments and law enforcement agencies are urged to ensure that all law enforcement officials are:

- *“selected by proper screening procedures; have appropriate moral, psychological and physical qualities [...] and receive continuous and thorough professional training,”* and are subject to periodic reviews of their *“fitness to perform [their] functions”* (BPUFF No. 18);
- trained and tested *“in accordance with appropriate proficiency standards in the use of force”* and that officials required to carry a firearm are authorized to do so only after having completed special training (BPUFF No. 19).

In BPUFF No. 20 it is further stipulated that:

- *“[i]n the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, [...] alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation [...] with a view to limiting the use of force and firearms”;*

and that:

- training programmes and operational procedures are to be reviewed *“in the light of particular incidents.”*

### **3.6 Orders, procedures and sanctions in law enforcement**

While it is necessary to highlight the importance of an institutional code of ethics, a code of ethics on its own cannot guarantee lawful behaviour.

Clear rules, procedures and orders established by a recognized authority and followed by an effective system of sanctions in case of disobedience are factors with a determinative influence on behaviour.

People are generally prepared to change their behaviour when one or more of the following conditions are fulfilled:

- When their behaviour can be easily changed;
- When a change in behaviour leads to gratification;
- When change is rendered necessary by the threat of punishment.

This naturally highlights the importance of training, orders and sanctions. Training for law enforcement officials, strict orders as to the conduct to adopt and effective sanctions in the event of failure to obey those orders are essential if respect for the law is to be ensured.

Law enforcement practices must conform to the basic principles of legality, necessity and proportionality. In other words, any law enforcement practice must have its basis in the law; recourse to it must be unavoidable, given the circumstances of the case in hand, and its impact must be appropriate in relation to the seriousness of the offence and the legitimate objective to be achieved.

Responsible management in law enforcement organizations must translate these legal standards into specific orders and procedures that comply with those principles. They must ensure that officials are taught and trained in the relevant laws and procedures. They must also take action if those orders and procedures are not followed.

Any failure to obey an order must be followed by corrective measures and – where necessary – appropriate sanctions. These can take different forms (e.g. disciplinary, penal or social). Disciplinary or penal sanctions have a double purpose: to set an example and, as preventive measures, to avoid violations becoming increasingly acceptable.

This is also what lies behind the concept of integration explained in the Introduction. In all following chapters particular attention will be given to the practical implications for the integration of the relevant legal standards into daily law enforcement practice.

### 3.7 Selected references

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## CHAPTER 4 OUTLINE

- 4.1 **Introduction**
- 4.2 **The legal framework**
  - 4.2.1 The right to a fair trial
  - 4.2.2 The right to privacy
  - 4.2.3 The obligation of non-discrimination
  - 4.2.4 Fighting crime: playing with the rules or playing by the rules?
- 4.3 **Investigating a crime**
  - 4.3.1 Gathering evidence
  - 4.3.2 Interrogating suspects
  - 4.3.3 Disappearances and extrajudicial killings
- 4.4 **Preventing juvenile delinquency**
  - 4.4.1 Background information
  - 4.4.2 Diversion
  - 4.4.3 Implications for law enforcement practice
- 4.5 **Selected references**

## KEY LEGAL DOCUMENTS

### Treaty law

- International Convention on the Elimination of All Forms of Racial Discrimination (CERD, adopted in 1965, entered into force in 1969)
- International Covenant on Civil and Political Rights (ICCPR adopted in 1966, entered into force in 1976)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, adopted in 1984, entered into force in 1987)
- Convention on the Rights of the Child (CRC, adopted in 1989, entered into force in 1990)
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT, adopted in 2002, entered into force in 2006)
- International Convention for the Protection of All Persons from Enforced Disappearance (CPED, adopted in 2006, entered into force in 2010)

### Non-treaty law

- Code of Conduct for Law Enforcement Officials (CCLEO, adopted in 1979)
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, adopted in 1985)
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration, adopted in 1985)
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles, adopted in 1988)
- United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines, adopted in 1990)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNRPJ, adopted in 1990)
- United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules, adopted in 1990)

## CHAPTER 4 PREVENTING AND DETECTING CRIME

### 4.1 Introduction

The State's obligation to protect human rights encompasses the obligation to protect people against abuse of their rights ("duty to protect," see Chapter 3, section 3.2). This concept is clearly expressed, for instance, in Article 2 of the International Covenant on Civil and Political Rights (ICCPR), whereby each State Party undertakes *"to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant"* and *"to adopt such laws and other measures as may be necessary to give effect to the rights recognized in the present Covenant."*

Prevention and detection of crime is thus a key obligation of the State as part of its duty to protect the human rights of those who have become or may become the victims of a crime. Establishing murder as a crime and taking measures to prevent and detect such crimes is thus an example of action taken by a State to comply with its obligation to protect the right to life:

*"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."* (ICCPR, Article 6(1))

Furthermore, numerous international human rights treaties contain the explicit obligation for States to establish certain acts as an offence and to take effective actions to prevent such acts. Two particularly pertinent examples are given in the following box.

#### CONVENTION AGAINST TORTURE (CAT)

##### Article 2

"1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

##### Article 4

- "1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

#### INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD)

##### Article 2

- "1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms

and promoting understanding among all races, and, to this end: [...] (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”

#### Article 4

“States Parties [...] (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.”

The obligation of the State to protect against abuse and violations of rights is also included in the Convention on the Rights of the Child (CRC):

#### Article 19

*“1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”*

Prevention and detection of crime are key responsibilities of law enforcement agencies. The full discharge of that responsibility, however, requires more than law enforcement input alone. The effective prevention and detection of crime are critically dependent on the existing levels and quality of cooperation between a law enforcement agency and the community it serves. Politicians at all levels (government, parliament, etc.), members of the judiciary, community groups, public and private business corporations and individuals need to join forces to create an environment in which crime is less likely to occur and in which all sides cooperate with the authorities in charge of the investigation of crime. This is essential if the results of efforts to prevent and detect crime are to be better than the inevitably unsatisfactory results of merely attempting to enforce criminal laws.

Crime appears to be an inherent part of everyday life, and although every law enforcement agency will do its utmost to eradicate the occurrence of crime from our societies, it is unlikely to succeed. It is common knowledge that the number of crimes solved through law enforcement activity stands in stark contrast to the number of crimes actually committed. Furthermore, the interests of victims of crime are – at least from their own point of view – much better served when they are prevented from becoming victims in the first place. The arrest and punishment of an offender in no way compensates fully or adequately for the loss of personal property, the invasion of personal privacy or the violation

of physical integrity. At the same time, where law enforcement agencies do not succeed in identifying and apprehending the perpetrator(s) of a particular crime, this tends to aggravate the suffering of victims of such crimes.

At the same time, by exercising their powers in fulfilment of their duty to prevent and detect crime, law enforcement officials may affect the human rights of individuals, in particular those suspected of having committed or being about to commit a crime. To do so in a way that complies with national and international human rights law is part of the “duty to respect” the rights of the individual concerned (see Chapter 3, section 3.2).

Consequently, as a first conclusion, it can be stated that, when fulfilling their duty to prevent and detect crime, law enforcement officials need to strike an appropriate balance between the rights and interests of the society, including the rights of the – potential or actual – victims of crime, to have crimes prevented and detected and the rights and interests of those who may be affected by law enforcement action. International human rights law provides the legal framework for this balancing act.

## **4.2 The legal framework**

No particular instrument in international human rights law deals specifically with issues relating to the prevention and detection of crime. Nor is there any one instrument setting out the roles and responsibilities of law enforcement agencies in this area. However, this does not mean that there is a vacuum. The prevention and detection of crime is an issue which impinges on all aspects of law enforcement – in particular, the use of force and firearms (see Chapter 7), arrest and detention (see Chapter 8) and search and seizure (see Chapter 9). Adequate prevention and detection of crime must have its basis in lawful and non-arbitrary law enforcement tactics and practices.

This chapter sets out key principles of international human rights law related to the responsibility to prevent and detect crime. A more in-depth presentation of the legal obligations of law enforcement officials in the exercise of their powers will then be dealt with in the chapters on each of the aforementioned powers (Chapters 7, 8 and 9). In order to ensure clarity and completeness, repetitions may occur.

### **4.2.1 The right to a fair trial**

The right to a fair trial is one of the key pillars protecting human rights in the field of law enforcement. It comprises a number of safeguards that are intended to strike the balance, referred to in the preceding section, between the obligation of the State to effectively prevent and detect crime and the rights of the individual who may be affected by law enforcement action.

*“In the determination of any criminal charge against him [or her], or of his [or her] rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”* (ICCPR, Article 14(1))

Similar provisions exist in regional treaties, e.g. Article 7 of the ACHPR, Article 8 of the ACHR, Article 13 of the ArabCHR and Article 6 of the ECHR. The aforementioned legal requirements enhance the transparency of the administration of justice, as well as the principle of equality before the law of all persons (ICCPR, Article 14(1); see also ICCPR, Article 2(1) on non-discrimination).

It is worth underscoring the fact that the rights set out in the following sections do not only apply once criminal charges have been brought before a court. They need to be respected by all those involved in the administration of justice at all stages of the proceedings, including by law enforcement officials conducting a criminal investigation. From the very beginning of the investigation of a crime, individuals are entitled to the respect of these rights. Law enforcement officials should be conscious of their obligations in this regard and of the crucial role that they have to play in ensuring the lawfulness of the judicial process from the very first steps of an investigation.

#### **4.2.1.1 The presumption of innocence**

The presumption of innocence constitutes an essential principle of a fair trial.

*“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”*

(ICCPR, Article 14(2))

A similar provision can be found in the ACHPR (Article 7(1)(b)), the ACHR (Article 8(2)), the ArabCHR (Article 16) and the ECHR (Article 6(2)).

The right to be presumed innocent applies equally to persons charged with a criminal offence and to accused persons prior to the filing of a criminal charge. This right continues to exist until the moment when a conviction becomes binding following final appeal. The real significance of the presumption of innocence is demonstrated in a criminal trial itself. A judge or a jury may convict a person for an offence only when there is no reasonable doubt of his or her guilt. The judge conducting the trial must do so without previously having formed an opinion on the guilt or innocence of the accused. The way in which he or she handles the case should leave no doubt in this regard.





## INTERNATIONAL JURISPRUDENCE

### Human Rights Committee

#### Case of Sobhraj v. Nepal

UN Doc. CCPR/C/99/D/1870/2009, 27 July 2010

“7.3 [...] The Committee is concerned to note the assertion in both the District Court’s and the Patan Appeal Court’s judgements that if the person claims that he was in another place during the incident, then he has to prove it and if he cannot, then it should not be held against him. The Committee refers to its general comment No 32, where it stated that the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. The Committee insists on the fact that a criminal court may convict a person only when there is no reasonable doubt of his or her guilt, and it is for the prosecution to dispel any such doubt. In the present case, both the District Court and the Patan Appeal Court have shifted the burden of proof to the detriment of the author, thereby violating article 14, paragraph 2, of the Covenant.”

A primary task in law enforcement is to bring offenders to justice. However, it is not the task of law enforcement officials to decide on the guilt or innocence of a person arrested for an offence. Their responsibility is to record, objectively and accurately, all the facts relating to a particular crime that has been committed. Law enforcement officials are charged with fact-finding; it is the judiciary that is charged with analysing these facts in order to determine the guilt or innocence of the accused person(s) and to apply criminal justice accordingly.

#### 4.2.1.2 Minimum guarantees for a fair trial

Article 14(3) of the ICCPR states that “[i]n the determination of any criminal charge against him [or her], everyone shall be entitled to the following minimum guarantees, in full equality”:

*“(a) To be informed promptly and in detail in a language which he [or she] understands of the nature and cause of the charge against him [or her].”*

This responsibility has a direct impact on law enforcement practices. At the moment of arresting a person suspected of an offence, it is the arresting law enforcement official who has the duty to inform the arrested person of the reasons for the arrest, or to inform that person of any criminal charges brought against him or her (ICCPR, Article 9(2); see also Chapter 8). The fulfilment of this duty is also of direct importance in ensuring that the arrested person effectively enjoys the rights set forth in the following provision.

*“(b) To have adequate time and facilities for the preparation of his [or her] defence and to communicate with counsel of his [or her] own choosing.”*

This second provision also requires law enforcement practices to fulfil certain expectations. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), which will be presented in greater detail in Chapter 8, sets forth the requirements for action to be taken by law enforcement officials vis-à-vis arrested and/or detained persons more fully: the duty promptly to inform persons under arrest and in detention about their rights and how to avail themselves of such rights (Principle 13); the entitlement to and provision of legal counsel (Principle 17); and guarantees for unimpeded consultations and communication with that legal counsel (Principle 18). Those requirements make it clear that, in the early stages of criminal proceedings, the protection of the right to a fair trial of accused persons largely depends upon lawful and non-arbitrary law enforcement practices.

*“(c) To be tried without undue delay.”*

The countdown for implementation of this particular provision begins when the suspect (accused, defendant) is informed that the authorities are taking specific steps to prosecute him or her. It ends on the date of the definitive decision, i.e. final and conclusive judgment or dismissal of the proceedings. The particular circumstances and complexity of a pending case will have to be considered when deciding what constitutes a reasonable time and “*undue delay*.” From the outset it is clear that the investigative part of the process (which is in the hands of law enforcement agencies) must be included in the equation, as any undue delay caused by inadequate law enforcement practice may have a negative effect on the duration of pre-trial detention of an accused person.

*“(d) To have the right to defence.”*

The right to defence can be divided into a list of individual rights:

- to defend oneself in person;
- to choose one’s own counsel;
- to be informed of the right to legal counsel; and
- to receive free legal assistance.

Everyone charged with a criminal offence has a primary, unrestricted right to be present at the trial and to defend himself or herself or to choose to have a defence counsel instead. It is the obligation of the court to inform the accused person accordingly of this right; prior to the charge, this obligation falls on the law enforcement official concerned. The choice of an attorney can be made by the accused person if he or she has sufficient means to pay

for legal assistance. If not, that person is entitled to have legal counsel assigned to him or her at no personal cost.

*“(e) To call and examine witnesses.”*

The right of the accused person to call, obtain the attendance of and examine witnesses (or have them examined) under the same conditions as witnesses brought against him [or her] is an essential element of “equality of arms” and thus of the principle of a “fair trial.”

The investigation that precedes the trial in court normally serves to identify witnesses of a particular criminal offence. The integrity of law enforcement practice is, once again, directly related to the need for objectiveness in the investigation process and for full respect of the presumption of innocence with regard to the accused person(s).

*“(f) To have the free assistance of an interpreter.”*

If the accused does not speak or understand the language in which the court proceedings are conducted, he or she is entitled to the free assistance of an interpreter. This right is directly related to another provision of Article 14(3) of the ICCPR, which prescribes that information on the nature and cause of the charge must be provided in a language that the accused understands (Article 14(3)(a)).

From the latter provision it can be concluded that in law enforcement practice, whenever arrested and accused persons do not speak or understand the language spoken to them, they must be given the services of an interpreter to inform them of the reasons for the arrest or of the charges brought against them. The interrogation of such persons would naturally also need to take place in the presence of an interpreter.

*“(g) Not to be compelled to testify against himself [or herself] or to confess guilt.”*

This provision also extends to the investigatory phase. Law enforcement officials must refrain from any action that can be interpreted as an attempt to extract a statement from an arrested or accused person which therefore cannot be said to have been given of his or her free will. In connection with this provision it is important to note once more the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment (ICCPR, Article 7) and the provisions in the Body of Principles that relate to the interrogation of persons under detention or imprisonment (Principles 21 and 23). The use of confessions obtained under ill-treatment is prohibited (CAT, Article 15). It is

the right of the accused person to refuse testimony. However, this right does not extend to witnesses of crime. They may not refuse to testify.

Other important components of the right to a “fair trial” include the provision in Article 14(5) of the ICCPR, which grants everyone convicted of a crime the right to have his or her conviction or sentence reviewed by a higher tribunal according to law. Victims of miscarriage of justice have an enforceable right to compensation for their suffering, unless it is clearly established that the (wrong) decision was made due to the non-disclosure of an unknown fact that can be wholly or partly attributed to the victim (ICCPR, Article 14(6)). The final paragraph of Article 14(7), reiterates the *ne bis in idem* principle. It prohibits a person from being “*tried or punished again for an offence for which he [or she] has already been finally convicted or acquitted.*”

#### **4.2.2 The right to privacy**

Almost every investigation conducted by law enforcement officials for the prevention or detection of crime leads to situations in which actions taken result in an invasion of the private sphere of individuals. While it is clear that in every country a code of penal procedure will stipulate the investigative powers and competences of law enforcement officials, it is also clear that the existence of adequate laws is not of itself sufficient to ensure adequate respect for the privacy of the individual.

- “1. *No one shall be subjected to arbitrary or unlawful interference with his [or her] privacy, family, home or correspondence, nor to unlawful attacks on his [or her] honour and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks.*” (ICCPR, Article 17)

In relation to criminal investigations, this means that those actions by law enforcement officials that entail, or might entail, an invasion of a person’s privacy must be permissible under domestic law – which must set out the criteria for resorting to such measures – and that recourse to such actions must be necessary and in proportion to the legitimate objective to be achieved.

Entering someone’s home in search of evidence and intercepting and monitoring correspondence and telephone conversations are serious intrusions into the private sphere of the individuals concerned. These actions therefore have to be justified as being urgently needed for legitimate law enforcement purposes; they should only go as far as is necessary for the achievement of these purposes; they should not be disproportionate; and, finally, they should be carried out in a manner ensuring full accountability for the law enforcement action (see also Chapter 9).

## TELEPHONE TAPPING

### **An example of the application of the governing principles in domestic law**

In many countries, the permission to intercept and monitor telephone conversations (*based on a provision of domestic law – legality*) can be obtained only through a judge (*accountability*), who shall grant permission only in cases where the crime to be investigated is sufficiently serious (*proportionality*), and where it is clear that the suspect(s) will take part in the conversations to be monitored and that evidence against the suspect(s) cannot reasonably be obtained through less intrusive measures (*necessity*).

Law enforcement practices in this particular area require strict monitoring, both internally (by those officials charged with command and/or management responsibility) and externally (by officials of the judiciary and others). Actions undertaken by individual law enforcement officials must therefore be recorded. Such records will enable a fair and impartial judgement to be made with regard to the lawfulness and non-arbitrariness of those actions once a particular case comes to trial. In that respect reference must also be made to Article 4 of the Code of Conduct for Law Enforcement Officials (CCLEO) which states that:

*“Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.”*

The clear inference in this article is that in situations in which lawful and non-arbitrary interference with privacy, family, home or correspondence takes place, the executing law enforcement officials have a responsibility to respect and protect the privacy of information thus obtained. The random disclosure of information obtained through action which was in itself legitimate could still constitute unlawful interference with someone’s privacy.

### **4.2.3 The obligation of non-discrimination**

It is of utmost importance for the credibility of the whole judicial process that the investigation of a crime is carried out with great objectivity. Law enforcement officials should therefore not be influenced in their decisions and actions by considerations based on discriminatory reasoning. A person should be considered a potential suspect on the basis of clear facts and logical conclusions and any such consideration should not be influenced by his or her nationality, race, religion, gender, social class, etc.

The ICCPR grants the following rights:

Article 16

*“Everyone shall have the right to recognition everywhere as a person before the law.”*

### Article 26

*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

Similar provision can be found, for instance, in the ACHPR (Articles 2, 3 and 5), the ACHR (Articles 1 and 2), the ECHR (Article 14) and the ArabCHR (Articles 3 and 22).

In addition, Article 2(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) states more specifically:

*“(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; [...]*

*(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”*



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of *Timishev v. Russia*

#### Applications Nos 55762/00 and 55974/00, 13 December 2005

“56. A differential treatment of persons in relevantly, similar situations, without an objective and reasonable justification, constitutes discrimination (see *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV). Discrimination on account of one’s actual or perceived ethnicity is a form of racial discrimination [...]. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. [...]

58. The Government did not offer any justification for the difference in treatment between persons of Chechen and non-Chechen ethnic origin in the enjoyment of their right to liberty of movement. [...]

59. In conclusion, since the applicant’s right to liberty of movement was restricted solely on the ground of his ethnic origin, that difference in treatment constituted racial discrimination within the meaning of Article 14 of the Convention. There has therefore been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 4 to the Convention.”

When investigating a crime, law enforcement officials often use the technique of “profiling,” i.e. based on the nature of the crime, the circumstances under which it has been committed and, possibly, other evidence, certain conclusions are drawn on the potential suspect, e.g. his or her age, level of education, personality. Once these conclusions have been drawn, the search for the person who committed the crime will then be narrowed down to individuals who match the established profile.

Although this is a recognized technique, law enforcement officials have to take care not to slip into discriminatory profiling based on stereotypes, for example:

- Narrowing down the search for an offender to a specific group, e.g. a specific nationality, merely because, in the area in question, this type of crime is usually committed by nationals of that specific country would be discriminatory practice unless there is additional objective evidence that points in that direction.
- Stopping, searching and carrying out identity checks of a specific group, e.g. all men of a specific religious or ethnic group in a situation of a presumed terrorist threat, without additional objective indicators to suggest that the threat originates from members of this group would have to be considered a violation of Article 26 of the ICCPR and possibly of Article 2 of the CERD.



## LOOKING CLOSER

### **Committee on the Elimination of Racial Discrimination General recommendation XXXI (A/60/18, pp. 98-108), No. 20**

“State parties should take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person’s colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.”

It must be stressed that a profiling approach of that kind is not only discriminatory but also, in far too many cases, inefficient, in the ways indicated below:

- Premature conclusions based on abstract “experience” without additional information or evidence may too easily point in the wrong direction. The case will thus remain unsolved and there is a high risk that the perpetrator will get away with the crime;
- An apparently “easy” way to look for the perpetrator of a crime, this kind of profiling may prevent law enforcement officials from looking for further, different types of evidence or indicators that could lead faster or with greater certainty to the perpetrator;
- Huge efforts in terms of logistics and human resources are often deployed to stop and search a large number of people belonging to a specific group

or with a certain physical appearance, without narrowing down the group to be investigated by using relevant additional indicators based on actual evidence. This limits the resources available for other investigations or law enforcement operations;

- This type of approach is likely to cause the members of the specific group or minority to feel that they are being discriminated against, which in turn may lead to alienation and a high level of distrust towards the police. It can make this group less inclined to report crime or to provide information that could be relevant to the police investigations. In the long term this will have a negative effect on police work and efficiency. This phenomenon is frequently observed in poor neighbourhoods, where people feel discriminated against because of their low social status because police forces investigating a specific crime immediately launch broad searches for the perpetrator in that neighbourhood without any further information or evidence that he or she actually originates from there. Consequently, people living in such neighbourhoods become increasingly reluctant to report crime to the police and develop a tendency to deal with crime on their own and in their own – often violent – manner.

#### **4.2.4 Fighting crime: playing with the rules or playing by the rules?**

From some of the practical examples given above it is clear that the prevention and detection of crime is an area in law enforcement that demands high moral and ethical standards of law enforcement officials.

All too easily law enforcement officials charged with duties in the area of the prevention and detection of crime will experience their work as a form of routine, in which the majority of functions will be carried out automatically. Yet another burglary or being presented with the file of an armed robbery when six similar cases are already waiting in a drawer can easily lead to indifference on the part of the investigating official(s). The victims of such crimes, however, will not understand such indifference – nor will they find it acceptable. In terms of apprehending perpetrators, a lack of enthusiasm and commitment on the part of the investigating official will do nothing for the rights of the victim and may even assist an offender in evading justice.

In addition, throughout the investigative process, there are many occasions on which violations of individual rights and freedoms of arrested and/or detained persons can occur – often without their ever being noticed. Prejudice on the part of investigating officials, the use of evidence obtained through unlawful practice, subtle pressure on an accused person in order to obtain a testimony – all are examples of practices that are difficult to detect in retrospect. Having to deal continually with individuals who have, or who are suspected of having, committed a crime may have a negative effect on the attitude of law enforcement officials towards those individuals. It may generate a sense



that the rules protecting the rights of such individuals are part of an “unfair” process: the individual has transgressed the law but the law enforcement official remains obliged to respect the law and the perpetrator eventually gets away with his or her crime. Rules such as the presumption of innocence, the right to remain silent or rules protecting privacy are therefore often perceived as an obstacle to efficient policing and to justice, and law enforcement officials may easily be tempted to “bend” those rules.

Consequently, this means that much of what constitutes a “fair trial” will depend on the individual law enforcement official.

This situation requires a range of responses from the command and management levels of a law enforcement institution:

- The rule of law must be unequivocally accepted and promoted as a fundamental value in its own right; it should be made clear that even one individual transgression by a law enforcement official – if tolerated – affects the functioning of the judicial system as a whole. The values of the rules governing the investigative and judicial process must be enshrined in the immovable values of the law enforcement institution.
- The command and management levels should also foster the understanding that respect for these rules – at least in the long term – does not hamper police efficiency, but rather contributes to it. It should be made clear, for example, that rules such as the presumption of innocence or the right of the suspect to remain silent enhance the objectivity and open-minded behaviour of law enforcement officials and prevent premature conclusions from being drawn that may lead to the real perpetrator(s) escaping justice. Similarly, strictly law-abiding behaviour and respect for human rights will improve the relationship with the community and secure the support of the community for the police, that support being indispensable to efficient and effective policing.
- The higher command and management levels must put in place practical means and measures covering all relevant aspects (procedures, education, training, equipment, and an effective system of sanctions) to prevent law enforcement officials from bending the rules at will and to ensure that they abide by them. Internal monitoring and supervisory mechanisms should make it possible to adjust procedures, to improve the knowledge and practical skills of law enforcement officials and to take corrective measures if the law or the established rules and procedures have not been respected (depending on the seriousness, through coaching, training, or a disciplinary or penal response).



## INTEGRATION IN PRACTICE

### Doctrine

Clear operational guidelines must be provided on how to proceed in the investigation of a crime. For instance, clear rules should be established about documenting the information and informing superiors when a law enforcement official obtains knowledge of a crime committed (or to be committed). Likewise, standing operational procedures should clearly establish when and how to carry out a body search, thus ensuring the efficiency of the search as well as protecting the dignity of the person searched.

### Education

Law enforcement officials must be fully acquainted with the legal requirements governing their actions, i.e. in which situations they are allowed to use certain methods of investigation (such as electronic or personal surveillance) or to exercise certain powers (such as entering a suspect's house), and the rules to follow (obtaining a search warrant). Likewise, they must be fully aware of their obligations under national (and international) law when dealing with a suspect and of a suspect's rights.

### Training

Law enforcement officials must feel comfortable when using the available legal methods of investigation (e.g. interrogating suspects, the use of forensics) so that they feel able to respond adequately to the demands of their duty. Law enforcement officials must be trained to resist the multiple factors that may prompt them to transgress the law, e.g. their own emotions when dealing with a particular violent crime or when being provoked by a suspect.

### System of sanctions

Rules and procedures must ensure appropriate control and supervision of the investigation process. For example, standard forms used to record all relevant details of the interrogation of a suspect should make it possible to detect whether the excessive length of an interview has led to violation of the suspect's right not to be compelled to testify against himself or herself. If confirmation is found that the length of the interview was indeed excessive, appropriate action would have to be taken to ensure that such action is unlikely to be repeated (e.g. warnings or other disciplinary measures, or – if the behaviour amounts to an offence – initiating a penal procedure).

## 4.3 Investigating a crime

The information given below should not be interpreted as providing practical guidance on how to conduct investigations or how to gather evidence; it is merely an attempt to set law enforcement practice in the correct legal framework of international standards.

### **4.3.1 Gathering evidence**

The effective detection of a crime hinges on the successful gathering of evidence. Two kinds of evidence are important: material evidence (“silent witnesses”) and statements by witnesses.

#### **4.3.1.1 Material evidence**

In principle, material evidence can be found where a crime has been committed or where it has left traces. It is therefore important for the scene of a crime to be located, as well as all sites where materials related to the crime have subsequently been left. In the case of a murder this would mean finding the actual site of the killing (if it did not occur at the place where the victim’s body was found), working out the route taken by the killer to and from that particular site (or those sites) and trying to identify the places where the killer might have disposed of materials related to the crime.

Before developing this subject further, it is essential to recall that no one may be subjected to arbitrary interference with privacy, family, home or correspondence (ICCPR, Article 17). Where a crime has left traces in public places, this prohibition does not impede law enforcement practice. However, if such traces have been left behind in a private home, or if indeed the crime occurred in that home, the mere fact of that crime having been committed is not usually considered a sufficient basis for law enforcement officials to enter a private dwelling. In such a situation law enforcement officials have to follow the relevant procedures as established in their national law. In most countries this means that they will need a court order allowing them access to that home, if need be against the will of the inhabitants, for the purpose of gathering evidence. This procedure seeks to protect individuals against unlawful and/or arbitrary invasions of their most private sphere.

The actual securing, collection and treatment of material evidence is the task of police specialists. In certain cases, forensic laboratories are entrusted with the subsequent analysis of that material. The requirements for material evidence to be accepted as irrefutable proof in a court of law are extremely demanding and inflexible. Those standards represent recognition of the importance of a fair trial, to which all accused persons are entitled.

#### **4.3.1.2 Statements by witnesses**

The second type of evidence is information obtained from the statements of witnesses. Witnesses are important to the investigation process because they can be compelled to testify and, when testifying, they are obliged to tell the truth. The situation of witnesses contrasts directly with that of suspected perpetrators and accused persons, who cannot be compelled to testify against themselves or to confess guilt (ICCPR, Article 14(3)(g)).

However, in order to obtain a useful statement from a witness, the law enforcement official(s) conducting the interview must focus on each witness's "reasons for knowing." What did the witness see, hear or smell of the actual events; what is direct observation; what is hearsay? The statements of witnesses will help to establish factual evidence against known or unknown perpetrators of crime. Although rules for the interrogation of suspects or accused persons with regard, for instance, to the recording of time, duration and intervals<sup>11</sup> do not apply to witnesses, certain countries advise their law enforcement agencies to observe those same rules nevertheless. This is done to avoid subsequent criticism in a court of law that, for instance, the testimony of a witness should be deemed unreliable owing to extreme fatigue induced by the frequency and duration of interviews.

At this juncture it is appropriate to comment on the common law enforcement practices of using confidential informants for the prevention and detection of crime and of using infiltration for that same purpose. The basic premise is that both practices may be used only when to do so is lawful and necessary for the interests of justice.

As the use of confidential informants often entails the payment of money for information provided, the attention of law enforcement officials must be drawn to the potential risks of such practices, including the risk that:

- informants, attracted by the prospect of payment, may incite others to commit crimes, of which they then inform their law enforcement contacts;
- informants may exploit the relationship with their law enforcement contacts for the purposes of committing crime and avoiding detection;
- informants may be induced by their law enforcement contacts to prompt others to commit crimes, thus enabling the law enforcement agency to make subsequent arrests;
- the money involved in the dealings with informants may have a corrupting influence on the law enforcement officials involved, as the possible means of ensuring effective oversight for such undercover operations are usually limited.

The term "infiltration" refers to the practice whereby either a law enforcement official or a confidential informant is introduced into a criminal organization for the purpose of gathering information that cannot be obtained otherwise. This practice must be lawful and absolutely necessary for legitimate law enforcement purposes. Even if those conditions are met, a number of risks will still remain.

First of all, infiltration can be extremely dangerous for the person carrying it out. Second, the need to protect the identity of this person throughout all

<sup>11</sup> These are usually specified in national law, but see also No. 23 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

stages of the criminal proceedings risks being in conflict with the principle of fair trial and particularly with the provision stating that the suspect or accused has the right to cross-examine witnesses brought against him or her (ICCPR, Article 14(3)(e)). In situations in which, for security reasons, the identity of the infiltrator(s) is not revealed, this right can be in serious jeopardy.

It is clear that both practices must be closely supervised by a competent member of the judiciary and that, in order to safeguard the right to a fair trial, their application must be made dependent on permission obtained prior to their implementation.



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights Case of Teixeira de Castro v. Portugal 44/1997/828/1034, Judgment of 9 June 1998

“33. The Commission considered that the offence had been committed and the applicant sentenced to what was a fairly heavy penalty essentially, if not exclusively, as a result of the police officers’ actions. The officers had thus incited criminal activity which might not otherwise have taken place. That situation had irremediably affected the fairness of the proceedings.

34. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court’s task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair [...].

36. [...] The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex. The public interest cannot justify the use of evidence obtained as a result of police incitement.”

### 4.3.2 Interrogating suspects

Statements by suspects or accused persons with regard to a crime that has been committed are a third important source of evidence. It should be emphasized, however, that in the investigation process law enforcement officials should not overly rely on such statements as the basis for a case to be presented in court. The reasons for this are straightforward. Suspects have the right to remain silent and cannot be compelled to testify against themselves or to confess guilt. Furthermore, suspects are entitled to withdraw or alter statements made at any stage of the proceedings. In many situations, material evidence and statements by witnesses will obviously be more valuable than information obtained by interrogating a suspect.

In relation to the interrogation of suspects and accused persons, the absolute prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment must be stressed once again. Apart from the fact that such ill-treatment is absolutely forbidden by law in all circumstances, the use of results (confessions or information) obtained by such methods violates the right to a fair trial.

Nonetheless, despite its absolute legal prohibition, arguments are frequently presented that seek to justify torture for the alleged purpose of justice – despite doubts about the usefulness of statements made under the effect of torture. See, for example, the Report submitted by the Special Rapporteur on torture and other cruel, inhuman, degrading treatment or punishment of 3 February 2011 (A/HRC/16/52, paragraph No. 58), in which he reiterates *“his conviction that torture and ill-treatment are and always will be ineffective means or tools for intelligence or information gathering and law enforcement. Confessions and statements obtained under torture are inherently unreliable, and often disorient and disperse the efforts of law enforcement and investigations personnel.”*

More importantly, such arguments are short-sighted and ignore the very reasons for the prohibition of torture:

- Torture undermines the basic principles of liberty, security and human rights on which our societies are supposed to be built and weakens overall respect for the rule of law;
- Torture is degrading both for the victim and the perpetrator and has lasting harmful effects on the victim and on the individual law enforcement official as well as on the law enforcement institution as a whole.

In fact, torture can therefore never be justified under any circumstances (see, for example, the following box).



## INTERNATIONAL JURISPRUDENCE

### **European Court of Human Rights Case of Gaefgen v. Germany Application No. 22978/05, 3 June 2010**

#### **The case**

Despite strong evidence against the suspected kidnapper of a boy, the suspect refused to reveal the whereabouts of the latter, who – in the view of the investigating law enforcement officials – was in immediate danger of dying as a result of the weather conditions and lack of food and water. Following orders issued by a superior, the investigating officer threatened the suspect with severe ill-treatment, that – if put in practice – would have amounted to

torture. Under this pressure the suspect quickly agreed to lead the police to the place where the boy was held. However, the boy had already died.

### **The consequences of the case**

The evidence against the suspect derived from his confession became inadmissible in court, as did further evidence against him that was obtained solely through his confession. The suspect was subsequently sentenced for the kidnapping and killing of the boy only because he later repeated his confession, having been informed that his previous confession and the related evidence could not be used against him. If he had withheld his confession, it is highly probable that he would have gone free. The two police officers involved (the interrogating officer and his superior) were sentenced for coercion. They also suffered negative consequences for their professional careers.

### **The position of the European Court**

“103. As to its physical and mental effects, the Court notes that the applicant, who had previously refused to disclose J.’s whereabouts, confessed under threat as to where he had hidden the body. [...] The Court therefore considers that the real and immediate threats of deliberate and imminent ill-treatment to which the applicant was subjected during his interrogation must be regarded as having caused him considerable fear, anguish and mental suffering. [...]

106. The Court further notes that the threats of deliberate and imminent ill-treatment were made in the context of the applicant being in the custody of law-enforcement officials, apparently handcuffed, and thus in a state of vulnerability. It is clear that D. and E. acted in the performance of their duties as State agents and that they intended, if necessary, to carry out that threat under medical supervision and by a specially trained officer. [...]

107. In this connection, the Court accepts the motivation for the police officers’ conduct and that they acted in an attempt to save a child’s life. However, it is necessary to underline that, having regard to the provision of Article 3 and to its long-established case-law [...], the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3, which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult. 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.”

Suspected and accused persons have the right to be presumed innocent until proven guilty in a court of law. The interrogating law enforcement officials do not establish innocence or guilt through their questioning – their task is to establish facts.

Their fact-finding mission starts with an investigation of the scene of the crime, as well as of the sites where that crime has left traces. Their aim is to gather material evidence of relevance to the crime committed. Their subsequent attention is focused on people who may have witnessed the crime being committed or who may have other relevant information. Only this dual investigative approach and an analysis of the information obtained can enable them, by assembling sufficient facts, to establish a reasonable suspicion against an individual as having committed this crime (if a suspect/suspects was/were not arrested in the act of committing the crime).

The arrest of suspects and their subsequent detention and interrogation are also surrounded by procedural safeguards (see Chapter 8).

The law enforcement officials involved need to prepare thoroughly before questioning suspects. They must seek to obtain as clear a picture as possible of the facts that have been established so far and of the sequence of events determined on that basis.

The purpose of an interrogation is to clarify facts that have already been established and to establish new facts about the crime that has been committed. Every interview must be clearly recorded. Suspects' statements that contain a confession of guilt should be recorded as far as possible in their own words. The duration of the interview and the people present as well as the length of time between two interviews must also be clearly recorded. This is both an intrinsic element of a professional investigation and a way of ensuring that suspects are not subjected to any unlawful treatment or undue pressure. As shown in the following excerpt from an interim report by the Special Rapporteur of the Human Rights Council, other measures exist that may help to prevent torture and cruel, inhuman, degrading or otherwise unlawful treatment.



## LOOKING CLOSER

### **Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment A/65/273, 10 August 2010**

"75. [...] There are numerous methods of prevention that have been developed in the past, which, if adequately implemented by States, could easily eradicate torture: abolition of secret and incommunicado detention; proper registration of every detainee from the moment of arrest or apprehension; prompt access to legal counsel within 24 hours; access to relatives; prompt access to an independent judge; presumption of innocence; prompt and independent medical examination of all detainees; video/audio recording of all interrogations; no detention under the control of the interrogators or investigators for more than 48 hours; prompt, impartial and effective investigation of all allegations or



suspicions of torture; inadmissibility of evidence obtained under torture; and effective training of all officials involved in the custody, interrogation and medical care of detainees.”

It must be noted, however, that these measures do not guarantee to prevent ill-treatment, particularly if any one measure is taken in isolation. For instance, audio-taping or video-taping of interrogations may lead to ill-treatment occurring outside the interrogation process and facility or the presence of medical personnel may be misused for the purpose of applying sophisticated methods of ill-treatment based on their advice (how far to go and when to stop ill-treatment, what to do in order not to leave marks). Thus, it is essential for these measures to be part of a comprehensive system which ensures that the safeguards necessary to prevent unlawful interrogation techniques and investigation methods are established in the legal framework and in the institutional policy of the law enforcement agency. Appropriate accountability mechanisms are an indispensable part of an effective system.



## INTEGRATION IN PRACTICE

### System of sanctions

Adequate implementation of safeguards intended to prevent the use of torture can be ensured by regular inspections by independent bodies. Such bodies are:

- At the national level: judicial authorities, human rights commission, ombudsman, lay visits;
- At the international level: Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Similar bodies also exist at the regional level (e.g. European Committee for the Prevention of Torture, special commissions established by the Inter-American Commission on Human Rights).

These institutions provide a means of generating timely and adequate responses in the form of criminal and disciplinary investigations into allegations of torture and ill-treatment by law enforcement officials and consequently act as a strong deterrent against ill-treatment (see the details on inspections in the above-mentioned report of the Special Rapporteur).

It has already been established that torturing or putting pressure on suspects to compel them to testify can result in a false confession, made in order to prevent further torture or pressure. It should be noted, however, that false confessions are not made solely in situations in which people have been subjected to torture or ill-treatment. Law enforcement agencies around the world are familiar with individuals confessing to crimes that they did not commit, often for complex personal and psychological reasons. Most agencies have chosen not to disclose certain facts of a crime (known only to the “true perpetrator”) so that false confessions can be swiftly dismissed.

### 4.3.3 Disappearances and extrajudicial killings

There are two types of violations which, because of their gravity and their rejection of the fundamental principles of human rights and the rule of law, merit particular mention. The seriousness of those human rights violations is made more acute by the fact that they are committed by State officials.

- **Enforced disappearance**

International Convention for the Protection of All Persons from Enforced Disappearance (CPEd):

Article 2

Enforced disappearance *“is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”*

- **Extrajudicial killings**

Extrajudicial killings are unlawful killings that can be directly or indirectly attributed to a State or a State authority. The term covers a wide range of killings. The United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN Doc. E/ST/CSDHA/12 (1991) provides a definition:

*“These executions include: (a) political assassinations; (b) deaths resulting from torture or ill-treatment in prison or detention; (c) death resulting from enforced ‘disappearances’; (d) deaths resulting from the excessive use of force by law-enforcement personnel; (e) executions without due process; and (f) acts of genocide.”*

In the above definition the word “disappearances” has been placed in quotation marks to make it clear that those concerned have not really vanished. The victims’ whereabouts and fate may be concealed from the outside world but are known to those responsible for their disappearance.

Unlawful and arbitrary deprivation of liberty and the deliberate and unlawful taking of life are some of the most serious crimes that can be committed by those who are, in fact, called upon to protect and promote the human rights of all persons. The very foundation of a society and of the rule of law are swept away whenever and wherever a State is responsible for denying its population such fundamental rights.

Every effort must therefore be made to achieve the effective prevention of such grave violations of human rights. The recruitment, training and

supervision of law enforcement officials must offer operational guarantees that tasks will be carried out in an adequate, lawful and non-arbitrary manner.

Only the complete transparency of law enforcement agencies and their further evolution to open-system-type organizations will help to establish the levels of true accountability that are necessary for the effective prevention of such violations of human rights. The seriousness of such crimes also needs to be understood by law enforcement agencies and by State governments, resulting in the prompt, thorough and impartial investigation of any allegation of a crime of this nature having been or being committed.

In this regard it is worth mentioning that if a person last seen in the hands of State officials subsequently disappears, dies or emerges injured from the interview, the burden for a plausible explanation of the whereabouts and the fate of the person shifts to the State.



## INTERNATIONAL JURISPRUDENCE

### Human Rights Committee

#### Case of Sathasivam and Saraswathi v. Sri Lanka

UN Doc. CCPR/C/93/D/1436/2005, 8 July 2008

"6.2 As to the claim under article 6 that the death of the victim is directly attributable to the State party, the Committee recalls that according to the uncontested material the victim was in normal health before being taken into police custody, where he was shortly thereafter seen by eyewitnesses suffering substantial and severe injuries. The alleged reasons for his subsequent death, namely that he died during an LTTE attack, have been dismissed by the State party's own judicial and executive authorities. In these circumstances, the Committee must give due weight to the presumption that injury and, a fortiori, death – suffered in custody must be held to be attributable to the State party itself. The Committee accordingly concludes that the State party is responsible for arbitrary deprivation of the victim's life, in breach of article 6 of the Covenant."

Finally, investigation of such crimes must ensure that due attention is paid to any victims and that the results of the investigation are made public. The officials responsible must be brought to justice.



## INTEGRATION IN PRACTICE

### Doctrine

Operational procedures need to be established on what to do if a person dies in custody (including the obligatory information of the relevant State bodies/institutions and members of the family of the deceased as well as the conduct of an obligatory autopsy).

### Education

Law enforcement officials must be aware of their State's – and consequently their own obligations regarding the prevention of extrajudicial killings. They must be aware of the existing national laws and operational procedures to be respected in cases of death in custody.

### Training and equipment

Law enforcement officials in charge of the investigation of deaths in custody should be trained in the techniques used to identify the cause of death and should have the appropriate equipment to enable them to conduct such examinations. Law enforcement officials must be trained in the proper management of dead bodies so that deceased persons may be identified, thus preventing people from remaining unaccounted for.

### System of sanctions

Rules and procedures in place must ensure that deaths in custody are reported immediately in order to allow prompt and effective investigation. Non-compliance with such rules must be followed by the necessary corrective measures (training, disciplinary or, where appropriate, penal sanctions). Law enforcement agencies must cooperate fully and provide all information needed for the proper conduct of the investigation of a death in custody and related penal proceedings.

## 4.4 Preventing juvenile delinquency

### 4.4.1. Background information

The prevention of juvenile delinquency is a particular important element in the prevention of crime. Where young people come into conflict with the law, it is in the society's utmost interest to prevent them from becoming the "hard core" adult criminals of tomorrow. The way in which the justice system, including law enforcement agencies, deals with juveniles who are alleged, or found, to have committed an offence is an important factor in determining whether they will grow up to become law-abiding adults or whether their future will be characterized by violence and criminal activity. A number of international instruments have been developed, indicating that the international community has acknowledged the special position of juveniles – and particularly that of juveniles in conflict with the law. The two fundamental premises are as follows:

- Because of their age juveniles are vulnerable to abuse, neglect and exploitation and need to be protected from such threats;

- Bearing in mind how easily juveniles can be influenced, the special attention given to juveniles in the justice system sets out to prevent them from committing crimes and ultimately engaging in a “criminal career.”

The following international instruments govern matters relating to the administration of juvenile justice:

- Convention on the Rights of the Child (CRC);
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);
- United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines);
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNRPJ);
- United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules).

Of the instruments referred to above, only the CRC is a treaty. The other instruments can be considered as offering guidance by setting out widely accepted principles but their provisions do not impose legally binding obligations on States.

The instruments listed above are specifically designed to:

- protect the human rights of juveniles;
- protect the well-being of juveniles who come into conflict with the law;
- promote the child’s sense of dignity and worth;
- promote his or her reintegration into society;
- protect juveniles against abuse, neglect and exploitation; and
- introduce special measures to prevent juvenile delinquency.

The CRC defines a “child” as *“every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”* (Article 1).

The Beijing Rules define a juvenile as a child or young person who, *“under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult”* (Rule 2.2(a)). A juvenile offender is defined as *“a child or young person who is alleged to have committed or who has been found to have committed an offence”* (Rule 2.2(c)).

The aforementioned instruments do not rule decisively on the minimum age of criminal responsibility, leaving a decision on that matter to be made at the national level. However, the Beijing Rules do state that that age should *“not be fixed at too low an age level”* so that account can be taken of *“emotional, mental and intellectual maturity”* (Rule 4). In the commentary to Rule 4, it is acknowledged that *“[t]he minimum age of criminal responsibility differs widely*

*owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behaviour."*

#### 4.4.2 Diversion

In the prevention of juvenile delinquency, the concept of diversion (i.e. removal from criminal justice processing) plays a central role. It is generally accepted that for children who have come into conflict with the law a different approach is needed than that of the usual criminal justice system for adults. The aim should be to reintegrate the young offender effectively into society.

The CRC is the central instrument in the juvenile justice system. It presents a wide range of measures to safeguard the best interests of the child, including measures that protect children who come into conflict with the law. It states clearly, for instance, that detention must be a "*measure of last resort*" and used only "*for the shortest appropriate period of time*" (Article 37(b)). In its General Comment No. 10, the Committee on the Rights of the Child has elaborated on the measures to be adopted in that sense (see the following box).



### LOOKING CLOSER

#### Committee on the Rights of the Child General Comment No. 10

"25. In the opinion of the Committee, the obligation of States parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings applies, but is certainly not limited to children who commit minor offences, such as shoplifting or other property offences with limited damage, and first-time child offenders. Statistics in many States parties indicate that a large part, and often the majority, of offences committed by children fall into these categories. It is in line with the principles set out in article 40(1) of CRC to deal with all such cases without resorting to criminal law procedures in court. In addition to avoiding stigmatization, this approach has good results for children and is in the interests of public safety, and has proven to be more cost-effective.

26. States parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system, and ensure that children's human rights and legal safeguards are thereby fully respected and protected (art. 40(3)(b)).

27. It is left to the discretion of States parties to decide on the exact nature and content of the measures for dealing with children in conflict with the law without resorting to judicial proceedings, and to take the necessary legislative and other measures for their implementation. Nonetheless, on the basis of the information provided in the reports from some States parties, it is clear that a variety of community-based programmes have been developed, such as community service, supervision and guidance by for example social workers or probation

officers, family conferencing and other forms of restorative justice including restitution to and compensation of victims. Other States parties should benefit from these experiences. As far as full respect for human rights and legal safeguards is concerned, the Committee refers to the relevant parts of article 40 of CRC and emphasizes the following:

- Diversion (i.e. measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings) should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding;
- The child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure. With a view to strengthening parental involvement, States parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years;
- The law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination;
- The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities, and on the possibility of review of the measure; [...]

28. When judicial proceedings are initiated by the competent authority (usually the prosecutor's office), the principles of a fair and just trial must be applied [...]. At the same time, the juvenile justice system should provide for ample opportunities to deal with children in conflict with the law by using social and/or educational measures, and to strictly limit the use of deprivation of liberty, and in particular pre-trial detention, as a measure of last resort. In the disposition phase of the proceedings, deprivation of liberty must be used only as a measure of last resort and for the shortest appropriate period of time (art. 37(b)). This means that States parties should have in place a well-trained probation service to allow for the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day report centres, and the possibility of early release from detention."

In a similar manner, the Riyadh Guidelines focus on the prevention of juvenile delinquency through the involvement of all parts of society and through the adoption of a child-oriented approach; they consider the prevention of juvenile delinquency to be an essential part of crime prevention in society. The instrument elaborates on the roles of the family, education, community and mass media in the achievement of that objective and sets out roles and responsibilities with regard to social policy, legislation and juvenile justice administration, research, policy development and coordination.

An underlying premise of the guidelines is that *“youthful behaviour or conduct that does not conform to overall social norms is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood”*(Article 5(e)).

The guidelines encourage the development and application of comprehensive plans for the prevention of juvenile delinquency at every level of government. There should be close cooperation between the various levels of government, the private sector, representative citizens of the community, child care agencies, law enforcement and judicial agencies in taking action to prevent juvenile crime. Specialized personnel should exist at all levels.



## INTEGRATION IN PRACTICE

### Doctrine

Operational procedures should establish the obligatory information of relevant actors (e.g. child care agencies) if a minor is the suspected offender of a crime.

The Tokyo Rules is an instrument concerned with offenders in general and at all stages of the proceedings, irrespective of whether they are suspected or accused of having committed an offence or have been sentenced. It formulates basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.

In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions.

Non-custodial measures fit in very well with the overriding objective of the juvenile justice system to divert juveniles who come into contact with the law away from the criminal justice system and to redirect them towards the community. Non-custodial measures must, of course, be provided for in national legislation as a pre-condition for their lawful application.

### 4.4.3 Implications for law enforcement practice

A juvenile offender is a special type of offender, requiring special protection and treatment. This is acknowledged by the existence of specialized international instruments that have been created with the protection of the specific interests of juveniles at heart.



The Beijing Rules are very explicit on the need for specialization within law enforcement agencies in relation to juveniles. Rule 1.6 states that juvenile justice services shall be *“systematically developed and co-ordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes.”*



## INTEGRATION IN PRACTICE

### Training

As law enforcement officials are the juvenile's first point of contact within the juvenile justice system, it is most important that they act in an informed and appropriate manner. Beijing Rule 12 draws attention to the need for specialized training for all law enforcement officials who are involved in the administration of juvenile justice.

Specialized law enforcement units are therefore becoming increasingly indispensable, not only for the implementation of specific principles contained in the Beijing Rules, but more generally to improve the prevention and control of juvenile crime and the handling of juvenile offenders.

The diversion of juveniles away from the criminal justice system and their redirection towards the community requires law enforcement officials to adopt an attitude and approach that differs from attitudes and approaches appropriate for adult offenders. The establishment and maintenance of a relationship with community groups, child care agencies and officials within the judiciary assigned to juvenile justice calls for special knowledge and skills on the part of law enforcement officials.

It is essential, for instance, that the training given to law enforcement officials conveys the perception of juvenile delinquency as a transitional problem that calls for guidance, understanding and preventive support measures. Furthermore, for the successful application of non-custodial measures, both a thorough understanding of the juvenile concerned and a capacity to apply such measures in close cooperation and coordination with other key agencies are essential, the aim being to ensure the successful rehabilitation of the juvenile offender. The objective of such measures is to prevent recidivism rather than to inflict punishment for an offence committed. Such approaches require law enforcement officials to have broad views and a thorough appreciation not only of the rights and the special position of juveniles, but also of the special position and rights of victims of juvenile crime, while bearing in mind society's needs for protection and satisfaction. Nonetheless, the particular interests of the juvenile offender cannot be made subordinate to other interests or fail to be given priority without full justification.

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## CHAPTER 5 OUTLINE

- 5.1 Introduction
- 5.2 Assemblies and demonstrations
  - 5.2.1 Applicable law
  - 5.2.2 Law enforcement practice
- 5.3 States of emergency
  - 5.3.1 Definition
  - 5.3.2 Requirements
  - 5.3.3 Derogations
  - 5.3.4 Implications for law enforcement practice
- 5.4 Military armed forces in law enforcement
- 5.5 Selected references

## KEY LEGAL DOCUMENTS

### Treaty law

- International Covenant on Civil and Political Rights (ICCPR, adopted in 1966, entered into force in 1976)

### Non-treaty law

- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF, adopted in 1990)
- Declaration of Minimum Humanitarian Standards (Turku Declaration, adopted in 1990)

## CHAPTER 5

# MAINTAINING PUBLIC ORDER

### 5.1 Introduction

Peace, stability and security in a country are largely dependent on the capacity of its law enforcement agencies to enforce national laws and effectively maintain public order. Policing major incidents requires an understanding of more than the legal responsibilities of participants in such events. It also requires a simultaneous understanding of the rights, freedoms and obligations of all people under the law, regardless of whether they are involved in the situation or not. The management of public order may be described as granting one gathering of persons the right to exercise their legal rights and freedoms without infringing the rights of others, while at the same time assuring observance of the law by all parties. This applies to all types of situations in which public order management is required: public demonstrations and assemblies (see the following sections in this chapter for further details), emergency situations such as natural disasters or major accidents, mass events such as football matches or rock concerts, high profile political events and so on. More specific information about the application of the governing principles, the balance of interests and rights and the importance of good planning is given below in relation to public assemblies and demonstrations. These considerations are, however, applicable and indispensable in all types of public order management.

The effective discharge of this responsibility will be much more difficult when the circumstances surrounding such events change from peaceful to violent, or escalate further to more widespread violence or even to situations of armed conflict. In every situation law enforcement agencies remain responsible for the maintenance of public order – unless a lawful decision is taken to confer this task on other parts of a State's security apparatus. However, that does not change the essential nature of the task, which is that of law enforcement (CCLEO, Article 1, Commentary (b)).

### 5.2 Assemblies and demonstrations

The phenomenon of people taking to the streets to express their feelings and opinions publicly on any topic that is close to their hearts is common enough in most countries in the world. Although such events are not necessarily violent, the occasions which, unfortunately, tend to stand out in people's minds are those that are characterized by physical confrontation (among demonstrators themselves and between demonstrators and law enforcement officials). As this includes situations in which law enforcement officials might resort to force, the principles governing the use of force in the specific context of public assemblies will first be broadly addressed. A more comprehensive

presentation of the rules governing the use of force and firearms is presented in Chapter 7.

At this juncture, it is worth noting that the management of public assemblies not only requires decisions relating to the use of force; it also involves constant efforts to balance a whole range of rights that may be affected when people decide to gather in public. The maintenance of peace and order should be the overarching goal in the management of public assemblies. Consequently, prevention of violence, de-escalation when violence occurs and, as far as possible, avoiding the use of force should be guiding concepts. This chapter discusses the legal standards and their operational implications in that endeavour.

### **5.2.1 Applicable law**

National law determines whether and under what circumstances a public assembly is to be considered lawful or unlawful. It should furthermore determine the possible restrictions that authorities can impose on the conduct of a public assembly. Such legal provisions need to comply with the country's obligations under international law. The decision of the authorities to allow a demonstration or an assembly to take place or, conversely, to prohibit it, has to be taken in accordance with this legal framework, and in particular with Article 21 of the International Covenant on Civil and Political Rights (ICCPR):

*“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”*

The principle of legality also requires the national legislation regulating the lawfulness of assemblies and demonstrations to be in line with international human rights law; in particular, assemblies or demonstrations may not be prohibited on arbitrary grounds or on grounds that would be incompatible with human rights. It would be beyond the scope of this Manual to discuss in greater detail the underlying human rights standards to be respected in this regard. However, whatever decision is taken, there are a number of rights, rules and standards that authorities and, in particular, law enforcement officials must respect when managing public assemblies, including when taking the decision to disperse an assembly or not.

Respect for the rights and freedoms of others or for their reputation, public order and public safety, national security and public health or morals – all these can be reasons that necessitate imposing restrictions on the exercise of the aforementioned rights, always provided that these restrictions are themselves

legitimate, necessary, proportionate and in overall respect of the country's international obligations. Law enforcement officials will be called upon to put any such restriction into effect in any situation in which it is deemed necessary by the competent authorities. This must also be done in strict respect of the principles of legality, necessity, proportionality and accountability.

Utmost attention must be paid to the obligation of law enforcement officials to respect and protect the life, liberty and security of all persons (ICCPR, Article 6(1); CCLEO, Article 2; BPUFF, Preamble (paragraph 3); BPUFF No. 5; and the regional treaties, i.e. ACHPR, Articles 4 and 6; ACHR, Articles 4(1), 5(1) and 7(1); ArabCHR, Articles 5 and 14; ECHR, Articles 2(1) and 5(1)).

The BPUFF provides guidance as to how this respect can best be ensured, as shown below.

In application of the *principle of legality*, there is a need to distinguish between lawful and unlawful assemblies (BPUFF No. 12). A lawful assembly, i.e. an assembly that takes place in full respect of the provisions of national law, can only be restricted if other legal provisions authorize such restrictions, which should be both necessary and proportionate. Such restrictions may refer, for instance, to the geographical area in which the assembly will be taking place (for example, in order to ensure access to hospitals or to protect children going to and coming from school) or to the time (for example, limiting the number of hours that a major road can be occupied by the assembly). These are referred to as "time, place and manner restrictions."

Furthermore, where assemblies are lawful, law enforcement officials are duty bound to protect them, e.g. against violent counter-demonstrations.

When managing public assemblies, law enforcement agencies should seek to avoid the use of force, which should remain the last resort (BPUFF Nos 4 and 13). The *principle of necessity* gives priority to the peaceful settlements of conflicts and to the use of methods of persuasion, negotiation and mediation in order to limit recourse to the use of force (BPUFF No. 20).

Another important distinction must be made between violent and non-violent assemblies. This becomes relevant in two sets of circumstances, as discussed below.

### **Unlawful but peaceful assemblies**

An unlawful assembly, i.e. an assembly that does not take place in accordance with the provisions of national law (for example, if a notice period has not been respected or if authorization has not been obtained), may nevertheless be completely peaceful. Thus, in application of the principle of proportionality,

law enforcement officials have to balance carefully the public interest in dispersing such an unlawful assembly against the possible negative consequences of its dispersion (see BPUFF No. 13). The fact that an assembly, though unlawful, takes place peacefully may lead to a decision not to disperse it and, in particular, not to use force to that end, the aim being to prevent an unnecessary and potentially dangerous escalation of the situation. Such a decision does not prevent the subsequent prosecution of those participating in an unlawful event. However, in the interest of protecting other important rights (including the life, physical integrity and property of people who are not involved in the assembly), the recommended course of action may be to allow the assembly itself to proceed.

### **Violent assemblies**

An assembly that is or becomes violent may lead to a decision to disperse it in order to stop the violence – even though the assembly may have been lawful in the beginning. However, it should be noted that the presence of a limited number of violent protestors does not necessarily make the whole assembly violent. In application of the principles of necessity and proportionality, law enforcement officials will therefore have to consider the possibility of dealing with such violent individuals before resorting to the dispersion of the assembly as a whole (see section 5.2.2).

Finally, the BPUFF recommends a number of precautionary measures that should help law enforcement officials to deal with a public assembly in accordance with the above-mentioned principles. These measures refer to the availability of protective equipment and equipment that allows a graduated use of force, including incapacitating equipment (BPUFF No. 2), to acquiring a good understanding of crowd behaviour (BPUFF No. 20) and to the appropriate selection and training of law enforcement officials (BPUFF No. 19). The availability and accessibility of medical services for anyone who is injured (see BPUFF No. 5(c)) is of particular importance in public assemblies.

### **5.2.2 Law enforcement practice**

This Manual is not intended to be a tool for the elaboration and transmission of technical law enforcement tactics for dealing with assemblies and demonstrations. The presentation here of examples of law enforcement practices with regard to demonstrations and assemblies is nevertheless justified in that they may help to ensure respect for applicable legal standards.

In terms of law enforcement, experience with the maintenance of public order shows that many aspects of demonstrations, assemblies, etc. have a degree of predictability. Large-scale events such as demonstrations and assemblies require preparation. Law enforcement agencies are increasingly endeavouring to be involved in that preparation phase, i.e. to negotiate the itinerary for the



event with the organizers as far as possible. The clear advantages of this procedure are that:

- organizers are acquainted with the objectives and tolerance levels of the law enforcement operation relating to their demonstration and are informed of their obligations with regard to the rights of those not participating in the demonstration;
- law enforcement authorities acquire information about the goals and objectives of the demonstration as well as about attendance, likely behaviour, timing, etc.;
- both parties can subsequently work out clear agreements regarding routes, law enforcement presence, contingency arrangements, etc.;
- points of contention or potential conflict can be negotiated and resolved prior to the event so that they do not pose a problem when the assembly or demonstration actually takes place.

Another important lesson to be drawn from experience is that effective law enforcement strategies no longer wait until public order has actually been disrupted and then needs to be restored. The prevention of disturbances through preparation, as referred to above, and through early intervention targeting individual offenders has proved far more effective. The main concept behind “early intervention” is based on some well-established perceptions of crowd behaviour:

- people in crowds do not form a homogeneous mass with all individuals behaving more or less in the same way;
- people in crowds are not necessarily more likely to use violence than they would in everyday circumstances;
- people in crowds do not necessarily have a greater tendency to engage in “emotional” or “irrational” behaviour.

These perceptions justify the conclusion that people in a crowd are, and remain, individuals. Each individual in a crowd will make independent decisions. It is true that such decisions may well be influenced by the behaviour of others. However, if someone in a crowd picks up a stone to throw at law enforcement officials present on the scene, this incident does not automatically lead to further violence. The act *can* trigger a decision-making process in other people present and witnessing the incident, who in turn may also decide to pick up stones and throw them. However, they may also decide *not* to do so.

By intervening at an early stage, effective law enforcement seeks to apprehend the first individual throwing a stone (or, more generally, individuals breaking the law) and to remove them from the scene before their behaviour acts as a stimulus on other people present. Such interventions are specifically targeted and should have a low impact on the demonstration, not affecting innocent bystanders. On the other hand, acts of violence by individuals or groups may be deliberately

provocative, the intention being to seek violent confrontations with the authorities. In that case, the opposite approach might be more appropriate; in other words, not giving in to provocations by such groups while limiting police action to the protection of those not involved in violence might be a more appropriate means of preventing the escalation sought by a minority. Good communication with the organizers of the demonstrations and all those who wish to demonstrate peacefully is crucial in such situations. Again, these options show that preparing for a public assembly combined with good knowledge of those who are likely to participate and their attitude is vital to ensure that the right choice is made at the right moment (see also BPUFF No. 20).



## INTEGRATION IN PRACTICE

### Education

Law enforcement officials having to deal with public order situations should be taught the “psychology” of crowd situations (as applied to all sides, the demonstrators, uninvolved bystanders and law enforcement officials). The teaching should also cover panic triggers or factors that can lead to an escalation or to de-escalation of a situation.

Recognition of the fact that people in a crowd are individuals and not merely a “mass” allows communication to take place between law enforcement officials and participants in the demonstration. Such communication does not merely involve conversation but can be extended to form part of the strategies and tactics of law enforcement. The use of amplification equipment to direct people in a crowd or to warn people that force may be used allows them to make up their minds about what they want to do and where they want to go.



## INTEGRATION IN PRACTICE

### Training and equipment

- Communication devices should be part of the standard equipment for public order situations. Law enforcement officials should be trained not only in the technical use of such equipment but also on how to communicate in an appropriate manner with demonstrators and bystanders.
- The presence of fire (e.g. where items such as tyres or cars are burning) increases tension and may lead to further escalation of the situation. To include the use of fire-extinguishers in training exercises (or even inviting the fire brigade to take part in such exercises) may be an appropriate measure to achieve de-escalation or at least to prevent further escalation in such circumstances.

Law enforcement officials should be aware of a few additional facts:

- People in crowds cannot move rapidly; before a change of direction can be made or a march can come to a stop, time must therefore be allowed for the “message” to be transmitted to, and understood by, each and every individual;
- People in crowds are responsible individuals who expect and deserve to be treated as such; they must not be treated as a group;
- The presence of police dogs at a demonstration is easily perceived by participants as an act of aggression on the part of law enforcement officials. Furthermore, dogs do not distinguish between offenders and bystanders; if not kept under tight control, they may well bite anyone who comes within their reach.

The physical appearance of law enforcement officials is another important factor in the maintenance of public order. People are used to seeing the uniforms worn by their local law enforcement officials for normal duties. Many countries have decided to dress their law enforcement officials in a different uniform during assemblies and demonstrations. The fear of escalation and riots, the desire to assert authority and the protection of law enforcement officials are reasons for the adoption of this tactic. Law enforcement officials therefore wear “riot gear,” with protective equipment such as helmets and shields. This type of uniform is usually reserved for exceptional, violent circumstances. While law enforcement agencies may not set out to convey a hostile impression to demonstrators by their appearance, this is often exactly what happens. People find it hard to believe that law enforcement officials in full riot gear, presenting a very different image from the one familiar to them, are actually the very same officials. It is not surprising that law enforcement officials dressed and equipped in this way find it difficult to convince the public of their peaceful intentions. More generally speaking, fear does not necessarily promote rational behaviour and the appearance and equipment chosen by law enforcement officials – normal clothing or riot gear, dogs, horses, tear gas, etc. – should not serve or be used to create a sense of fear among demonstrators that might only increase tension and aggression or even cause panic and ultimately lead to an escalation of the situation.

A particularly crucial question in the policing of assemblies concerns the use of firearms. Besides the legal standards, which will be presented in detail in Chapter 7, the practical challenges are enormous. A violent assembly poses some specific additional risks. First, law enforcement officials usually have to deal with large crowds. Second, the violence generates a high level of confusion and disorganization. Third, it becomes increasingly difficult to distinguish between people involved in the violence and those who are not. Fourth, panic reactions can increase the risk of harm to people in the area. All those factors make it questionable in many situations whether the use of firearms is appropriate, both in view of the potential consequences for people

who are present but not involved in the violence and also in view of the probability of effectively achieving the underlying objective, i.e. protection of life and the restoration of peace and order.



## INTEGRATION IN PRACTICE

### Doctrine

It should be clearly established in advance who, in a public order situation, may take decisions regarding the use of firearms and those authorized to use them.



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of Evrim Öktem v. Turkey, 9207/03

#### Information Note on the Court's case-law No. 113, November 2008

"The court could not agree with the Government's argument that the impugned protest would have degenerated into an insurrection. Nothing in the case file indicated by what criminal behaviour the protestors might have endangered the lives of innocent bystanders present at the time of the police officers' intervention. [...] Even assuming that they did have good reason to fear for their lives, the police should not have gone so far as to upset the necessary balance between the aims and the means. In the absence of any clear escalation in the damage done or any serious threat to people's safety, it would surely have been preferable for them to wait for reinforcements better equipped to deal with such difficulties and thereby avoid unnecessarily provoking the crowd, bearing in mind that at the time they had no power of dissuasion other than their weapons. [...] R. Ç. had enjoyed a great autonomy of action and taken unconsidered initiatives, which would probably not have been the case if he had had the benefit of proper training and instructions or, at least, if the department from which he had requested reinforcements had given him clear and adequate directives. If the situation had degenerated in that way, it was doubtless because at the relevant time the system in place did not afford clear guidelines and criteria governing the use of force in peacetime by police officers individually or in the course of pursuit operations."

As in all other types of law enforcement operations, lessons learned should be integrated into public order management. The recommendation is therefore to carry out a systematic review of such operations (after action review), involving all those competent to contribute to such an analysis and to suggest any necessary changes for future operations.

The process should lead to:

- the identification and addressing of gaps in operational procedures;

- the adaptation or changing of equipment;
- improved training;
- necessary disciplinary proceedings or even the initiation of criminal prosecution; and
- counselling for law enforcement officials who are involved in violent situations (BPUFF No. 21).



## INTEGRATION IN PRACTICE

### System of sanctions

Law enforcement authorities should ensure (e.g. through videotaping, the use of the media and/or other persons specifically tasked to monitor the situation) that they acquire detailed information about the evolution of a public order situation, including situations in which force was used, by whom, for which reasons and in which way. This information is then fed into the process of deriving lessons for the future.

N.B. As highlighted in Chapter 3, section 3.6, the fourth element of the concept of integration, i.e. system of sanctions, is to be understood in the broadest way, as extending from appropriate control and supervision to taking appropriate corrective measures in all their possible forms – disciplinary, penal, social or other.

However, it should be noted that such a process cannot and may not replace the independent external control of public order situations (particularly in the case of use of force resulting in death or injury) by the prosecution and the judicial or other authorities (BPUFF No. 22).

## 5.3 States of emergency

It is not always clear when separate incidents (such as assemblies, rallies, demonstrations, riots and isolated acts of violence) become interrelated and, viewed together, constitute a more or less consistent pattern, escalating to more widespread violence. What is clear, however, is that such a pattern presents the relevant authorities with serious public safety and public order problems. Every effort must be taken to ensure effective law enforcement, the prevention and detection of crime and the restoration of public safety. When such efforts fail, a sense of lawlessness with impunity may grow within a society, exacerbating existing levels of tension even further. Disturbances and tensions may eventually lead to a situation that threatens the life of the nation and tempts the government in power to proclaim a state of emergency. This occurs when the government is no longer convinced of its ability, under the prevailing conditions and with the measures normally at its disposal, to control the situation. Article 4 of the ICCPR contains important provisions for such situations, which are set out below.

### 5.3.1 Definition

Article 4 of the ICCPR makes it possible for States Parties to take “*measures derogating from their obligations under the present Covenant,*” but only “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.”

Most constitutions contain emergency clauses that empower the head of State or government to take exceptional measures (including restrictions on or the suspension of basic rights) with or without the consent of parliament in wartime or in other catastrophes. Of course, a privilege of that kind runs the risk of being abused or misused, leading to excessive measures in violation of human rights law. International law is thus faced with the task of striking a balance between recognizing the legitimate right of sovereign States to defend their constitutional order and preventing misuse of the right to proclaim a state of emergency.

### 5.3.2 Requirements

Although an emergency situation may be readily apparent, the derogation of rights under the ICCPR constitutes a violation of a State Party’s obligation unless the emergency has been officially proclaimed by the domestic body empowered to do so. This proclamation must take the form of public notification of the population affected. Therein lies its essential significance: the people must know the exact material, territorial and temporal scope of application of emergency measures and their impact on the exercise of human rights. In particular, the proclamation requirement is intended to prevent *de facto* derogations as well as subsequent attempts to justify human rights violations that have already been committed.

Derogation measures may be taken in a state of emergency only “*to the extent strictly required by the exigencies of the situation.*” The degree of interference and the scope of the measure (in terms of both territory and duration) must be commensurate with what is actually necessary to combat an emergency that threatens the life of the nation. In addition to this requirement, the measures may not be “*inconsistent with [the State’s] other obligations under international law [or] involve discrimination solely on the ground of race, colour, sex, language, religion or social origin*” (ICCPR, Article 4(1)).

“*Other obligations under international law*” refers equally to principles of customary international law and of international treaty law (primarily to other human rights conventions and to treaties in the field of international humanitarian law). Derogation from provisions of the ICCPR which are not among the non-derogable rights cited in Article 4(2) is permitted only insofar as the derogation does not violate the obligation not to discriminate (ICCPR, Article 4(1)).

Article 4(3) of the ICCPR stipulates that any State Party “shall immediately inform other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated,” i.e. provide prompt notification of a state of emergency. Similar notification is required when a state of emergency is ended. Unlike the proclamation requirement, the notification requirement is not a condition that is necessary to render the taking of emergency measures lawful. Rather, its aim is to facilitate international supervision by other States Parties and by the Human Rights Committee.

### 5.3.3 Derogations

In Article 4(2) of the ICCPR, reference is made to a number of inalienable, i.e. non-derogable, rights. These are:

- the right to life (Article 6);
- the prohibition of torture and cruel, inhuman or degrading treatment or punishment (Article 7);
- the prohibition of slavery and servitude (Article 8);
- the prohibition of detention on the ground of inability to fulfil a contractual obligation (Article 11);
- the prohibition of retroactivity of criminal law (Article 15);
- the right to recognition as a person before the law (Article 16);
- the right to freedom of thought, conscience and religion (Article 18).

None of those rights can be suspended or abrogated in a state of emergency. Each of those rights exists for all persons in all circumstances. A State cannot therefore use the imposition of a state of emergency as an excuse for failing to protect and uphold these inalienable rights.



## LOOKING CLOSER

### Human Rights Committee

#### General Comment No. 29 on Article 4 of the ICCPR (CCPR/C/21/Rev.1/Add.11)

The Committee for Civil and Political Rights has issued a General Comment on Article 4 of the ICCPR that includes some additional rights not explicitly included in those not subject to derogation referred to in Article 4(2). Of particular relevance for the purpose of this Manual is the following comment on the non-derogable character of the right to a fair trial (ICCPR, Article 14):

“16. Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements

of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."

Various regional human rights instruments also recognize states of emergency (with a varying number of non-derogable rights). Whereas the ICCPR only refers to public emergency (as does Article 4 of the ArabCHR), Article 15 of the ECHR, Article 15 of the ESC and Article 27 of the ACHR all refer to war as well. The ACHPR deliberately does not provide for the possibility of a state of emergency; limitations of rights and freedoms cannot be justified by emergencies or special circumstances. However, collective security, *inter alia*, is considered a legitimate reason for limiting rights and freedoms, provided that these limitations are strictly proportionate and absolutely necessary (see ACHPR, Article 27(2) and Communications of the African Commission No. 105/93, paragraphs 67-69).



## LOOKING CLOSER

### Minimum humanitarian standards

A comparison of international humanitarian law and human rights law has led some observers to the conclusion that there was a protection gap in respect of situations below the threshold of an armed conflict, which allowed States to declare a state of emergency and to derogate clauses in the International Covenant on Civil and Political Rights (ICCPR) and certain other human rights treaties. At the same time, important aspects were not regulated by human rights law, such as the standards for the protection of the wounded, sick and dead and standards relating to medical or humanitarian relief organizations. This led to the Declaration of Minimum Humanitarian Standards, a document drawn up by a group of international human rights and humanitarian law experts (Turku Declaration, adopted in 1990). It has no official legal status. However, its content may offer guidance for the operational behaviour of law enforcement agencies during internal disturbances and tensions or in public emergency situations.

The Turku Declaration calls for the observance of rights from which, under the ICCPR, derogations may otherwise be made in states of emergency. It consists of 18 articles and provides for rules on the following rights and subjects:

- Equality and non-discrimination (Article 2);
- Personal rights and acts forbidden under all circumstances (Article 3);
- Rules related to deprivation of liberty (Article 4);
- Prohibition of attacks on persons not taking part in acts of violence, use of force subject to proportionality, prohibition of the use of forbidden weapons (Article 5);
- Prohibition of acts or threats of violence causing terror among the population (Article 6);



- Rules relating to displacement (Article 7);
- Provisions on the right to life (Article 8);
- Rules relating to legal proceedings and judgment (Article 9);
- Protection of children (Article 10);
- Assigned residence, internment, administrative detention (Article 11);
- Protection, search and medical care for the wounded and sick (Articles 12 and 13);
- Medical and religious personnel (Article 14);
- Humanitarian organizations and their activities (Article 15);
- Protection of rights of groups, minorities and peoples (Article 16).

### 5.3.4 Implications for law enforcement practice

The characteristics of emergency situations are frequently used to justify stronger restrictions of human rights, increased powers for law enforcement agencies and reduced accountability (e.g. related to surveillance measures, stop and search activities and mass arrests). However, the actual need for such measures must be assessed carefully and their proportionality to the threat must be evaluated. Where the exercise of powers is unnecessary or disproportionate, it would first of all be unlawful to resort to such measures. In addition, instead of improving the situation, their implementation would probably only serve to make things worse. It can easily lead to inefficient use of resources and to alienation between the law enforcement agency and the people, both of which are counterproductive in the attempt to restore peace, order and security.

Under the pressure of occurrences that are characteristic of emergency situations, the exercise of unnecessary or disproportionate powers may lead to generalized patterns of law enforcement practices that are both unlawful and indiscriminate – a situation that presents even greater problems. Unlawful and indiscriminate law enforcement practices have far-reaching negative consequences. If law enforcement agencies resort to excessive or arbitrary action or even to unlawful discrimination, this will be seen as confirming the perceived state of lawlessness and have further negative repercussions on the already deteriorating state of law and order. Failure to bring those responsible for such acts to justice will foster a culture of impunity. Suspension of judicial guarantees (or even the mere overloading of the judiciary, caused, for instance, by mass arrests) will strengthen the perception of lawlessness and further consolidate *de facto* impunity for wrongdoing.

Law enforcement action is a key factor in emergency situations. Random or excessive action – as well as unlawful discrimination – will erode confidence in law enforcement, further endanger public safety and be at least partly responsible for the further escalation of a situation. Conversely, specific, lawful, non-arbitrary and precisely targeted forms of action, directed at initiators and

perpetuators of disturbances and tensions, can lead to a reassertion of control and defuse the situation.

Thus, the upholding of absolute respect for the rule of law, particularly close supervision of all law enforcement action in relation to the emergency situation and full accountability are of even greater importance and should be given the utmost attention by the management of a law enforcement agency in an emergency situation.

#### **5.4 Military armed forces in law enforcement**

In many countries of the world, authorities may decide to confer the task of maintaining public order in demonstrations and other public assemblies to the military armed forces. There can be multiple reasons for taking such a decision. It is frequently the consequence of police forces not being – or being perceived not to be – sufficiently equipped in terms of numbers, operational capacity, equipment, training, etc. to respond to what is often a very violent situation.

The deployment of military armed forces in such situations is not prohibited by international law. On the contrary, it is explicitly considered in Commentary (b) to Article 1 of the CCLEO. However, in this case military armed forces are bound by the legal framework applicable to law enforcement.

The need to respect a legal framework fundamentally different from that applicable to the conduct of hostilities in situations of armed conflict presents military armed forces with a number of important challenges, given their core mandate to protect the country against an enemy.

Combating an enemy with the objective of neutralization, including the option to kill, implies a *modus operandi* that is geared from the onset to the use of deadly force. Injury and loss of life are – unfortunately – normal consequences of the conduct of hostilities. Operational procedures, weaponry and equipment as well as training are designed accordingly, whereas law enforcement operations seek to avoid injury and the loss of life. The mission of such operations is to serve and protect the population, in particular to protect the life and security of the individual. The maintenance of a situation of peace and order, in which no one is to be harmed, is the ultimate goal of all law enforcement activity. Consequently, the operational and mental adjustment required of military armed forces deployed in law enforcement operations should not be underestimated.

The law enforcement mission, even in a situation of a violent assembly, must be to protect life and to de-escalate a situation as far as possible in order to prevent loss of life, injury and destruction of property. Demonstrators, even those who are violent, must not be perceived as enemies. This must be clear in the minds

of all those deployed in the situation. The operational procedures must be formulated accordingly. The forces deployed need to be trained in accordance with such procedures and must dispose of equipment that allows a graduated and proportionate response to the situation. They must also be proficient in the use of such equipment. Military weaponry, such as machine guns, tanks or hand grenades, with which they are familiar, is no longer appropriate; instead, they will have to use protective gear, batons, tear gas and rubber bullets. Communication with demonstrators should form part of the operational handling of the situation, implying that those dealing with the situation should have the appropriate communication equipment and communication skills.



## INTERNATIONAL JURISPRUDENCE

### **Inter-American Court of Human Rights Case of the Caracazo v. Venezuela Series C, No. 95, Judgment of 29 August 2002**

“127. [...] The State must adopt all necessary provision [...] and specifically those for education and training of all members of its armed forces and its security agencies on principles and provisions of human rights protection and regarding the limits to which the use of weapons by law enforcement officials is subject, even in a state of emergency. The pretext of maintenance of public security cannot be invoked to violate the right to life. The State must, also, adjust operational plans regarding public disturbances to the requirements of respect and protection of those rights, adopting to this end, among other measures, those geared toward control of actions by all members of the security forces in the very field of action to avoid excess.”

Authorities have to consider carefully whether it will be possible to take all necessary measures to ensure that the military armed forces deployed have the capacity to fulfil a law enforcement mission in due respect of the applicable legal framework. Where operational procedures and the training and equipment of the military forces are not in line with the requirements for law enforcement, authorities should refrain from deploying them in law enforcement operations. Moreover, even if all necessary measures have been put in place, it is recommended to place the armed forces deployed under the control of the civil authorities in order to ensure that all decisions taken are commensurate with the mission of the operation – the maintenance of public peace and order.



## INTEGRATION IN PRACTICE

### Doctrine

Internal rules and procedures must clearly determine the chain of command, particularly in relation to the civil authorities but also in view of the decision-making process and criteria governing recourse (or not) to force, including the type of force to be used.

### Education

Military armed forces deployed in public order situations must fully understand their mission (to restore peace and security and to protect life) and their personal responsibility (i.e. criminal liability in case of excessive use of force).

### Training and equipment

Military armed forces must be proficient in the correct and appropriate use of any equipment that is not part of their usual equipment (e.g. shields, helmets, protective gear, batons, tear gas, water cannons, etc.).

### System of sanctions

While it is normal for firearms to be used in the conduct of hostilities and their use is therefore not subject to any specific reporting rules, in the conduct of law enforcement operations, the principle of accountability requires any use of a firearm to be reported. This is a precondition for assessing whether or not excessive use has been made of force; the monitoring, supervision and reporting mechanisms of the armed forces deployed must ensure that no use of a firearm remains unnoticed.

## 5.5 Selected references

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## CHAPTER 6 OUTLINE

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6.5.7 Selected references

## Note

Key legal documents and selected references are presented in the subsections of this chapter.

# CHAPTER 6

## PROVIDING PROTECTION AND ASSISTANCE FOR PEOPLE IN NEED

### 6.1 Introduction

The provision of protection and assistance is the third pillar of police responsibility (in addition to the maintenance of public order and the prevention and detection of crime) but it is very often overlooked or at least treated as a secondary responsibility. However, all three categories of responsibility are strongly interlinked and, at least in the long term, one cannot be achieved without the other. Moreover, to protect and assist people in need forms an essential part of the duties of the State under international human rights law towards those falling under its jurisdiction, in particular, the duty to protect and the duty to ensure and to fulfil human rights (see Chapter 3, section 3.2).

People are often in need of protection and assistance because of a specific vulnerability, which should be understood in the broadest sense. Individuals are vulnerable:

- if, as a result of a specific situation or characteristic, they are particularly exposed to discrimination, abuse and exploitation by others;

and/or

- if they do not have access to basic necessities for survival (e.g. food, water, shelter and medical care) on a permanent basis or in a particular emergency situation;

and/or

- if, in any other way, they are unable to care for themselves.

When these aspects are fulfilled cumulatively, the vulnerability of the person is exacerbated.

People are often rendered vulnerable by certain distinguishing attributes, such as age (children, the elderly), gender, sexual orientation, race, colour, language, religious beliefs, membership of a specific religious group, political or other opinion, nationality, ethnic or social origin, legal or social status (asylum seekers, refugees, human rights activists), disability and poverty.

The international community has established a number of documents – treaties and soft law documents – that set out to protect groups of people who, depending on the context and the specific circumstances, may present such vulnerabilities. Law enforcement officials, among others, are called to put the rights established in these documents into practice. Some of the documents include practical obligations for law enforcement officials.

This chapter will address the following groups of potentially vulnerable people:

- Victims of crime and abuse of power;
- Children;
- Women;
- Refugees;
- Internally displaced people;
- Migrants.

This is by no means an exhaustive list of vulnerable groups; the degree of vulnerability may also be dependent on the context. The range of categories of potentially vulnerable people is very broad and includes foreigners, religious or ethnic minorities, homosexuals, victims of natural disasters, elderly people, people with disabilities, members of certain political parties, certain professions, detainees, poor people, people living in informal settlements, people with HIV and so on. Moreover, people could fall into several categories at the same time, which will make them even more vulnerable. Law enforcement officials need to have a clear understanding of the society in which they work, its composition, the existence of any type of minorities or marginalized groups, the reason for their vulnerability and their specific need of protection.

## 6.2 Victims of crime and abuse of power

### KEY LEGAL DOCUMENTS

#### Treaty law

- European Convention on Human Rights (ECHR, adopted in 1950, entered into force in 1953)
- American Convention on Human Rights (adopted in 1969, entered into force in 1978)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, adopted in 1984, entered into force in 1987)
- Inter-American Convention to Prevent and Punish Torture (adopted in 1985, entered into force in 1987)
- Arab Charter on Human Rights (ArabCHR, adopted in 1994, last version adopted in 2004, entered into force in 2008)

#### Non-treaty law

- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration, adopted in 1985)
- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted in 2005)

### 6.2.1 Background information

The suffering endured by people who are the victims of crime and/or of abuse of power often lasts far beyond the immediate act and its direct consequences. Some examples are given here:

- The injuries sustained may require long-term medical treatment or frequent surgery. They may even last a lifetime, causing continuous pain or long-lasting or permanent disabilities;



- The psychological trauma suffered can have a highly disruptive effect on their daily life. Loss of trust in other human beings, the incapacity to face situations similar to the one which caused them harm, panic attacks, sleeping problems, a state of continuous fear if the person who committed the act remains undetected or is for other reasons not prosecuted – for a victim, psychological harm is perhaps one of the most serious consequences of crime or abuse of power;
- Material consequences may also have repercussions far beyond the immediate loss of or damage to personal property. Crime and/or abuse of power may deprive victims of their means of earning a living; this can even apply to an apparently minor theft, e.g. the theft of a bicycle may mean that the victim loses his or her job. The physical or psychological consequences may make victims less able or fully unable to pursue their previous economic activity;
- The situation may be worsened through stigmatization that follows on from the crime or abuse of power, particularly in cases of sexual violence or if the person was arrested arbitrarily for a crime that is considered especially repugnant (e.g. paedophilia).

Law enforcement officials are often the first people to establish contact with the victim. It is therefore vital for them to be aware of the aggravating factors described above; they should also do everything in their powers not to make the situation even worse for the victim. The way in which the investigation is conducted should not lead to a re-traumatization of the victim. The protection of a victim's privacy is also of particular importance.

However, a cursory examination of existing law enforcement training and practices reveals that attention and resources are centred on (potential) offenders. The tasks of law enforcement and the maintenance of public order tend to be focused mainly on those breaking the law or disturbing public order. Little or no concern is shown for the vast majority of people who abide by the law and who do not cause any disruption. It is consequently not surprising that, beyond their right to file a complaint, individuals who suffer injury or other harm at the hands of a criminal offender receive little or no attention or protection.

Some treaties contain provisions that deal with the rights of victims of certain types of crime (see section 6.2.2) and of abuse of power (see section 6.2.3), but there is only one comprehensive (soft law) instrument offering guidance to member States on the issue of protection and redress for such victims: the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration).<sup>12</sup>

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<sup>12</sup> The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law is another important document for the protection of victims, but it covers only the type of violations mentioned in its title.

It cannot be stated strongly enough that it is indeed a primary responsibility of the State to protect people from violations of their rights. If this protection fails and a crime or an abuse of power is committed, the State should take all possible measures to provide for redress and reparation and to avoid, as far as possible, exposing the victim to any further suffering. Consequently, national laws as well as the established procedures of law enforcement agencies and the behaviour of the individual law enforcement official should take due account of the concepts and principles formulated in the Victims Declaration, as well as of the protection and assistance provided for in specific instruments related to specific crimes, such as, for instance, the CAT (see section 6.2.2 (b)).

## **6.2.2 Victims of crime**

### **6.2.2.1 General principles**

The Victims Declaration defines “victims of crime” as *“persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power”* (Article 1).

As stated above, law enforcement officials will often be the first people to establish contact with a victim of crime. That initial contact constitutes what might be described as the first-aid stage in the victim’s situation; the provision of proper care and assistance for victims is extremely important. By contrast, law enforcement tends to be preoccupied with the progress and results of an investigation process. However, law enforcement officials should also pay the highest attention to the victim’s welfare and well-being. The crime committed cannot be reversed but adequate help and assistance for victims will definitely help to mitigate its negative repercussions.

The Victims Declaration offers some guidance in defining State responsibility and the rights of victims. In Article 4 it urges that victims should be treated with *“compassion and respect for their dignity.”* It further recommends that *“[w]here public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted”* (Article 11).

It also states that a person may be considered a victim *“regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the [...] relationship between the perpetrator and the victim”* (Article 2). The term “victim” is subsequently extended to include the victim’s immediate family or dependents as well as people who have suffered harm when intervening on the victim’s behalf.

Further provisions relate to access to justice and fair treatment, restitution, compensation and assistance, as follows:

- Victims of crime and abuse of power should be able to exercise the right of access to *“mechanisms of justice and to prompt redress”* (Article 4);
- They should be able to obtain redress through *“fair, inexpensive and accessible”* procedures, both formal and informal (Article 5);
- They should be informed of the role of such mechanisms, the scope, timing and progress of the proceedings and the disposition of their cases, especially in cases of serious crime and where such information was requested (Article 6(a));
- They have the right to have their views *“presented and considered at appropriate stages of the proceedings where their personal interests are affected”* (Article 6(b));
- They are entitled to proper assistance throughout the legal process (Article 6(c));
- Their privacy should be protected and measures should be taken to ensure their safety and that of their families from intimidation and retaliation (Article 6(d));
- There should be no *“unnecessary delay in the disposition of their cases and the execution of orders granting awards”* to them (Article 6(e));
- They should have access to *“[i]nformal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices,”* which should be used where appropriate *“to facilitate conciliation and redress for victims”* (Article 7).



## INTEGRATION IN PRACTICE

### Doctrine

Crimes – in particular, very violent crimes – usually receive considerable media attention. To a certain extent, it is understandable that the general public is interested in knowing what is occurring in society, what threats to their security exist and how they are dealt with by the police. Furthermore, the investigation may sometimes call for support from the public (e.g. requesting witnesses to present themselves). However, in order to prevent further traumatization of the victim, law enforcement officials should take great care in their dealings with the media. It is therefore recommended that pre-established rules or regulations establish clear competences and decision-making processes for media contact. Along with the presumption of innocence for the suspect or accused, protection of the victim’s dignity and privacy should be given particular attention in such regulations.

With regard to restitution and compensation, a number of principles are set out in Articles 8 to 13:

- Offenders should make restitution to their victims;
- States are encouraged to keep restitution mechanisms under review and to consider their introduction into criminal law;
- The State should be responsible for restitution in cases where the offender is a State official (e.g. a law enforcement official);
- Where compensation cannot be obtained from the offender or other sources, States are encouraged to provide such compensation;
- The establishment of particular funds to that end is encouraged.

In addition, “[v]ictims should receive the necessary material, medical, psychological and social assistance” (Article 14); victims should be informed about possible assistance measures available to them (Article 15); “[p]olice, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure prompt and proper aid” (Article 16).



## INTEGRATION IN PRACTICE

### Training

Law enforcement officials must be trained on how to best approach a person who has been victim of a crime or abuse of power. They need to have the necessary psychological competence to show empathy, to give the victim a sense of safety and not to further enhance the trauma experienced through inappropriate methods of investigation or questioning.

### 6.2.2.2 Victims of specific crimes: torture

Torture is a particular serious crime with long-lasting harmful effects on everyone involved (the victim, the perpetrator and society as a whole). Thus, its prohibition is absolute and knows no exception.

The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) establishes a definition of torture as well as a number of rules protecting the rights of victims of torture:

- Torture is defined as an act “by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him [or her] or a third person information or a confession, punishing him [or her] for an act he [or she] or a third person has committed or is suspected of having committed, or intimidating or coercing him [or her] or a third person [...], when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity” (Article 1);

- States are required to ensure that all acts of torture are offences under their criminal law (Article 4);
- Victims (or alleged victims) of torture are entitled to a prompt and impartial investigation and must be protected (Article 13);
- Each State Party *“shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his [or her] dependants shall be entitled to compensation”* (Article 14);
- Evidence obtained through torture shall be inadmissible in court (Article 15).

Since the CAT is a treaty, its provisions create obligations that are legally binding on States Parties. The provision on protection and redress for victims of torture therefore offers victims of torture stronger guarantees than the provisions of the Victims Declaration set out above.

Regional treaties also confirm the absolute prohibition of torture (ACHPR, Article 5; ACHR, Article 5.2; ArabCHR, Article 8; ECHR, Article 3). In relation to the protection of the rights of victims, the Inter-American Convention to Prevent and Punish Torture provides for similar protection to that provided for in the CAT:

- The State shall ensure that torture is punished under criminal law (Article 6, second paragraph);
- Victims of torture shall be entitled to compensation (Article 9);
- Evidence obtained under torture shall be inadmissible in court (Article 10).

The ArabCHR also requires States to regard acts of torture as crimes punishable by law and includes the rights of the victim to obtain redress, rehabilitation and compensation (Article 8(2)).

Although the ECHR does not contain an explicit rule for the rights of the victims of torture, the European Court of Human Rights has frequently decided on measures for adequate redress and compensation for acts in violation of Article 3 (Prohibition of torture) of the ECHR (see the example in the next box). This competence derives from Articles 13 and 41 of the ECHR:

#### Article 13

*“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”*

#### Article 41

*“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”*



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of Gaefgen v. Germany

#### Application No. 22978/05, 3 June 2010

"116. [...] In cases of wilful ill-treatment by State agents in breach of Article 3, the Court has repeatedly found that two measures are necessary to provide sufficient redress. Firstly, the State authorities must have conducted a thorough and effective investigation capable of leading to the identification and punishment of those responsible [...]. Secondly, an award of compensation to the applicant is required where appropriate [...] or, at least, the possibility of seeking and obtaining compensation for the damage which the applicant sustained as a result of the ill-treatment [...].

118. Concerning the requirement for compensation to remedy a breach of Article 3 at national level, the Court has repeatedly found that, in addition to a thorough and effective investigation, it is necessary for the State to have made an award of compensation to the applicant, where appropriate, or at least to have given him or her the possibility of seeking and obtaining compensation for the damage he or she sustained as a result of the ill-treatment [...].

119. In cases of wilful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim. This is so because, if the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice [...]."

Torture being one of the most serious human rights violations, State authorities should also undertake to provide the protection and entitlements established for victims in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

### 6.2.2.3 Victims of specific crimes: domestic violence

Domestic violence refers to any type of physical violence that takes place within the family. The phenomenon is usually assumed to consist of men beating their wives or partners or of parents abusing their children. However, it is important to note that although public statistics show these to account for the majority of cases, men can also be victims of violence committed by their wives. As this is little known or understood as a phenomenon of violence, men might be even more vulnerable than women in such situations and unable to obtain protection because they are ashamed to report such violence

and because their environment – family members or friends – might not recognize the signs of such violence.

All victims of domestic violence find themselves in a particularly difficult situation. The possible serious consequences – relating to aspects such as child care, economic consequences and stigmatization – tend to deter victims from reporting such crimes. The violence generally occurs in a closed environment without witnesses or clear evidence. This means that even when domestic violence is reported, the investigation might not lead to arrest and/or other efficient protection measures for the victim, in which case the situation becomes even more difficult and dangerous – sometimes even life-threatening – for the victim. Domestic violence is also fraught with a number of misconceptions within society as a whole as well as among law enforcement officials. It is often considered a private matter, in which the police should not interfere. There is a lack of understanding about why the victim is not in a position to escape from the violence by separating from the perpetrator. All too often the victim is accused of having provided a “reason” for being beaten. Finally, the seriousness of domestic violence is often underestimated and only starts to be taken seriously once it is (almost) too late for the victim – who has already suffered serious injury or even been killed.

In this environment it is not surprising that the offenders – men or women – are usually confident that they will be able to beat their spouse or partner with impunity, that they will not be reported to the police and that, even if they are, they will be able to escape punishment. Unfortunately, law enforcement authorities throughout the world have contributed to this situation by refusing not only to treat domestic violence as a crime but also failing to intervene to stop such violence – usually on the supposed grounds that it is a “family” problem.

Domestic violence is not just a family problem; it is a community problem and the entire community is usually responsible for its continuance: the friends and neighbours who ignore or excuse clear evidence of violence, the doctor who only mends bones and tends bruises and the police and court officials who refuse to intervene in a “private matter.” Law enforcement officials can help to prevent the crime of domestic violence only by treating it as a crime. They are responsible for upholding and protecting the victim’s right to life, to security and to bodily integrity. Their failure to protect a person against violence in the home is a clear abdication of that responsibility.

It is the duty of every law enforcement agency to expose such crimes, to prevent them as far as possible and to treat the victims in a caring, sensitive and professional manner.



## INTEGRATION IN PRACTICE

### Education and training

The phenomenon of domestic violence should be included as a specific subject in police education curricula. Law enforcement officials should be made fully aware of this phenomenon and of the particularly difficult situation of the victim. They should be trained to recognize signs of domestic violence and to investigate them thoroughly but carefully and to demonstrate the necessary empathy for the victim and an understanding of the highly emotional environment in which domestic violence usually occurs.

### 6.2.3 Victims of abuse of power

In Article 18 of the Victims Declaration, “victims of abuse of power” are defined as *“persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.”*

The last part of that provision deserves further explanation. In order to be able to fulfil their duties, almost all State agents have been granted certain powers, such as the power to authorize or oppose certain acts (e.g. to construct a building or not, to open certain businesses or not), to grant or deny certain rights (e.g. the right of asylum) or to request payments (e.g. fees, taxes). The most prominent powers are, of course, the powers of law enforcement officials to arrest and detain, to search and seize and to use force and firearms. All those powers are supposed to be exercised in due respect of the law (legality) and of the complementary principles that should govern all State activity, i.e. necessity, proportionality and accountability. When this framework is deliberately transgressed in the exercise of State powers (e.g. through arbitrary and/or discriminatory behaviour or for personal interests or gain), the conduct of the State agent can be qualified as abuse of power. Even where such behaviour does not constitute a crime under criminal law, it can have serious negative effects on the individual victim (see, for instance, the above-mentioned elements listed in Article 18 of the Victims Declaration) and on society as a whole.

On a global level, a number of treaty provisions create obligations that are legally binding on States Parties concerning the rights and the position of victims of abuse of power. In the ICCPR, for instance, those provisions establish:

- the right of any person whose rights or freedoms have been violated to *“have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”* (ICCPR, Article 2(3)(a));



- the obligation to ensure the right to have the claim to such a remedy determined by a competent judicial, legislative, administrative or other authority and to develop the possibilities of judicial remedies (ICCPR, Article 2(3)(b));
- the obligation to ensure the enforcement of the remedy (ICCPR, Article 2(3)(c));
- the enforceable right of victims of unlawful arrest or detention to compensation (ICCPR, Article 9(5));
- the right of victims of punishment based on a miscarriage of justice to be compensated according to law (ICCPR, Article 14(6)).

The Victims Declaration provides for more comprehensive protection of the rights of victims of abuse of power by concentrating further on certain specific measures to be taken. It makes a general recommendation to States to proscribe abuses of power in national law and to provide for remedies for victims of such abuses, including *“restitution and/or compensation, and necessary material, medical, psychological and social assistance and support”* (Article 19).<sup>13</sup>

Another international soft law provision relating to (potentially) abusive behaviour, which is particularly relevant for law enforcement officials, relates to the use of force and firearms. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF) state that *“[p]ersons affected by the use of force and firearms or their legal representatives”* must be given access to an *“independent process, including a judicial process. In the event of death of such persons, this provision shall apply to their dependants accordingly”* (BPUFF No. 23).

On a regional level, similar protection can be found in numerous treaties, as in the examples given below.

Similar to Article 13 of the ECHR (see section 6.2.2), Article 25 of the American Convention on Human Rights states:

- “1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his [or her] fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
  - a. to ensure that any person claiming such remedy shall have his [or her] rights determined by the competent authority provided for by the legal system of the state;

<sup>13</sup> If the behaviour of a State agent constitutes both an abuse of power and a crime (e.g. acts of torture), the rules referred to in the previous section (6.2.2) also remain applicable.

*b. to develop the possibilities of judicial remedy; and  
c. to ensure that the competent authorities shall enforce such remedies when granted."*

Article 23 of the Arab Charter on Human Rights contains a similar provision:

*"Each State party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."*

In other regional instruments, the competences granted to the regional human rights court system provide opportunities for redress and compensation for victims of abuse of power. For example, similar to Article 41 of the ECHR (quoted in section 6.2.2.2), Article 27 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights includes the following provision:

*"If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."*

Article 10(d) of Supplementary Protocol on the ECOWAS Court of Justice grants individuals access to the Court *"on application for relief for violation of their human rights."*



## INTERNATIONAL JURISPRUDENCE

### **ECOWAS Community Court of Justice Case of Manneh v. The Gambia AHRLR 171, Judgment of 5 June 2008**

"41. The Court has found that the applicant was arrested on 11 July 2006 by the police force of The Gambia and has since been detained *incommunicado*, and without being charged. He has not been told the reason for his arrest, let alone the fact that it was in accord with a previously laid down law. The Court holds these act clearly violate the provisions of article 2, 6 and 7(1) of the African Charter on Human and Peoples' Rights. Furthermore, in view of the fact that these violations of applicant's human rights were caused by the defendant, which refused to appear in Court, it entitles the applicant to damages. And the Court considers that this violation should be terminated and the dignity of the applicant's person is to be restored."

The above-mentioned standards place a number of responsibilities on law enforcement agencies:

- when an (alleged) abuse of power by a State agent is reported, to investigate whether this behaviour also contains elements that would constitute an offence under criminal law;
- to ensure the protection of victims of abuse of power against further harm (e.g. through blackmail or undue pressure by the abusive State agent with the intention of preventing an abuse from being reported or of encouraging the withdrawal of a complaint);
- to take all possible measures to prevent any abuse of power by law enforcement officials themselves;
- to investigate thoroughly any allegation of an abuse of power committed by a law enforcement official; and
- in case of a confirmed abuse of power by a law enforcement official, to take all appropriate corrective measures, such as redress and compensation of the victim, disciplinary measures, improved training, and monitoring and supervision of the law enforcement official responsible for the abuse.



## INTEGRATION IN PRACTICE

### System of sanctions

Law enforcement agencies should establish a publicly known channel through which people who consider themselves victims of an abuse of power by a law enforcement official can make their complaints. This should include the right to receive a response within a reasonable time frame and an explanation of the basis on which the complaint has been considered founded or not. In case of a justifiable complaint, the right to redress and compensation should be ensured (either through this channel or in separate proceedings, which should be indicated in the response).

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## 6.3 Children

### KEY LEGAL DOCUMENTS

#### Treaty law

- Convention on the Rights of the Child (CRC, adopted in 1989, entered into force in 1990) and its Optional Protocols on involvement of children in armed conflict and on the sale of children, child prostitution and child pornography (adopted in 2000, entered into force in 2002)
- African Charter on the Rights and Welfare of the Child (adopted in 1990, entered into force in 1999)

#### Non-treaty law

- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, adopted in 1985)

#### 6.3.1 Background information

Children need special care and protection and are dependent on the aid and assistance of adults, especially in the early years of their existence. In many parts of the world, inadequate social conditions, natural disasters, armed conflicts, exploitation, illiteracy, hunger and disability have placed children in a critical situation. On their own, children are not capable of effectively coping with such conditions or of changing them for the better. Governments need to adopt domestic legislation which recognizes the special position and needs of children and which creates a framework of additional protection that is conducive to their well-being. At the international level, on 20 November 1989 the General Assembly of the United Nations adopted – unanimously – the Convention on the Rights of the Child (CRC), which recognizes the need of children for special safeguards

and care, including appropriate legal protection. The CRC entered into force on 2 September 1990. The African Charter on the Rights and Welfare of the Child (adopted in 1990, entered into force in 1999) provides for similar protection of children.

The special situation and vulnerability of children places a double responsibility on law enforcement officials:

- to give children protection and assistance wherever the need arises; and
- to pay utmost attention, in the exercise of their powers, to the specific needs and rights of a child and to exercise as much restraint as possible, giving highest priority to the well-being of the child.



## LOOKING CLOSER

### Committee on the Rights of the Child

#### General Comment No. 13

“3 (f) The right of children to have their best interests be a primary consideration in all matters involving or affecting them must be respected, especially when they are victims of violence, as well as in all measures of prevention.

5. [...] These special obligations are due diligence and the obligation to prevent violence or violations of human rights, the obligation to protect child victims and witnesses from human rights violations, the obligation to investigate and to punish those responsible, and the obligation to provide access to redress human rights violations. [...]

13. [...] Addressing and eliminating the widespread prevalence and incidence of violence against children is an obligation of States parties under the Convention. Securing and promoting children’s fundamental rights to respect for their human dignity and physical and psychological integrity, through the prevention of all forms of violence, is essential for promoting the full set of child rights in the Convention. [...]

### 6.3.2 Convention on the Rights of the Child

The CRC is a treaty. It therefore creates legally binding obligations for State Parties, which must ensure that the provisions of the CRC are fully implemented at the national level. Measures taken to this end may include (but are not limited to) the adaptation of existing legislation concerning children or the adoption of new legislation in conformity with the provisions as they are set out in the CRC. It offers a wide range of measures aimed at protecting the direct interests of the child.

For the purposes of the CRC, a child is defined as *“every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”* (CRC, Article 1). The primary focus of the CRC is *“the best interests of the child”* (CRC, Article 3). All measures prescribed under the Convention take

this principle as their starting point. The CRC leaves no doubt that children are considered entitled to the same fundamental human rights and freedoms as adults. Certain fundamental rights, such as the right to life, liberty and security of person, the right to freedom of thought and of expression, and the right to peaceful assembly and association, are firmly established in the CRC. In addition, the CRC seeks to provide additional protection against abuse, neglect and exploitation of children (Articles 32 to 36).

The CRC requires States Parties to take measures, including domestic legislation, that combat abuse, neglect and exploitation of children, in order specifically:

- to protect children from economic exploitation and work that is harmful to their development and well-being and to provide for penalties and other sanctions to ensure the effective enforcement of this rule (Article 32);
- to protect children from the illicit use of drugs and psychotropic substances and *“to prevent the use of children in the illicit production and trafficking of such substances”* (Article 33);
- to protect children against *“all forms of sexual exploitation and sexual abuse,”* including unlawful sexual activity, the exploitation of children in prostitution or unlawful sexual practices, and the *“exploitative use of children in pornographic performances and materials”* (Article 34);
- to prevent the *“abduction of, the sale of or traffic in children for any purpose or in any form”* (Article 35);
- to protect children against *“all other forms of exploitation prejudicial to any aspects of the child’s welfare”* (Article 36).

Law enforcement officials play a crucial role in the protection of children through the prevention and thorough investigation of these types of exploitation. The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography contains further detailed obligations for the States party to the Protocol – and consequently for their law enforcement officials – on the investigation and punishment of such crimes.

Children also need specific protection while deprived of their liberty, a situation which potentially makes them even more vulnerable to exploitation, abuse or otherwise harmful influence by adults. Therefore, Article 37 of the CRC and Article 10(2b) of the ICCPR request authorities to keep children deprived of their liberty separate from adults. In addition, the CRC also sets forth the reasons for and the conditions under which children can be lawfully deprived of their liberty, as well as the entitlements of a child who is accused of having infringed penal law (CRC, Articles 37 and 40). Those safeguards will be further developed in detail in Chapter 8, section 8.7.

### 6.3.3 Implications for law enforcement practice

Dealing with children requires a great deal of sensitivity and care on the part of law enforcement officials.

#### 6.3.3.1 Children as witnesses and/or victims of crime

Interviewing a child who has been victim or witness of a crime is a delicate task because, on the one hand, it may prove difficult to obtain reliable information and because, on the other hand, (further) traumatization of the child must be avoided. Where the father and/or the mother are the suspects in the investigation, law enforcement officials must be aware of the life-long damage that they could inflict on the psychological well-being of the child if they take advantage of the child's inexperience to obtain evidence against one or both of its parents – even if the child itself is the victim of the investigated crime.



#### INTEGRATION IN PRACTICE

##### Training

Law enforcement officials need to acquire the psychological skills required in order to interview children with due care. Every effort must be made to avoid intimidating and/or traumatizing the child, in particular where he or she has been the victim or the witness of a violent crime. Furthermore, law enforcement officials should ensure that they are asking questions in a way that allows only reliable evidence to be obtained; questions should not steer the answers of the child in a specific direction (see also CRC General Comment No. 13, Nos (44(d)(i) and 51).

#### 6.3.3.2 Children as suspects

It is important to ensure that the investigation does not harm the well-being of the child. Unnecessary traumatization needs to be prevented. Beijing Rule 10.3 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) stipulates that “[c]ontacts between the law enforcement agencies and a juvenile offender<sup>14</sup> shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case”. Furthermore, the Beijing Rules stipulate that “[t]he juvenile’s right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling” and that “[i]n principle, no information that may lead to the identification of a juvenile offender shall be published” (Rule 8). Specialization within law enforcement agencies with regard to juveniles is recommended through the establishment of special units or departments and through the additional training of those law enforcement officials who are required to deal with juvenile offenders

<sup>14</sup> For the definition of a juvenile see Beijing Rule 2.2 and Chapter 4, section 4.4.1.

(Rule 12). The specific rules protecting the rights of children during the investigation and judicial process will be dealt with in Chapter 8, section 8.7. Regarding the need for a different response to children in conflict with the law from the response to adults, see Chapter 4, section 4.4.

### 6.3.3.3 The use of force and firearms against children

Neither the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF) nor the Code of Conduct for Law Enforcement Officials (CCLEO) – nor any other international instrument for that matter – provides guidance on the use of force against children. It is safe to conclude that the same rules and provisions applicable to adults apply equally to children or young persons. Chapter 7 on the use of force and firearms provides a clear and detailed overview of those rules. However, in view of the vulnerable position of the child – and the requirements for special protection and treatment – it is reasonable to conclude that utmost restraint must be exercised in the use of force and firearms against children, as the impact of their use against children is likely to be more severe than in the case of adults. Law enforcement officials must therefore be urged to seriously weigh such consequences against the importance of the legitimate objective to be achieved. Furthermore, the seriousness of the threat presented by a child needs to be evaluated with particular care and law enforcement officials must be encouraged to search for adequate alternatives to the use of force and firearms against children.



## INTEGRATION IN PRACTICE

### Doctrine

Handcuffing of children should be avoided as far as possible. Operational procedures should include an instruction to that effect as well as guidance on possible exceptions (limiting such exceptions to extreme cases only).

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## 6.4 Women

### KEY LEGAL DOCUMENTS

#### Treaty law

- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, adopted in 1979, entered into force in 1981)

#### Non-treaty law

- United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules, adopted in 2010)

#### 6.4.1 Background information

The Charter of the United Nations (UN Charter, 1945) was the first international legal instrument to explicitly affirm the equal rights of men and women and to include gender as one of the prohibited grounds for discrimination (along with race, language and religion). These guarantees were repeated in the Universal Declaration of Human Rights (UDHR), adopted by the General Assembly in 1948. Since that time, equal rights for women have been refined and extended in a large number of international human rights treaties – most notably in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The rights contained in both those instruments are fully applicable to women as well as to men – as are the rights in other general human rights treaties such as the CAT and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Non-discrimination on the basis of sex is also included in the CRC and in each of the regional human rights treaties (ACHPR, Article 2; ACHR, Article 1; ECHR, Article 14). Why then, was it thought necessary to develop a separate legal instrument for women? Additional means of protecting the human rights of women were seen as necessary because existing protection of human rights in general has not been sufficient to guarantee women protection of their rights. As the Preamble to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) explains, women still do not have equal rights with men and discrimination against women continues to exist in every society. Article 1 states that:

*“[...] the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”*

Equality is the very foundation of every society which is committed to justice and human rights. However, in virtually all societies and all spheres of activity, women are subject to inequalities in law and in fact, as shown in the box below.

## PROGRESS OF THE WORLD'S WOMEN (2011-2012)\*

- Some 600 million women, more than half the world's working women, are in vulnerable employment, trapped in insecure jobs, often outside the purview of labour legislation.
- Globally, around 53 per cent of working women are employed in vulnerable jobs, as own-account workers or as unpaid workers in family businesses or farms. In South Asia and sub-Saharan Africa, more than 80 per cent of women workers are in that kind of employment.
- The average pay gap between women and men is 10-30 per cent.
- In 22 of the 25 countries in sub-Saharan Africa for which data are available, women are more likely than men to live in poverty.
- In developing countries, more than one-third of women are married before the age of 18. They therefore miss out on education and are exposed to the risks of early pregnancy.
- In almost every region, young women are significantly more likely to be "education poor" (to have four years or less of primary education) than young men. In the Middle East and North Africa, around 25 per cent of women between the ages of 17 and 22 have less than four years of schooling, whereas the figure for men is one in eight.
- In 127 countries rape within marriage is not explicitly criminalized.
- A 2009 study of European countries found that, on average, only 14 per cent of reported rapes ended in a conviction, with rates falling as low as 5 per cent in some countries.
- Under-reporting of crimes against women is a serious problem in all regions. Across 57 countries, crime surveys show that, on average, 10 per cent of women say they have experienced sexual assault, but of these women only 11 per cent reported it. By comparison, there is an incidence of robbery of on average 8 per cent, with a reporting rate, however, of 38 per cent.
- Mass displacement is a consequence of violent conflict and women represent the majority of internally displaced people (IDPs) and refugees globally.
- In 18 out of 30 countries, more than half of women report having no say in household decisions.
- Women's representation in national parliaments has reached or exceeded 30 per cent in only 28 countries.
- At the national level, women's representation in parliaments has increased in the last decade, but globally less than one in five members of parliament is a woman. Developed regions have reached 30 per cent critical mass for the share of women in ministerial positions, but no region has achieved the mark for the proportion of women in parliament.

\* This information is taken from UN Women, *Progress of the World's Women (2011-2012), In Pursuit of Justice*, United Nations, New York, 2011.

This situation is both caused and aggravated by the existence of discrimination in the family, in the community and in the workplace. Discrimination against women is perpetuated by the survival of stereotyped concepts (of men as well as of women) and of traditional cultures and beliefs that are detrimental to women.

While it is not the purpose of this Manual to address the question of gender equality in general, it is important for law enforcement officials to understand the particular situation of women as it is described above. Although women should not be considered as vulnerable by nature, the inequalities described above can increase the vulnerability of women in a country or in a specific context or situation. Where this vulnerability materializes or at least where there is an increased risk of that happening, the work of law enforcement officials needs to take account of the situation of women.

Too often, women suffer badly in the administration of justice. In many countries, women do not have the same legal rights as men and are therefore treated as second-class citizens in the police station and in the court room. When detained or imprisoned, women are far more vulnerable than men to assault – especially to gender-based forms of abuse such as sexual assault. Women are often detained, tortured and sometimes even killed because their relatives or the people with whom they associate are connected with political opposition groups or are wanted by the authorities. In times of violence, all human rights are under threat. Women are often among those subjected to particular suffering in such situations; quickly caught up in conflicts not of their making, they become the butt of reprisal killings. Women comprise most of the world's refugees and displaced persons. They are left to rear families on their own and are frequently raped and sexually abused with impunity.

In situations in which women find themselves exposed to these specific risks and vulnerabilities, law enforcement officials again have a double responsibility (as for other vulnerable groups):

- To provide protection and assistance for women wherever the need arises;
- To take account of the specific needs and rights of women in the exercise of their powers.

#### **6.4.2 Violence against women**

The United Nations Committee on the Elimination of Discrimination against Women has defined gender-based violence as *“violence that is directed at a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”* (General Recommendation No. 19(6)).

In its resolution 61/143 (2006), the General Assembly of the United Nations defined *“violence against women”* as *“any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including [...] arbitrary deprivation of liberty, whether occurring in public or in private life.”*

Violence against women is not a new phenomenon but has continued throughout history – unnoticed and unchallenged. There has been considerable international pressure to consider violence against women as an international human rights issue. The Committee has responded by stating specifically that the general prohibition of gender-based discrimination in the CEDAW includes gender-based violence as defined above. It has further affirmed that violence against women constitutes a violation of their internationally recognized human rights – irrespective of whether the perpetrator is a public official or a private person. State responsibility for violence against women may be invoked when a government official is involved in an act of gender-based violence and also when the State fails to act with due diligence to prevent violations of women's rights by private persons or to investigate and punish such acts of violence and to provide compensation.

These statements have been reinforced by the Declaration on the Elimination of Violence against Women adopted by the General Assembly in 1993, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women adopted in 1994, as well as specific provisions of the Vienna Declaration and Programme of Action adopted at the 1993 World Conference on Human Rights, the Beijing Declaration and Platform for Action adopted at the Fourth World Conference on Women in 1995, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted in 2003, and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) adopted in 2011. Each of these instruments makes it clear that violence against women, whether it occurs in the home, in the workplace or at the hands of public officials, is a clear violation of human rights.

Prevention of crime is a fundamental law enforcement objective and an area of activity with specific importance for the rights of women. In all societies, women are vulnerable to certain types of crime simply because they are women. Such crimes include domestic violence, sexual and other forms of assault, forced prostitution and trafficking.

Sexual violence is not limited to rape only. Sexual violence also encompasses forced prostitution, sexual slavery, forced impregnation, forced maternity, forced termination of pregnancy, forced sterilization, indecent assault, trafficking and inappropriate medical examinations or strip searches. Acts of sexual violence are self-standing crimes under the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) as well as under the Rome Statute of the International Criminal Court (ICC). In some cases, the jurisprudence of these bodies has qualified rape as a war crime and/or a crime against humanity. Those tribunals have also recognized that acts of

sexual violence can constitute torture, inhuman treatment and, in certain circumstances, acts of genocide.

Law enforcement officials can take a number of different steps to prevent women from falling victim to such crimes. Forced prostitution, for example, is a human rights violation which disproportionately affects women migrants – many of whom are procured in poor countries for sexual exploitation in richer ones. Those women will often be illegal migrants and therefore afraid to approach law enforcement authorities for help – even when they are subjected to the most inhumane treatment. In such cases, it is the clear responsibility of law enforcement agencies to make an effort to identify victims of forced prostitution (both in the country that they are leaving as well as in the country of entry), to treat them as victims rather than as criminals and to take measures to ensure their protection. At the same time, law enforcement agencies must make every effort to track down the perpetrators of such crimes and put a firm stop to their illegal practices.

Sexual violence is a particularly challenging issue for law enforcement officials. The severe traumatization of victims, the serious health consequences, the risk of stigmatization, and the particularly problematic situation of evidence relating to crimes that usually occur without witnesses – all those aspects render the investigation of such crimes particularly difficult and sensitive. It is a difficult task to prevent further traumatization of the victim while at the same time seeking to obtain credible and reliable testimonies.



## INTEGRATION IN PRACTICE

### Doctrine and training

The procedures established at law enforcement agencies for the investigation of cases of sexual violence should give priority to ensuring that the victim is given appropriate medical and psychological care. Physical evidence should be obtained through female medical personnel only and great care should be taken to prevent further traumatization of the victim. As far as possible, the victim should be interviewed by a female law enforcement official who has had appropriate training in psychology. Thorough preparation and the recording of interviews should prevent the need for repetitive questioning that forces the victim to re-live the trauma unnecessarily.

Domestic violence is another serious violation of women's rights and (in most countries) a crime which law enforcement officials should seek to prevent (see section 6.2.2.3). Law enforcement officials are responsible for upholding and protecting women's human rights, including the right to life, to security and to bodily integrity.

In most countries in the world, crimes affecting women rank low in priority. Nonetheless, it is the duty of every law enforcement agency to uncover such crimes, to prevent them as far as possible and to treat the victims in a caring, sensitive and professional manner. In this regard, due consideration should be given to the need for privacy and it should be borne in mind that such needs may not be the same for a woman as for a man. It follows that different, special measures may sometimes need to be taken by law enforcement officials involved in the investigation of crimes to ensure that the personal privacy of women is protected and preserved.

#### **6.4.3 The position of women in the administration of justice**

In accordance with the basic principle of non-discrimination, women are entitled to the same rights on arrest and during detention as men (for further details, see Chapter 8). However, the related principle of equal protection of the rights of all persons – as well as respect for the inherent dignity of the human person (Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 1) – may well require that additional forms of protection and consideration be offered to women in an arrest situation. Such measures will include ensuring that a woman is arrested by a female official (whenever practical), that women and their clothing are searched by a female official (in all circumstances) and that women detainees are kept separate from male detainees (also in all circumstances). It should be noted that additional protection and consideration for women in situations of arrest will not be deemed discriminatory because their goal is to redress an existing imbalance – the aim being to bring about a situation in which the ability of women to enjoy their rights is equal to that of men.

Specific standards have been established to protect detainees from ill-treatment and abuse of power, to safeguard them against damage to their health caused by inadequate conditions of detention and to guarantee that the basic rights of detainees – as human beings – are respected. The need to provide for specific legal protection for detainees is based on the fact that they depend on the State to meet their essential needs. Women detainees are in double jeopardy. They are often poor and they are often migrants. In many countries, women will be placed in detention for acts that would not be considered crimes if committed by a man. Once in detention, women are at an even greater risk of assault than men (especially assault by law enforcement officials).

International human rights law is guided by the fundamental principle of non-discrimination: women detainees are entitled to the same rights as male detainees and must not be discriminated against. As noted earlier, equality of result does not necessarily mean equality of treatment. The need to extend special protection to women detainees is recognized in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,

which clearly states that measures applied under the law and designed solely to protect the rights and special status of women (especially pregnant women and nursing mothers) “*shall not be deemed to be discriminatory*” (Principle 5(2)).

One of the most serious human rights concerns is, of course, violence against women detainees by law enforcement and security officials. Protection against violence is a basic human right. The United Nations Economic and Social Council (ECOSOC) has called upon member States to take all appropriate measures urgently to eradicate acts of physical violence against women detainees (ECOSOC resolution 1986/29). Such measures should include the following as an absolute minimum:

- Women should only be interrogated or detained by or under the supervision of female officials;
- There should be no contact between male guards and female detainees unless a female guard is present;
- All law enforcement officials coming into contact with female detainees should receive appropriate training;
- All officials must be made aware of the fact that sexual assault of detainees is a serious crime; in some circumstances it may even be considered an act of torture and must not be tolerated under any circumstances whatsoever;
- Prompt, thorough and impartial investigations must be conducted into all reports of torture, assault or ill-treatment of women detainees;
- Any law enforcement official responsible for such acts or for encouraging or condoning them must be brought to justice;
- Specific procedures should be in place for identifying and reacting to allegations of violence against women detainees (see the box below).



## LOOKING CLOSER

In its resolution A/RES/52/86 (1998), the General Assembly of the United Nations urged member States

- (a) To ensure that the applicable provisions of laws, codes and procedures related to violence against women are consistently enforced in such a way that all criminal acts of violence against women are recognized and responded to accordingly by the criminal justice system;
- (b) To develop investigative techniques that do not degrade women subjected to violence and that minimize intrusion into their lives, while maintaining standards for the collection of the best evidence;
- (c) To ensure that police procedures, including decisions on the arrest, detention and terms of any form of release of the perpetrator, take into account the need for the safety of the victim and others related through family, socially or otherwise, and that these procedures also prevent further acts of violence;

- (d) To empower the police to respond promptly to incidents of violence against women;
- (e) To ensure that the exercise of police powers is undertaken according to the rule of law and codes of conduct and that the police may be held accountable for any infringement thereof."

Women who have become victims of sexual abuse in detention (or prior to detention) require specific attention and support. The Bangkok Rules provide further guidance on this matter:

*"Rule 7*

- 1. If the existence of sexual abuse or other forms of violence before or during detention is diagnosed, the woman prisoner shall be informed of her right to seek recourse from judicial authorities. The woman prisoner should be fully informed of the procedures and steps involved. If the woman prisoner agrees to take legal action, appropriate staff shall be informed and immediately refer the case to the competent authority for investigation. Prison authorities shall help such women to access legal assistance.*
- 2. Whether or not the woman chooses to take legal action, prison authorities shall endeavour to ensure that she has immediate access to specialized psychological support or counselling.*
- 3. Specific measures shall be developed to avoid any form of retaliation against those making such reports or taking legal action.*

*Rule 25*

- 1. Women prisoners who report abuse shall be provided immediate protection, support and counselling, and their claims shall be investigated by competent and independent authorities, with full respect for the principle of confidentiality. Protection measures shall take into account specifically the risks of retaliation.*
- 2. Women prisoners who have been subjected to sexual abuse, and especially those who have become pregnant as a result, shall receive appropriate medical advice and counselling and shall be provided with the requisite physical and mental health care, support and legal aid.*
- 3. In order to monitor the conditions of detention and treatment of women prisoners, inspectorates, visiting or monitoring boards or supervisory bodies shall include women members."*

Victims of rape and sexual abuse and other torture or ill-treatment in custody should be entitled to fair and adequate compensation and appropriate medical care (for further details, see section 6.2).

#### **6.4.4 Implications for law enforcement practice**

As presented above, the special situation and needs of women require law enforcement agencies to ensure that sufficient numbers of female law enforcement officials are present in their institution for the purpose of:



- conducting searches and seizure;
- ensuring safety and security in places of detention for female detainees;
- conducting investigations in cases of domestic and sexual violence as well as in other cases in order to protect a woman's dignity (regardless of whether she is a victim, witness or suspect);
- general representativity.

Various legal instruments mentioned in this Manual make clear reference to the need for law enforcement agencies to be representative of the community as a whole. This is specifically included in the General Assembly resolution 34/169 by which the CCLEO was adopted. Moreover, Resolution A/RES/52/86 of the General Assembly of the United Nations urges governments “[t]o encourage women to join police forces, including at the operational level” (No. 8(f)).

Women are seriously under-represented in almost every law enforcement agency in the world. They are particularly sparse at strategic, managerial and policy-making levels. Under-representation is a fundamental reason why law enforcement is generally so hostile to women and to their special needs. It is not enough to have a handful of women in the lower ranks. Such measures amount to little more than a token gesture and the lack of a critical “female mass” will prevent those women from being able to serve to their full potential.<sup>15</sup>

Another problem facing women who are recruited to law enforcement agencies is the fact that they are not integrated into regular law enforcement areas. Instead, many are restricted to administrative tasks and to “feminine” aspects of law enforcement (e.g. issues concerning women and children) – often for wages that are lower than those of their male counterparts. Additional considerations include the prevalence of sexual harassment and the maintenance of policies, practices and attitudes which marginalize women officials and their impact on the organization. Very few law enforcement agencies in the world have developed coherent strategies to address such problems. Law enforcement agencies are often very isolated from the society within which they operate and are often the very last to respond to changing social mores.

Discrimination against women in recruitment and selection procedures should be identified and addressed. Such discrimination is often hidden and procedures which seem to be “gender-neutral” will, on closer inspection, be found to be “gender-specific” in their application. One example is the height requirement and physical test – both of which are potential obstacles with regard to access by women (and often also by people from ethnic minority backgrounds) to law enforcement agencies. A height requirement which is the same for men and women is discriminatory because men are, on average, taller than women and therefore more men will meet this requirement than

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<sup>15</sup> For the importance of maintaining a police force that is representative of society, see also Chapter 10.

women. The same logic applies to physical tests which are set at the same level for men and women or which, even if different, do not set realistic goals for women applicants.

### 6.4.5 Selected references

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> [http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/TrainingcurriculumPoliceVAW\\_English.pdf](http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/TrainingcurriculumPoliceVAW_English.pdf) (last consulted on 30 September 2013)

## 6.5 People on the move

### KEY LEGAL DOCUMENTS

#### Treaty law

- International Convention on the Elimination of All Forms of Racial Discrimination (CERD, adopted in 1965, entered into force in 1969)
- Convention relating to the Status of Refugees (CRSR, adopted in 1951, entered into force in 1954) and its Protocol (adopted in 1966, entered into force in 1967)
- Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention, adopted in 1969, entered into force in 1974)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, adopted in 1990, entered into force in 2003)
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted in 2000, entered into force in 2003)
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted in 2000, entered into force in 2004)

#### Non-treaty law

- Principles Covering Treatment of Refugees (Asian-African Refugee Principles, adopted by the Asian-African Legal Consultative Committee (AALCO) in 1966)
- Declaration on Territorial Asylum (adopted in 1967)
- Cartagena Declaration on Refugees (Cartagena Declaration, adopted in 1984)
- Guiding Principles on Internal Displacement (adopted in 1998)

### 6.5.1 Background information

In recent years the plight of refugees, internally displaced persons (IDPs) and migrants has become a problem of global significance and with global implications. The total number of refugees and IDPs is estimated at around 45 million worldwide<sup>16</sup>; most of them are in Africa and Asia. Every day thousands of migrants try to make their way to other countries in the hope of finding a better life there. Many of those who do this clandestinely disappear in the course of the journey. Those who manage to reach their destination find themselves in a precarious situation. Countries of destination are tightening border control measures, causing migrants to choose even more dangerous and remote routes.

The ever-increasing numbers of people on the move present the international community with enormous challenges and have even sparked tensions in areas and regions that were previously untroubled. The procurement and adequate and equal distribution of vast quantities of basic requirements in terms of food, shelter, medical care and hygiene are a source of huge logistical problems. The governments concerned see themselves in apparently insoluble dilemmas, not least of which are those presented by the question of repatriation. People who have fled their home country because of ethnic strife and human rights violations are often afraid to return to their country of origin, while their presence in another country or region gives rise to seemingly insurmountable problems.

The current international dimensions of the problems and challenges in relation to refugees, IDPs and migrants does not in any way diminish their significance for law enforcement officials at the national level. By contrast, the following sections underline the importance of protection and assistance within law enforcement activities on behalf of people on the move.

### 6.5.2 Refugees

The Convention relating to the Status of Refugees (CRSR) of 1951 defines the term “refugee” as applying to any person who “[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable, or owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it” (Article 1(A)(2)).

The Convention also sets minimum standards for the treatment of refugees, including the basic rights to which they are entitled. After the entry into force

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<sup>16</sup> Source: UNHCR, *Displacement: The New 21st Century Challenge, Global Trends 2012*, UNHCR, 2012.

of the CRSR in 1954 it soon became clear that the problem of refugees was not going to be limited to dealing with the effects and aftermath of the Second World War. The emergence of conflicts after 1 January 1951 triggered a flow of new refugees who could not claim or benefit from the protection of the CRSR. On 4 October 1967 the United Nations Protocol relating to the Status of Refugees entered into force; by removing the time limits contained in the definition of “refugee” in Article 1 of the CRSR, it extended the scope of that definition to any person to whom it otherwise applied.

Persons falling within the definition of refugee given in Article 1 of the CRSR are entitled to the protection of their rights as set out in the CRSR. In subsections D, E and F of Article 1, the conditions are specified under which a person cannot benefit from the protection and rights offered by the Convention. Particular attention is drawn to subsection F, which stipulates that the *“provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he [or she] has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he [or she] has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee; (c) he [or she] has been guilty of acts contrary to the purposes and principles of the United Nations.”*

It is important to note that while refugees are entitled to general protection of their rights and freedoms in full equality with other persons, the CRSR sets out to offer additional protection, making due allowance for the particular circumstances faced by refugees. With regard to refugees, conventions and/or declarations have been drafted by the Council of Europe, the Organization of African Unity (OAU) and the Organization of American States (OAS).

The Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) gives a broader definition of the term “refugee” than the CRSR, taking account of most of the root causes of the refugee problem. The second paragraph of Article 1(2) of the OAU Refugee Convention states that *“the term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his [or her] country of origin or nationality, is compelled to leave his [or her] place of habitual residence in order to seek refuge in another place outside his [or her] country of origin or nationality.”*

As for the OAS, the 1984 Cartagena Declaration lays the foundations for the treatment of Central American refugees. The Declaration includes the principle of non-refoulement (discussed in section 6.5.5) and addresses the important issue of the integration of refugees into receiving societies, as well as the need

to eradicate the causes of the refugee problem. In the Cartagena Declaration the term “refugee” is defined as including *“persons who have fled their countries because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order”* (Part III, paragraph 3). It is an established fact that 80% of the current refugee population consists of women and children. These groups are not only particularly vulnerable; in many countries the human rights of women and children are inadequately protected in the first place. Both groups are extremely prone to abuse, neglect and sexual or other forms of exploitation. Their fundamental rights and freedoms (i.e. the right to life, liberty and security of person) require special protection if they are to be at all able to claim the other rights to which they are entitled under international human rights instruments.

With regard to law enforcement responsibilities vis-à-vis refugees the following provisions of the CRSR are of particular importance:

- *“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion”* (Article 33(1));
- The provisions of the Convention must be applied *“without discrimination as to race, religion or country of origin”* (Article 3);
- *“A refugee shall have free access to the courts of law on the territory of all Contracting States”* (Article 16);
- Refugees lawfully in the territory of a Contracting State *“have the right to choose their place of residence and to move freely within that territory subject to any regulations applicable to aliens generally in the same circumstances”* (Article 26);
- *“The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document”* (Article 27);
- For the purpose of travel outside the territory of the State, refugees are to be issued with travel documents, *“unless compelling reasons of national security or public order otherwise require”* (Article 28(1));
- Penalties may not be imposed for the illegal entry into or presence in the territory of a Contracting State of people seeking refugee status as defined in Article 1, provided that those concerned *“present themselves without delay to the authorities and show good cause for their entry or presence”* (Article 31(1)).

### **6.5.3 Internally displaced persons**

As a result of situations of violence and armed conflict (or the threat of them) and mass violations of human rights, as well as floods, earthquakes and other natural disasters, there has been a dramatic increase in the number of people fleeing their homes in recent years. There are also deeper-seated factors underlying this phenomenon of mass displacement. Underdevelopment,

poverty, unequal distribution of wealth, unemployment, degradation of the environment, ethnic tensions, subjugation of minorities, intolerance, absence of democratic procedures, and many other factors have been cited as causes. Where such people, in fear of persecution, seek refuge in other countries, their interests are protected by the CRSR and the 1967 Protocol relating to the Status of Refugees. If such persons are victims of armed conflict situations, they are entitled to protection under international humanitarian law. In general, human rights law offers protection to all persons without distinction. However, where such people are displaced within their own country, specific problems arise as to rights and protection. "Internally displaced persons" (IDPs), pursuant to the criteria developed by the United Nations Special Rapporteur in the absence of an international legal definition, are "[p]ersons or groups of persons who have been forced to flee their homes or places of habitual residence suddenly or unexpectedly as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border."<sup>17</sup>

In 1998, the United Nations Secretary-General's representative on IDPs issued "Guiding Principles on Internal Displacement." These principles have been welcomed in resolutions of the United Nations Commission and the General Assembly as an important tool and standard for the protections of IDPs. While the document as such does not create new legal obligations for States, many – but not all – of the standards contained in it reflect existing international law. The United Nations Secretary-General refers to the Guiding Principles as "*the basic international norm for protection*" of IDPs. The Guiding Principles seek to protect all internally displaced persons in internal conflict situations, natural disasters and other situations of displacement. The 30 Principles, start with the basic rule that IDPs "*shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country*" (Principle 1(1)). National authorities have the primary duty to provide IDPs with protection and humanitarian assistance (Principle 25(1)). Displacement shall be avoided and, if it occurs, shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected (Principles 5 to 7). IDPs are granted fundamental rights (life, dignity, liberty and security of person, etc.) and are to be protected against a series of crimes such as genocide, starvation, rape, torture and being taken hostage (Principles 10 to 13). They must have the right to liberty of movement and to seek safety in other parts of their country or abroad (Principles 14 and 15). Furthermore, Principles 16 to 23 establish basic rights regarding living conditions (family, standard of living, property, exercise of religion, right to education). Sections IV and V are dedicated to humanitarian assistance and return and resettlement.

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<sup>17</sup> Analytical Report of the Secretary-General on internally displaced persons, United Nations document E/CN.4/1992/23, 14 February 1992.

The consequences of internal displacement are manifold and can deprive the persons concerned of the essentials that they need to survive. Loss of home, loss of employment, loss of security of person, threats to life and liberty, deprivation of food, loss of adequate health care and loss of education opportunities are among the harsh and immediate consequences of internal displacement. Most of today's IDPs have fled their homes because of massive and gross violations of human rights that threatened their life and livelihood. Yet the flight from their place of habitual residence leaves IDPs particularly exposed to further acts of violence, to enforced disappearances and to assaults on their personal dignity, including sexual violence and rape. The governments of States that have IDPs within their territory are first and foremost responsible for their care and protection. It must not be forgotten, however, that the very acts which drove the IDPs away from their homes were often instigated or tolerated by that same government. In other cases the governments concerned are not willing or able to provide the IDPs with the levels of assistance and protection that they need and to which they are entitled. A general observation can be made that IDPs are entitled to all the human rights and freedoms to which they were entitled when still living at their original place of residence within their country. Certain issues relating to, *inter alia*, the right to life, liberty and security of person, freedom of movement, asylum, etc. may be dealt with through legally binding instruments already in existence. The special vulnerability of IDPs to human rights violations and the fact that legally binding instruments that adequately address those vulnerabilities do not yet exist nonetheless remain. Internally displaced persons are fugitives in their own country and, more often than not, find that their rights and interests are not recognized or protected. Recent examples from Africa and the former Yugoslavia show that government authorities concerned are indeed unable and/or unwilling to respond adequately to the needs of IDPs and, as a result, appeal increasingly to the international community for assistance. This has already caused the UNHCR to include the plight of IDPs in the execution of its mandate, although they are not officially covered by it.

The following Guiding Principles on Internal Displacement are of particular relevance to law enforcement officials when dealing with IDPs:

- The obligation to carry out any displacement only in line with rules and procedures established by law and by competent legal authorities (Principle 7);
- The obligation to protect IDPs against a series of crimes and human rights violations (Principles 10 and 11);
- The prohibition of arbitrary arrest and detention (Principle 12(1));
- The obligation to grant and facilitate the free passage of humanitarian assistance (Principle 25(3));
- The obligation to facilitate return and resettlement (Principle 28(1));

- The obligation to assist in the recovery of property and possessions (Principle 29(2)).

#### 6.5.4 Migrants

Migration is an increasing global phenomenon. Without being refugees, people may decide for a variety of reasons to leave their country and try to make a living abroad. While this does not necessarily place them in a position of vulnerability, more often than not they may find themselves in considerable hardship. This is particularly the case when people cross borders clandestinely for economic reasons and without the approval of the competent immigration authorities or the necessary papers. They may enter the country on the basis of a tourist visa and then – being in a status of illegality – seek employment in an informal, often illegal, market. Human trafficking is another sad phenomenon of today's globalized world.

The illegal status of many migrants often exposes them to a variety of threats. They are easily subject to exploitation, which, at times, may even be described as modern slavery, with inhumane living and working conditions, no health insurance, and remuneration that is insufficient to meet even the most basic human needs. Victims of human trafficking, in particular, are often also forced into prostitution. When migrants living in illegality become victims of violence and crime, their illegal status often prevents them from seeking help from the police. If they go missing, no one is usually going to look for them or to report the fact to the police.

Despite the increase in human suffering that can be observed throughout the world, there is only one international instrument that protects migrants under special conditions, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, adopted by Resolution 45/158 of the General Assembly of the United Nations).<sup>18</sup> However, it has so far only limited applicability as there are only 47 States Parties.

The Convention provides for numerous rights applicable to *all* migrant workers, irrespective of whether they are in a regular “documented” situation or in an irregular “non-documented” situation; other rights specifically apply only to migrant workers and their families in a regular situation.

The Monitoring Committee has oversight of compliance with and implementation of the ICRMW, which provides for an obligatory reporting system (Articles 73 and 74) as well as for optional complaint mechanisms

<sup>18</sup> There are two additional, very specific documents, which supplement the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons and the Protocol against the Smuggling of Migrants by Land, Sea and Air, both of which set out to fight the specified phenomena of transnational organized crime, i.e. human trafficking and the smuggling of migrants. They contain articles that set out to protect victims of those two crimes (see section 6.5.6).



(Article 76: inter-State complaints; Article 77: complaints by individuals), subject to the explicit acceptance of the mechanisms by States Parties.

Most of the rights contained in the ICCPR are reiterated in the first part of the ICRMW and therefore apply to *all* migrant workers, reflecting the notion that migrant workers should have the same fundamental rights as other persons living in the country of employment or the country of transit, irrespective of whether their status is regular or irregular.

It furthermore contains provisions (of particular relevance to law enforcement officials) that address the specific vulnerability of migrant workers. The most relevant provisions are set out in the following box.

### **INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (ICRMW) – SELECTED ARTICLES**

“Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.” (Article 16(2))

“Any verification by law enforcement officials of the identity of migrant workers or members of their families shall be carried out in accordance with procedures established by law.” (Article 16(3))

“Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.” (Article 16(4))

“It shall not be the general rule that while awaiting trial they shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should the occasion arise, for the execution of the judgement.” (Article 16(6))

“Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.” (Article 17(3))

“Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children.” (Article 17(6))

“No migrant worker or member of his or her family shall be deprived of his or her authorization of residence or work permit or expelled merely on the ground of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition for such authorization or permit.” (Article 20(2))

“It shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits. No authorized confiscation of such documents shall take place without delivery of a detailed receipt. In no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family.” (Article 21)

“Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.” (Article 22(1))

“Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.” (Article 22(2))

### **6.5.5 The principle of non-refoulement**

An important principle for the protection of people on the move is the principle of non-refoulement. It has far-reaching implications for the responsibilities of law enforcement officials, particularly those in charge of border control, and therefore deserves closer analysis.

The principle of non-refoulement is traditionally associated with refugee law (CRSR, Article 33) but is also enshrined in extradition treaties, in international humanitarian law (Third Geneva Convention, Article 12, and Fourth Geneva Convention, Article 45) and human rights law (CAT, Article 3; Charter of Fundamental Rights of the European Union, Article 19(2)), and in other global and regional human rights treaties by interpretation. Insofar as non-refoulement covers persecution, torture, ill-treatment and arbitrary deprivation of life, it has become customary international law.

The principle of non-refoulement prohibits a State from transferring a person to another State if there are substantial grounds to believe that he or she is at risk of being subjected to violations of his or her fundamental rights, notably:

- Persecution on account of race, religion, nationality, membership of a particular social group or political opinion;
- Torture or other forms of cruel, inhuman or degrading treatment or punishment;
- Arbitrary deprivation of life, notably through imposition of the death penalty without fundamental guarantees of fair trial;

- Other threats considered in specific instruments, e.g. threat to physical integrity or liberty (see, for instance, the OAU Refugee Convention, Article 1.2, and the Cartagena Declaration, Conclusion No. 3, which include situations of generalized violence).

The type of conduct prohibited is to be understood in broad terms. It is thus not relevant whether the act is to be classified formally as expulsion, deportation, return or rejection or by any other term. It also applies to extradition and to situations of rejection at the border.

“Refoulement” is not only prohibited to the country of origin of the person concerned, but also to a third State in which there is either a risk of persecution or in which there is a risk of subsequent refoulement to a territory in which the individual faces a risk.

In practical terms, the principle of non-refoulement requires the State’s authorities that are planning to transfer a person to another State to assess whether there is a risk that the person will face persecution, torture, cruel, inhuman or degrading treatment or punishment or arbitrary deprivation of life after the transfer. Each case must be assessed individually – even in situations of mass influx – in order to avoid the grave consequences of an erroneous decision. If a risk is considered to exist, the person must not be transferred. Based on refugee law and general principles of human rights law, a number of fundamental procedural safeguards must be observed in the process of determining whether there is a risk for the person, in particular those presented here:

- The well-foundedness of the concerns, i.e. the existence of the risk, must be assessed on an individual basis by a body independent from the one that took the transfer decision;
- The person concerned must be informed in a timely manner of the intended transfer;
- The person must be given the opportunity to express any concerns that he or she may have regarding the risk of being subjected to torture or other forms of ill-treatment, arbitrary deprivation of life or persecution after the transfer;
- During the review of the well-foundedness of the fear, the transfer must be suspended.

In view of the massive influx of aliens to their territories for a number of reasons, many States around the world have started to take measures to protect their borders and to prevent people entering their territory, including physically preventing people from reaching the border and/or gaining access to the competent authorities, where they could present their cause and eventually seek asylum. Despite the understandable burden that this influx may present for a country, proceeding in this manner may be in violation of

the principle of non-refoulement. Law enforcement agencies must ensure compliance with the State's obligation to assess each case individually and with the right of the individual to due process of law.



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of Hirsi Jamaa and others v. Italy

#### Application No. 27765/09, 23 February 2012

"74. Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.

81. The Court observes that in the instant case the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities.

82. Accordingly, the events giving rise to the alleged violations fall within Italy's 'jurisdiction' within the meaning of Article 1 of the Convention.

114. However, expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3 [i.e. the prohibition of torture and inhuman or degrading treatment], and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.

122. The Court has already had occasion to note that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers. [...] However, having regard to the absolute character of the rights secured by Article 3, that cannot absolve a State of its obligations under that provision.

123. The Court reiterates that protection against the treatment prohibited by Article 3 imposes on States the obligation not to remove any person who, in the receiving country, would run the real risk of being subjected to such treatment.

134. [...] [T]he rules for the rescue of persons at sea and those governing the fight against people trafficking impose on States the obligation to fulfil the obligations arising out of international refugee law, including the '*non-refoulement*' principle.

156. In view of the foregoing, the Court considers that when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin, having regard in particular to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by the UNHCR."

### 6.5.6 Implications for law enforcement practice

The issue of refugees, IDPs and migrants is of direct relevance to law enforcement officials. They are most often the first point of contact between a refugee or a migrant and a receiving State. In addition, they may well have to help meet the needs of people who have left their country or place of residence in the course of their duties. It is therefore of the utmost importance for law enforcement officials to be aware of the rights of those people.

They must treat refugees in strict accordance with the provisions of the CRSR and its 1967 Protocol; those provisions establish minimum standards to be observed. As for IDPs, law enforcement officials must be aware of the fact that the people in question remain nationals of their country of residence and are fully entitled to all the rights and protection of national and international law as if they were still in their home countries.

The limited specific protection of migrants provided by the ICRMW due to the small number of State parties does not absolve law enforcement officials of specific obligations concerning the protection of and respect for migrants' rights.

In fact, law enforcement officials have a particular obligation to respect and ensure the human rights of *all* persons, without distinction of any kind, including national origin. This includes, in particular, protection against crime and the provision of assistance if they have become victims of crime. The CERD plays a central role in those obligations (see Chapter 4, section 4.2.3) but all other relevant human rights standards also apply to migrants.



#### LOOKING CLOSER

##### Inter-American Court of Human Rights

##### Juridical Condition and Rights of the Undocumented Migrants

##### Advisory Opinion OC-18/03, IACHR (Series A), No. 18, 17 September 2003

"118. We should mention that the regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination, because [...] this principle is of a fundamental nature and all States must guarantee it to their citizens and to all aliens who are in their territory.

123. As this Court has already indicated, due legal process refers to:

'all the requirements that must be observed in the procedural stages in order for an individual to be able to defend his rights adequately vis-à-vis any [...] act of the State that could affect them. That is to say, due process of law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of an administrative, punitive or jurisdictional nature.'

126. The right to judicial protection and judicial guarantees is violated for several reasons: owing to the risk a person runs, when he resorts to the administrative or judicial instances,

of being deported, expelled or deprived of his freedom, and by the negative to provide with a free public legal aid service, which prevent him from asserting the rights in question. In this respect, the State must guarantee that access to justice is genuine and not merely formal.

173. For the foregoing reasons, the Court [...] is of the opinion [...]

7. That the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory statutes. The broad scope of the preservation of due process encompasses all matters and all persons, without any discrimination.”

Law enforcement officials must respect and protect human dignity and maintain and uphold, without any adverse distinction, the human rights of all persons – which includes people on the move. It is up to individual law enforcement officials to implement this rule and to ensure that it has true practical effect rather than only theoretical significance.



## INTEGRATION IN PRACTICE

### Doctrine

The procedures established within law enforcement agencies for the processing of persons seeking refugee status or for their referral to competent authorities must be adequate and swift.

### Education and training

Appropriate treatment of people on the move by law enforcement agencies requires additional training and education for law enforcement officials. Knowledge of both international laws and domestic legislation is indispensable. An empathic ability to understand the individual's particular situation and circumstances is a must if protection, care and appropriate treatment are not to remain empty words.

In addition, law enforcement officials must understand the specific problems experienced by people who have left their country or place of residence. They should also be aware of their own capacity to alleviate or to aggravate the latter's suffering.

On the basis of the above-mentioned definition of vulnerability (section 6.1), people on the move are vulnerable in many respects. They face increased risks of abuse and violence while on the move and may be exposed to:

- kidnapping and trafficking by criminal gangs, smugglers, drug cartels or others;
- discrimination, exclusion and xenophobic violence;
- violence from authorities (army, border guards, police);

- risk of refoulement, persecution and stigmatization if they return to their country or place of origin.

Those risks are particularly serious where people have fallen into the hands of smugglers and traffickers and include ill-treatment, sexual abuse, exploitation, slavery and fear for the families that they have left behind, to name just but a few possible dangers.

The very fact of being on the move implies a number of risks, such as:

- lack of basic commodities such as food, water and shelter;
- accidents (e.g. train accidents, shipwrecks); and
- particular physical and psychological hardship on the journey itself.

People on the move often lack access to basic services (health, education, social services and housing), do not have sufficient knowledge of their own legal situation and rights and have insufficient access to assistance and legal support. When detained for whatever reasons, people on the move are often unaware of their rights and of the existing procedural and judicial guarantees. They may lack the official identification papers necessary for their release. Discriminatory treatment and conditions of detention as well as discrimination with regard to access to services are problems commonly encountered by people on the move. Those problems are often aggravated by a complete lack of external support from family, consular services or other visitors.

If people on the move disappear, they are likely to remain unaccounted for. If they are victims of crime, they may often not dare to report the incident, particularly in a xenophobic environment or where they are in an unclear or irregular situation.

Cultural or language barriers may further worsen all the above-mentioned factors.

Where one or more of those risks have materialized, law enforcement officials have increased responsibilities regarding the protection of people on the move:

- Law enforcement officials should not consider the people concerned as criminals. They are victims of a hardship situation who deserve protection and assistance, even if they are in an irregular situation. Law enforcement officials should be aware of the particular situation of people on the move (fear of xenophobia, ignorance of their rights, lack of proper documentation, fear of being sent back, exposure to threats against them or against the families that they have left behind). This situation – rather than the fact of being themselves involved in criminal activity – may often cause people on the move to avoid the police, not to report incidents in which they are victims of a crime and/or not to cooperate in crime investigations.

- The Protocol to Suppress, Prevent and Punish Trafficking in Persons, especially Women and Children clearly establishes that those affected by trafficking in persons are victims, even in case of consent (Article 2 and Article 3(a) and (b)).
- Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air urges States not to establish criminal liability for the fact of having been the object of smuggling.

As for all other people, law enforcement officials have a fundamental duty to protect people on the move against crime, abuse and exploitation. This duty to protect is of particular importance for people who have had to leave their homes behind. They have lost almost all their points of reference and their usual mechanisms for coping with difficult situations and for defending themselves and are therefore in need of even more protection than others.

- In this regard, for instance, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children requests State Parties to establish human trafficking as a criminal offence (Article 5(1)) and to *“establish comprehensive policies, programmes and other measures: (a) [t]o prevent and combat trafficking in persons; and (b) [t]o protect victims of trafficking in persons; especially women and children, from revictimization”* (Article 9(1)). States Parties shall also endeavour to *“protect the privacy and identity of victims of trafficking in persons”* (Article 6(1)) and to provide for their physical safety (Article 6(5)).
- States Parties are required to make the smuggling of migrants a criminal offence and to establish as aggravating such circumstances in which the lives and safety of migrants have been endangered or in which migrants have been subjected to inhuman or degrading treatment (Protocol against the Smuggling of Migrants by Land, Sea and Air, Article 6). The same Protocol enjoins States Parties to cooperate in order to prevent potential migrants from falling victim to organized crime (Article 15(2)).

Where necessary, law enforcement officials are required to provide or initiate the provision of assistance.

- Of particular relevance to law enforcement officials is, for instance, the right of victims of human trafficking to physical, psychological and social recovery, including appropriate housing, counselling and information (especially as regards their legal rights), as well as to medical, psychological and material assistance (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Article 6(3)(a) to (c)).

Other points that must be borne in mind under the heading of “assistance” include the following:

- The obligation to *“grant and facilitate the free passage of humanitarian assistance”* for IDPs (Guiding Principles on Internal Displacement, Principle 25(3)) has already been referred to in section 6.5.3;



- Refugees shall be entitled to the “*same treatment with respect to public relief and assistance*” as is accorded to the nationals of the country of refuge (CRSR, Article 23).

Where there is a reason to lawfully arrest or detain people on the move, law enforcement officials should ensure that they – as any other arrested or detained person<sup>19</sup> – are informed in a language that they understand of their legal status and rights, that they have access to a lawyer or legal counsel and that they obtain the appropriate support from consular services (Protocol against the Smuggling of Migrants by Land, Sea and Air, Article 16.5). They should also ensure that the people concerned are not victims of any type of xenophobic or discriminatory acts while in their custody – be it from other detainees or other law enforcement officials. In this regard, it is worth recalling that the obligation of non-discrimination (see Chapter 3, section 3.2) applies to all persons, including those on the move, irrespective of whether they are refugees, IDPs or migrants.

- Respect for the due process of law: law enforcement agencies in charge of border control must ensure that the right of aliens to have their individual situation assessed is respected. Procedures that set out to immediately return aliens before they are even physically in a position to present their cause, e.g. to apply for asylum, would be a violation of the principle of non-refoulement.



## INTEGRATION IN PRACTICE

### Doctrine

Internal procedures should ensure that persons who have crossed, or attempted to cross, the border are referred to the competent authorities in order to determine their status and legal situation.

### Education and training

The humane treatment of migrants and the protection of their rights must be part of the training for law enforcement officials (Protocol against the Smuggling of Migrants by Land, Sea and Air, Article 14(2)(e)).

## 6.5.7 Selected references

- Deng, Francis M., *Comprehensive Study* prepared by the Representative of the Secretary-General on the human rights issues related to internally displaced persons, pursuant to Commission on Human Rights resolution 1992/73, United Nations document E/CN.4/1993/35, Annex, 21 January 1993.

<sup>19</sup> For the rights of arrested and detained persons see Chapter 8.

- Frigo, Massimo, *Migration and International Human Rights Law*, International Commission of Jurists, Geneva, 2011.
- Hollenbach, David (ed.), *Driven from Home: Protecting the Rights of Forced Migrants*, Georgetown University Press, Washington, 2010.
- McAdam, Jane, *Complementary Protection in International Refugee Law*, Oxford University Press, Oxford, 2007.
- Shelley, Louise, *Human Trafficking: A Global Perspective*, Cambridge University Press, Cambridge, 2010.
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**Part III**

**LAW  
ENFORCEMENT  
POWERS**

## CHAPTER 7 OUTLINE

- 7.1 Introduction
- 7.2 Principles governing the use of force
  - 7.2.1 Legality
  - 7.2.2 Necessity
  - 7.2.3 Proportionality
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- 7.3 Use of firearms
  - 7.3.1 Overarching principles
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  - 7.3.3 Accountability for the use of firearms
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- 7.4 The use-of-force continuum: strengths and weaknesses of the concept
- 7.5 Use of force in public assemblies
- 7.6 Use of force in detention
- 7.7 Selected references

## KEY LEGAL DOCUMENTS

### Treaty law

- International Covenant on Civil and Political Rights (ICCPR, adopted in 1966, entered into force in 1976)

### Non-treaty law

- Standard Minimum Rules for the Treatment of Prisoners (SMR, adopted in 1955)
- Code of Conduct for Law Enforcement Officials (CCLEO, adopted in 1979)
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration, adopted in 1985)
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF, adopted in 1990)

## CHAPTER 7

# USE OF FORCE AND FIREARMS

### 7.1 Introduction

Law enforcement agencies around the world have been given a wide range of legal means to enable them to carry out their duties of enforcing the law and rendering assistance when needed. Those means, i.e. powers and authorities, relate, *inter alia*, to the use of force and firearms, arrest and detention, and search and seizure. In particular, the legal authority to use force when necessary and unavoidable for legitimate law enforcement purposes creates situations in which law enforcement officials and members of the community that they serve may find themselves on opposite sides. Initially, such confrontations concern individual law enforcement officials and individual citizens. However, they are capable of affecting the quality of the existing relationship between a law enforcement agency and the community as a whole.

This relationship will obviously suffer even more in the case of unlawful, i.e. unnecessary or disproportionate use of force. Law enforcement officials have to maintain very high standards of discipline and performance that acknowledge both the importance and the sensitivity of the tasks that they are called to perform. Adequate monitoring and review procedures are essential and are intended to guarantee that there is an appropriate balance between the discretionary powers exercised by individual law enforcement officials and the necessary legal and political accountability of the law enforcement organization as a whole.

This is of particular importance when the exercise of powers affects the right of everyone to life, liberty and security of person as proclaimed in Article 3 of the Universal Declaration of Human Rights (UDHR). These rights are reiterated in Articles 6(1) and 9(1) of the International Covenant on Civil and Political Rights (ICCPR).

ICCPR, Article 6(1)

*“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his [or her] life.”*

ICCPR, Article 9(1)

*“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law.”*

Other international treaties offering legal guarantees for the protection of the right to life are:

- the African Charter on Human and Peoples’ Rights (ACHPR, Article 4);

- the American Convention on Human Rights (ACHR, Article 4);
- the Arab Charter on Human Rights (ArabCHR, Article 5);
- the European Convention on Human Rights (ECHR, Article 2).

The right to life is the supreme human right, since without effective guarantees for it, all other human rights would be devoid of meaning. It is for that reason that Part III of the ICCPR begins with the right to life (Article 6(1)), further underscoring the special significance of this right by using the word “inherent.”



## LOOKING CLOSER

### Human Rights Committee CCPR General Comment No. 6

- “1. The right to life [...] is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation [...]. It is a right which should not be interpreted narrowly.
2. [...] The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. [...]
3. [...] The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6(1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.
5. [...] The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. [...]”

Therefore, and in full compliance with the above, law enforcement agencies around the world give the highest priority to the protection of the right to life of all persons by trying to prevent the deliberate taking of such life and by pursuing with persistence and determination those responsible for the (violent) death of a fellow human being. The seriousness of such an offence is further reflected in the severity of the penalty that can be imposed on the accused by a court of law if found guilty of the act of murder or manslaughter.

However, how does the high priority given to the protection of the right to life as demonstrated above relate to the legal authority of that same law enforcement agency to use force? Especially when that authority, in special circumstances, includes the intentional lethal use of firearms? Is not such power and authority, as granted to law enforcement officials by the State, in



direct contradiction to the positive steps that the same State is expected to take in order to protect life?

It is in view of those fundamental questions that the situations in which law enforcement officials may resort to the use of force, and especially to the use of firearms, must be confined strictly to exceptional circumstances.

## **7.2 Principles governing the use of force**

There is no legal definition of the use of force in international human rights law. In the context of law enforcement, force is generally understood as any physical constraint imposed on a person in order to obtain compliance with a (lawful) order. The range is very wide, including simply touching a person, the use of means of constraint such as handcuffing, of more violent means such as hitting a person or of technical means such as tear gas or electro-shock weapons (commonly known as tasers), and ultimately the use of firearms.

As with any other power, law enforcement officials are required, when using force, to comply fully with the principles of legality, necessity, proportionality and accountability (see Chapter 3, section 3.3). Guidance for the practical application of these principles is provided in the Code of Conduct for Law Enforcement Officials (CCLEO) and in the Basic Principles for the Use of Force and Firearms by Law Enforcement Officials (BPUFF).

The CCLEO seeks to create standards for law enforcement practices that are consistent with the provisions on basic human rights and freedoms. By establishing a set of guidelines of high ethical and legal quality, it seeks to influence the practical attitudes and behaviour of law enforcement officials, including in the use of force and firearms.

Similarly, the BPUFF aim to offer guidance to *“Member States in their task of ensuring and promoting the proper role of law enforcement officials.”* They *“should be taken into account and respected by Governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public.”* The preamble to this particular instrument also acknowledges the importance and complexity of the tasks of law enforcement officials, recognizing their vital role in the protection of life, liberty and security of all persons. Particular emphasis is placed on the maintenance of public safety and social peace, as well as on the importance of the qualifications, training and conduct of law enforcement officials. The preamble ends by stressing the need for national governments to take the principles enshrined in this instrument into account by adapting their national legislation and practice accordingly.

### 7.2.1 Legality

Law enforcement officials may resort to the use of force only in order to achieve legitimate law enforcement objectives.

Article 3 of the CCLEO establishes that force may be used by law enforcement officials *“only when strictly necessary and to the extent required for the performance of their duty.”* The Commentary to this Article further states that the use of force must not be *“disproportionate to the legitimate objective to be achieved.”* A similar provision is found in BPUFF 5(a).

Countries have vested in their law enforcement agencies the legal authority to use force if necessary for legitimate law enforcement purposes. When granting their law enforcement officials the legal authority to use force and firearms, States do not deny their responsibility to protect the right to life, liberty and security of all persons. That legal authority is laid down in domestic laws, which must clearly define the circumstances in which force may be used as well as the means that can be used in a particular situation. Countries do not only authorize their law enforcement officials to use force; certain countries go so far as to oblige their law enforcement officials to do so. This means that, pursuant to domestic legislation, a law enforcement official has the duty to use force if, in a given situation, the objective cannot be achieved otherwise. Only if the use of force would have to be considered inappropriate under the circumstances, i.e. given the importance of the objective to be achieved and the amount of force actually required to achieve it, should such force not be used (see also section 7.2.3).

### 7.2.2 Necessity

The principle of necessity requires law enforcement officials to use force only when all other means to achieve a legitimate objective have failed or seem extremely unlikely to achieve the intended result:

- They *“shall, as far as possible, apply non-violent means before resorting to the use of force and firearms”* (BPUFF No. 4).
- They are allowed to use only as much force as is necessary to achieve a legitimate objective (CCLEO, Article 3, Commentary (a)), i.e. law enforcement officials may not use more force than required by the circumstances and the use of force must also stop as soon as the legitimate objective has been achieved.
- They must *“minimize damage and injury, and respect and preserve human life”* (BPUFF No. 5(b)).

These provisions emphasize the requirement that the use of force by law enforcement officials should be exceptional and never go beyond the level reasonably necessary to achieve legitimate law enforcement objectives. In this connection, the use of firearms is to be seen as an extreme measure (for more

details of the specific limitations and requirements applicable to the use of firearms, see section 7.3).

### 7.2.3 Proportionality

Law enforcement officials are urged to exercise restraint when using force and firearms and to act in proportion to the seriousness of the offence and the legitimate objective to be achieved (BPUFF Nos 4 and 5; CCLEO, Article 3, Commentary (b)).

This assessment, which must be made by the individual law enforcement official whenever the question of the use of force arises, can lead to the conclusion that the negative implications of the use of force in a particular situation are greater than the significance of the legitimate objective to be achieved. In such situations police officials are required to abstain from further action.



#### LOOKING CLOSER

##### **Interim report of the Special rapporteur on extrajudicial, summary or arbitrary executions**

**UN GA A/61/311, 5 September 2006**

“42. [...] [T]he criterion of proportionality between the force used and the legitimate objective for which it is used requires that the escalation of force be broken off when the consequences for the suspect of applying a higher level of force would ‘outweigh’ the value of the objective. Proportionality could be said to set the point up to which the lives and well-being of others may justify inflicting force against the suspect – and past which force would be unjustifiable and, in so far as it should result in death, a violation of the right to life.”

This outcome of the application of the principle of proportionality cannot be emphasized enough. Withdrawal, not continuing to pursue the legitimate objective in the actual situation, must be an accepted option in any law enforcement operation if the negative consequences of the action would otherwise outweigh the legitimate objective.

#### EXAMPLE OF THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

Manoeuvring a police car to block the path of a stolen motorcycle that is travelling at a high speed may be disproportionate if the action is likely to cause a collision and involve a high risk of death or serious injury to the rider and/or passenger.

## 7.2.4 Accountability

Law enforcement officials need to be held accountable when they have resorted to the use of force. The primary responsibility of using force rests with individual officers, who are directly answerable to the law. However, accountability does not end there. Immediate superiors, witnessing colleagues, the law enforcement institution as a whole and the State must each assume their responsibility and be accountable for the use of force in the course of a law enforcement action.

BPUFF No. 22 calls on governments and law enforcement agencies to establish *“effective reporting and review procedures for all incidents”* in which:

- death or injury is caused through the use of force and firearms by law enforcement officials;
- law enforcement officials use firearms in the performance of their duty.

For incidents reported in accordance with these procedures, the following stipulations are made (BPUFF Nos 22 and 23):

- *“Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances”;*
- *“In cases of death and serious injury or other grave consequences, a detailed report must be sent promptly to the competent authorities responsible for administrative review and judicial control”;*
- *“Persons affected by the use of force and firearms or their legal representatives, shall have access to an independent process, including a judicial process”;*
- *“In the event of the death of such persons, this provision applies to their dependants accordingly.”*

### 7.2.4.1 Abusive use of force and firearms

*“Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.”* (BPUFF No. 7)

*“Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.”* (BPUFF No. 8)

Arbitrary or excessive use of force and firearms by law enforcement officials constitutes a violation of national criminal law. It also constitutes a violation of human rights by those very officials whose duty it is to maintain and uphold those rights. Any abuse of the power to use force and firearms constitutes a violation of human dignity and – potentially – of the physical integrity of the victims concerned. In any case, misuse of force and firearms will damage the fragile relationship between a law enforcement agency and the community

that it serves and may cause wounds that will take a long time to heal. It is for all the above reasons that misuse cannot and must not be tolerated.

The focus should be on preventing such acts through proper and regular education and training and adequate monitoring and review procedures. Whenever a case of suspected or alleged misuse occurs, there must be a prompt, independent, impartial and thorough investigation. Officials who are found guilty of such misuse must be punished. Throughout the investigation the special need of the victims should receive adequate attention in line with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration; for further details, see Chapter 6, section 6.2). If the law enforcement agency concerned is to succeed in restoring confidence in a damaged relationship, a genuine effort will be required.

#### **7.2.4.2 Responsibility of law enforcement officials**

*“Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.” (BPUFF No. 24)*

*“Governments and law enforcement agencies shall ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials and these principles refuse to carry out an [unlawful] order to use force and firearms; or who report such [unlawful] use by other officials.” (BPUFF No. 25)*

*“Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it. In any case, responsibility also rests on the superiors who gave the unlawful orders.” (BPUFF No. 26)*

Those principles make it clear that responsibility for the use of force and firearms is shared by the officials involved in a particular incident and by their superior officers. Without absolving law enforcement officials of individual responsibility for their actions, they make it the duty of superior officers to demonstrate all due care. The relationship between the provisions quoted above and the provisions on the misuse of force and firearms (BPUFF Nos 7 and 8) must be understood by all law enforcement officials.

#### **7.2.5 Implications for law enforcement practice**

Force may be used only as the last resort. As stated above, law enforcement officials are requested to use non-violent means as far as possible before

resorting to the use of force. Thus, the key words in law enforcement practice must be “de-escalation”, “negotiation”, “mediation”, “persuasion” and “conflict resolution.” Preference must be given to communication when seeking to achieve legitimate law enforcement objectives.



## INTEGRATION IN PRACTICE

### Doctrine

Operational procedures should oblige law enforcement officials to seek, as far as possible, a peaceful, non-violent solution to a given situation.

### Training

In accordance with BPUFF No. 20, law enforcement officials should be trained in the peaceful settlement of conflicts as well as in persuasion, negotiation and mediation techniques.

### System of sanctions

The internal reporting system should enable a law enforcement agency to assess whether the behaviour of law enforcement officials has complied with the operational procedures presented above. For example, a report form that includes the question “What did you do to de-escalate the situation?” may incite officers to attempt such de-escalation. Furthermore, such reports will also provide scope for assessing the need for corrective measures (e.g. disciplinary measures, training or improvements in operational procedures).

However, law enforcement objectives cannot always be achieved by means of communication. Essentially, two choices then remain: either the situation is left as it is and the law enforcement objective will not be achieved, or the law enforcement official decides to use force to achieve the objective. The BPUFF urge governments to *“adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials,”* who are also encouraged to *“keep the ethical issues associated with the use of force and firearms constantly under review”* (BPUFF No. 1).

The aforementioned rules and regulations should include provisions:

- to *“develop a range of means as broad as possible and [to] equip officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms”* (BPUFF No. 2);
- to develop *“non-lethal incapacitating weapons”* in order to restrain the *“application of means capable of causing death or injury”* (BPUFF No. 2);
- to equip officials with *“self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind”* (BPUFF No. 2);

- to ensure that the *“development and deployment of non-lethal incapacitating weapons is carefully evaluated in order to minimize the risk of endangering uninvolved persons”* and that the use of any such weapons is *“carefully controlled”* (BPUFF No. 3); this includes the development of appropriate procedures for their use, the proper selection of law enforcement officials allowed to use them, education of the selected law enforcement officials with regard to their potential harmful effects, continuous practical training in the use of these weapons and, to the extent possible, the prevention of misuse of such weapons.

Please note: the BPUFF use the term “non-lethal” weapons. However, it is recognized that, depending on the circumstances and its use, the simplest device may become lethal. Consequently, in accordance with current law enforcement terminology, this Manual will use the term “less lethal” instead of “non-lethal.”



## INTEGRATION IN PRACTICE

As presented above, despite being designed to be “less lethal,” most of the means employed in the use of force can have seriously harmful and even lethal effects. Typical examples are electro-shock weapons (commonly referred to as tasers). Although it is designed to reduce the need to resort to firearms and despite technical progress made, this item of equipment, which is in use throughout the world, regularly causes serious injury and even death. In practice, instead of being used to avoid the use of a firearm, it is used as an easy tool to compel a reluctant person to comply with orders without first attempting to use less violent means. This situation has even led some law enforcement agencies to abandon electro-shock weapons completely. Indeed, law enforcement agencies must seriously evaluate the benefits and risks of tasers or similar weapons and decide if they want to include them in the range of means available to their law enforcement officials and, if so, in which circumstances they are to be used.

### Doctrine

Operational procedures must state clearly by whom and in which circumstances electro-shock weapons may be used. For instance, the Council of Europe suggests that criteria for the use of electro-shock weapons should at least closely correspond to those governing the use of firearms (Council of Europe, CPT/Inf (2009) 30, report on a visit to the United Kingdom in 2008). The procedures must include instructions on their intended use and include information on risk factors prohibiting their use (e.g. at patrol stations or other areas where there are highly inflammable goods; people on whom they should not be used, such as children or the elderly).

### Education

Law enforcement officials must be acquainted with the potentially harmful effects of the specific type of electro-shock weapon that they might be using, including its effects in different circumstances and on different categories of persons.

## Training

Law enforcement officials must be trained in the appropriate use of electro-shock weapons as well as in the assessment of the specific risks of a given situation (e.g. as related to the age or health of the person). Only law enforcement officials who have been trained in the appropriate use of electro-shock weapons should be authorized to use them.

## System of sanctions

The facility with which electro-shock weapons can be used may incite law enforcement officials to have recourse to them too readily or even to make abusive use of them. In order to prevent excessive or abusive use of electro-shock weapons, each single use should be the subject of an obligatory report which provides a clear explanation of the circumstances, the risk assessment undertaken by the law enforcement official and the reasons why the electro-shock weapon was chosen as the appropriate option. Abusive use must imperatively lead to appropriate disciplinary and criminal proceedings. The reporting procedure should also allow the effective benefits and risks of this weapon to be re-evaluated regularly, the operational procedures and training to be revised if necessary, or even for this weapon to be excluded completely from the available law enforcement equipment. In this regard, the importance of developing *“non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons”* (BPUFF No. 2) cannot be stressed enough.

Further acknowledgment of the recognition by States of their responsibility can be found in the existing rules and practices concerning recruitment, selection, education and training of law enforcement officials.

The quality of law enforcement depends to a considerable extent on the quality of the human resources available. How good are the communicative skills of the individual law enforcement officials? What are the basic attitudes and behaviour of law enforcement officials in potentially confrontational or violent situations? How well are law enforcement officials trained in the controlled use of force and firearms? What alternatives to the use of force do officials recognize in a particular situation? It is first and foremost the answers to those questions that will decide the outcome of a confrontation between a law enforcement official and a citizen. In such cases a good legal framework can at best provide guidance; it never offers a ready-made solution.

Good tools might be considered as doing half the job. However, the skills of the person using the tools will determine the quality of the final product (see also Chapter 10, section 10.3). Therefore, governments and law enforcement agencies are urged to ensure that all law enforcement officials:

- *“are selected by proper screening procedures”* (BPUFF No. 18);
- *“have appropriate moral, psychological and physical qualities for the effective exercise of their functions”* (BPUFF No. 18);



- “receive continuous and thorough professional training” and are subject to periodic reviews of their “continued fitness to perform [their] functions” (BPUFF No. 18);
- “are provided with training and are tested in accordance with appropriate proficiency standards in the use of force” (BPUFF No. 19).

Governments and law enforcement agencies are also required to ensure that special attention is paid during training to a number of specific matters. These include:

- “issues of police ethics and human rights”;
- “alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms”;
- reviewing the “training programmes and operational procedures in the light of particular incidents” (BPUFF No. 20).

Finally, “[g]overnments and law enforcement agencies shall make stress counselling available to law enforcement officials who are involved in situations where force and firearms are used” (BPUFF No. 21).

## 7.3 Use of firearms

### 7.3.1 Overarching principles

One of the observations made by the Human Rights Committee with regard to the right to life (CCPR General Comment No. 6) was that “the deprivation of life by the authorities of the State is a matter of the utmost gravity.” The focus must be on “strictly controll[ing] and limit[ing] the circumstances in which a person may be deprived of his [or her] life by [State] authorities” in an effort to prevent the arbitrary taking of life.

The use of firearms for the achievement of legitimate law enforcement objectives is to be considered an extreme measure that is restricted to extreme circumstances. According to BPUFF No. 9, “law enforcement officials shall not use firearms against persons,” except:

- “in self-defence or defence of others against the imminent threat of death or serious injury”;
- “to prevent the perpetration of a particularly serious crime involving grave threat to life”; or
- to arrest, or to prevent the escape of, “a person presenting such a danger and resisting their authority”; and
- “only when less extreme means are insufficient to achieve these objectives.”

“In any event, the intentional lethal use of firearms” is limited to cases in which it is “strictly unavoidable in order to protect life” (BPUFF No. 9, author’s emphasis).

This complex provision requires some explanation:

- There is no legal definition of a firearm. However, the relevant provisions in the BPUFF are formulated in view of the highly lethal potential of a weapon that has been designed to kill (compared with other types of equipment or weapons which, depending on the circumstances, may also become lethal but which have not been specifically designed for that purpose).
- Given a firearm's potential to be highly lethal, BPUFF No. 9 draws a logical conclusion in application of the principle of proportionality: the use of a tool designed to take life can only be justified for an objective of equal importance, i.e. for the protection of life or against a threat of almost similar gravity (serious injury).
- This assumes particular significance in the case of arrest or the prevention of an escape. The use of a firearm in those situations can only be justified against a person "*presenting such a danger*," i.e. the liberty of this person must present a "*grave threat to life*" for others.



## LOOKING CLOSER

### Interim report of the Special rapporteur on extrajudicial, summary or arbitrary executions

UN GA A/61/311, 5 September 2006

"44. [...] The fundamental question is of proportionality between the objectively anticipatable likelihood that the use of force will result in death and the comparable anticipatable likelihood that failing to incapacitate the individual would result in the deaths of others. It must also be remembered that proportionality is a requirement additional to necessity. The principle of necessity will, thus, never justify the use of disproportionate force. If all proportionate measures have proved insufficient to apprehend a suspect, he or she must be permitted to escape."

- As mentioned above (section 7.2.1), in certain circumstances national legislation may oblige law enforcement officials to use force when the legitimate objective cannot be achieved otherwise. Such legislation frequently exists in relation to the arrest or escape of detainees. However, in due respect of the right to life, such legislation should be in line with the restrictions presented in BPUFF No. 9. In no circumstances should there be any obligation to make use of a firearm without allowing scope for the law enforcement official to make the mandatory assessment of the situation and to determine whether life actually is at risk.
- While the first parts of BPUFF No. 9 address situations in which law enforcement officials might use a firearm without the direct intention of killing (i.e. still hoping that their action may only result in injury and not in death), the last sentence sets a clear and absolute limit for situations in which

law enforcement officials make use of their firearms with the intention of killing another person. The BPUFF impose the highest possible threshold on such extreme situations (e.g. in hostage situations or suicide bombings), requiring there to be a direct and immediate, almost instant, threat to life.

In conclusion, the use of firearms must be seen as the last resort. The risks involved in their use in terms of damage and (serious) injury or death, as well as the lack of any real option afterwards, mean that they can only be used as the final possible means of containing a given situation; indeed, what are law enforcement officials to do if the use of firearms fails to ensure that the legitimate law enforcement objective is actually achieved? Law enforcement officials should not focus on the next available option when it comes to the use of force and firearms but rather on means and strategies that might serve to defuse a given situation. Preference must again be given to communication rather than to confrontation.

### **7.3.2 Procedures before and after use**

As emphasized above, the use of firearms is an extreme measure. This is further illustrated by the rules of behaviour that law enforcement officials need to observe prior to the actual use of such weapons. BPUFF No. 10 gives the following as a rule that must be observed at all times: *"In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."*

This provision is a direct reflection of the principle of necessity. If the warning leads to the person complying with the order issued by the law enforcement official, there is no justification for resorting to the use of firearms.

After the use of firearms, the same procedures apply as to any use of force, i.e. medical assistance must be provided for persons injured in the operation, and family members or friends of the injured person must be informed (BPUFF No. 5(c) and (d)). Furthermore, specific accountability rules apply to the reporting and investigation of situations in which firearms have been used.

### **7.3.3 Accountability for the use of firearms**

In addition to the aspects applicable to all types of use of force (see section 7.2.4), specific accountability rules apply to the use of firearms.

BPUFF No. 11 requires law enforcement agencies to *"[s]pecify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted"* and to *"[r]egulate the control, storage and issuing of firearms, including procedures for ensuring*

*that law enforcement officials are accountable for the firearms and ammunition issued to them.”*

Authorities are also required to “[p]rovide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty” (BPUFF No. 11(f)).

### **7.3.4 Implications for law enforcement practice**

The wide range of obligations with which law enforcement officials have to comply in connection with the use of firearms conveys a sense of the difficulty of the task. This difficulty is frequently enhanced by the situations in which law enforcement officials may have to decide whether or not to use a firearm. In a split second they have to decide on an appropriate response to a situation that is potentially life-threatening. That is an extremely difficult task which requires a range of precautionary measures to be taken by a law enforcement agency in order to ensure that the individual law enforcement official is able to adopt the best possible response to a given situation.

Law enforcement agencies should have rules and regulations that:

- *“[e]nsure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm”* (BPUFF No. 11(b));
- *“[p]rohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk”* (BPUFF No. 11(c));
- *“[p]rovide for warnings to be given, if appropriate, when firearms are to be discharged”* (BPUFF No. 11(e)).



## **INTEGRATION IN PRACTICE**

### **Doctrine**

In accordance with BPUFF No. 11(e), the operational procedures of a law enforcement agency should provide for the precise wording of a warning to be given prior to the use of firearms. This warning should comply with the requirements of BPUFF No. 10 and should be sufficiently clear and precise in order to be easily understood by the individual for whom it is intended.

A critical question is whether shots present an appropriate warning. Two aspects are problematic. First, the addressee of the warning shot may perceive the shot not as a warning but as a direct attack and overreact accordingly, leading to a further escalation of the situation. Second, bullets from a warning shot are extremely dangerous and can seriously injure or, in the worst case, even kill uninvolved persons when they are shot into the air; bullets must come down somewhere and the risk that this presents is almost impossible to control. Law enforcement agencies should therefore carefully evaluate the benefits and risks before deciding if at all, and in which situations, they should consider using shots as a possible means of issuing a warning.

## Education and training

Law enforcement officials must know the warning procedures by heart in order to be able to apply them appropriately, even in the most stressful circumstances. They must be trained to properly assess the situation in order to determine whether one of the exceptions given in BPUFF No. 10 applies (i.e. that a warning may not be appropriate).

If required to carry firearms, law enforcement officials *“should be authorized to do so only upon completion of special training in their use”* (BPUFF No. 19).



## INTEGRATION IN PRACTICE

### Training

Situations in which law enforcement officials may have to resort to the use of firearms are highly stressful for those officials. In order to enable them to respond appropriately in such situations, their training must be as realistic as possible. Endless exercises at shooting ranges are largely insufficient in this regard. It is also known today that repetitive exposure to challenging and stressful situations can improve the capacity of law enforcement officials to keep calm and maintain control of their intellectual and physical capacities despite the life-threatening nature of the situation. Obviously, such exercises should not be limited to the beginning of the careers of law enforcement officials. They should be repeated at regular intervals as long as officials perform duties involving the possible use of firearms.

Depending on the complexity of a situation, responsibility does not merely lie with the individual law enforcement official at the location. The higher command level has overall responsibility for taking all precautionary measures in line with the provisions of the BPUFF in order to respect and to protect life.



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of McCann and Others v. United Kingdom

#### Application No. 18984/91, 27 September 1995

“192. In carrying out its examination under Article 2 [...] of the [European Convention on Human Rights], the Court must bear in mind that the information that the United Kingdom authorities received that there would be a terrorist attack in Gibraltar presented them with a fundamental dilemma. On the one hand, they were required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel and, on the other, to have minimum resort to the use of lethal force against those suspected of posing this threat in the light of the obligations flowing from both domestic and international law.”

194. Against this background, in determining whether the force used was compatible with Article 2 [...], *the Court must carefully scrutinise [...] not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force* (author's emphasis).

199. All four soldiers admitted that they shot to kill. They considered that it was necessary to continue to fire at the suspects until they were rendered physically incapable of detonating a device.

200. The Court accepts that the soldiers honestly believed, in the light of the information that they had been given, [...] that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life.

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

212. [The soldiers'] reflex action in this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement [...]. *This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation* (author's emphasis).

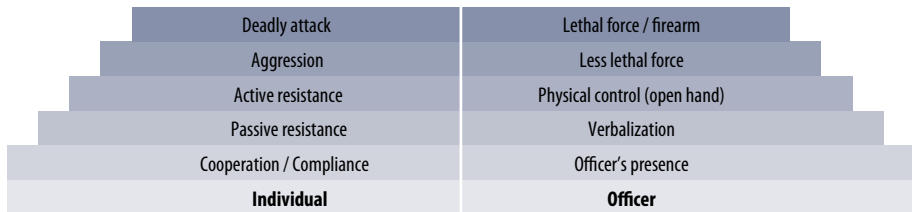
213. In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) [...] of the Convention."

The consequences of the (lethal) use of firearms can of course be reduced to a purely legal matter. However, it is advisable to consider the personal consequences for the official(s) involved. Although there are general rules as to how human beings react to stressful events, the specific reaction of each person depends first of all on that person and then on the particular circumstances of the event. The fact that counselling is made available after the event does not diminish the deeply emotional experience to which an official might be subjected as a result of the use of force and/or firearms but, on the contrary, should be seen as an acknowledgement of the seriousness of such events.

In a number of countries law enforcement agencies have experimented successfully with “self-help groups.” These groups comprise law enforcement officials who have been in a situation in which they used their firearm against a person and have themselves experienced the emotional aftermath of such an event. That experience is used to give counselling to colleagues traumatized by an incident involving the use of force and firearms. The self-help groups work in close conjunction with professional counsellors such as psychologists and psychiatrists.

## 7.4 The use-of-force continuum: strengths and weaknesses of the concept

Many law enforcement agencies throughout the world base their operational procedures for the use of force on the “use-of-force continuum.” In different ways, this model usually indicates a certain pattern of behaviour by an individual and the appropriate response of the law enforcement official roughly as shown below. Please note that the terminology and number of levels may vary considerably, as may its visual presentation in the form of a ladder, a circle or an even more complex chart.



This concept is worth examining more closely in the light of the above-mentioned principles on the use of force and firearms as it has a number of strengths and weaknesses.

First, it rightly indicates that the response of the officer needs to be in accordance with the situation and the behaviour of the individual. It also indicates clearly that certain responses are not appropriate to the situation, e.g. responding with potentially lethal force to overcome passive resistance. However, this model omits several crucial aspects of the use of force and firearms by law enforcement officials:

- It takes no account of the principle of necessity. For each individual type of behaviour, it is still mandatory for the necessity of the response and the possibility of a non-violent or less violent response to be assessed. Even in case of a deadly attack, it might be possible to counter the attack using less lethal means (e.g. using pepper spray against somebody attacking with a knife) – always depending, of course, on the individual circumstances of the situation.

- On the other hand, the chart may suggest that a law enforcement official has to start at the bottom of the chart, which is not always the case and will depend on the circumstances in question.
- The chart may trigger fairly reactive behaviour by the law enforcement official, whereas it is always recommended that the law enforcement official remain in control of a situation and be able to steer it in the right direction.
- Moreover, the chart does not include de-escalating measures, which should be attempted whenever possible.
- Finally, the chart does not consider the possibility of retreat, which – in application of the principle of proportionality – must be included in the possible options for law enforcement action.

Consequently, the use-of-force continuum runs the risk of making a complex issue appear simple. Its advantage is that it helps, first and foremost, to illustrate the idea of a graduated response. However, it should not be considered a “ready-to-use-one-fits-all” tool and should certainly not be used in isolation to explain the principles governing the use of force and firearms.

## **7.5 Use of force in public assemblies**

Some of the aspects governing the management of public assemblies have already been addressed in Chapter 5. It is nonetheless useful to recall some of the specific aspects that should guide the use of force and firearms in such situations.

### **General principles**

All principles governing the use of force referred to above (section 7.2) are applicable to the handling of public assemblies. In particular, the utmost attention must be paid to the obligation of law enforcement officials to respect and protect the life and security of all persons (see ICCPR, Article 6(1); CCLEO, Article 2; BPUFF, Preamble (paragraph 3); BPUFF No. 5; the provisions in regional treaties, i.e. ACHPR, Articles 4 and 6; ACHR, Articles 4(1), 5(1) and 7(1); ArabCHR, Articles 5 and 14; ECHR, Articles 2(1) and 5(1)). Therefore, the use of force must remain the last resort (BPUFF Nos 4 and 13). The principle of necessity requires the first objective to be the “*peaceful settlement of conflicts*” and for “*methods of persuasion, negotiation and mediation*” to be used in order to limit the need to resort to the use of force (BPUFF No. 20).

### **Distinction between lawful and unlawful assemblies**

A lawful assembly (see BPUFF No. 12), i.e. an assembly that takes place in full respect of the provisions of national law, can only be restricted if other legal provisions provide the necessary and proportionate authorization for such restrictions. It also means that law enforcement officials are required to protect lawful assemblies, e.g. against violent counter-demonstrations.



### **Distinction between violent and non-violent assemblies**

An assembly which does not take place in accordance with the provisions of national law (e.g. if a notice period has not been respected or if authorization has not been obtained) may nevertheless take place in an entirely peaceful manner. Thus, in application of the principle of proportionality, law enforcement officials have to weigh carefully the public interest for dispersing such an unlawful assembly against the possible negative consequences of its dispersion (see BPUFF No. 13). The fact that an unlawful assembly takes place peacefully may lead to the decision not to disperse it – and in particular not to use force to that end – in order to prevent an unnecessary and potentially dangerous escalation of the situation. This, of course, does not preclude the possibility of later prosecuting those responsible for holding or participating in an unlawful assembly.

A lawful assembly that turns violent may lead to the decision to disperse it in order to stop the violence. However, it must be noted that the presence of a limited number of violent protestors does not necessarily turn the whole assembly into a violent one. In application of the principles of necessity and proportionality, law enforcement officials will therefore have to consider the possibility of dealing separately with such violent individuals before resorting to the dispersion of the assembly as a whole.

### **The use of firearms**

In any case, the use of firearms in public assemblies may only be considered in violent assemblies and under strict observation of the rules stipulating their use: *“only when less dangerous means are not practicable”* and *“only to the minimum extent necessary”* (BPUFF No. 14) and only under the conditions stipulated in BPUFF No. 9. An initial reading of BPUFF No. 14 may lead to the conclusion that it presents additional circumstances in which it is lawful to use firearms. However, that is not the case as, in fact, it merely reiterates that the use of firearms is warranted only in the conditions referred to in BPUFF No. 9, which basically limits the use of firearms to situations in which life is in danger. In particular, it should be emphasized that BPUFF No. 14 does not allow the use of firearms for the sole purpose of dispersing a crowd or indiscriminate firing into a violent crowd.

### **Precautions**

Finally, the BPUFF recommend a number of precautionary measures that should help law enforcement officials to deal with a public assembly in accordance with the above-mentioned principles. These measures refer to the availability of protective equipment and equipment that allows a graduated use of force, including incapacitating equipment (BPUFF No. 2), to ensuring that law enforcement officials have a good understanding of crowd behaviour (BPUFF No. 20) and to the appropriate selection and training of law enforcement officials (BPUFF Nos 18 and 19). The availability and accessibility of medical

services to assist any injured person (see BPUFF No. 5(c)) is of particular importance in situations involving public assemblies.



## INTEGRATION IN PRACTICE

### Training

Prison officers shall be given special physical training to enable them to restrain aggressive prisoners (SMR No. 54(2)).

### 7.6 Use of force in detention

In their relations with detainees, law enforcement officials are not allowed to use force other than when *“strictly necessary for the maintenance of security and order within the institution”* or when *“personal safety is threatened”* (BPUFF No. 15 and SMR No. 54(1)).

Law enforcement officials may not use firearms *“except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting the danger referred to in principle 9”* ( BPUFF No. 16).

Similarly to BPUFF No. 14, BPUFF No. 16 does not provide for different requirements for the use of firearms in detention. It simply reiterates that also in places of detention, firearms may only be used in accordance with the conditions and criteria set forth in BPUFF No. 9.

Prison officers in direct contact with prisoners should not carry firearms, except in special circumstances, and in that case they should only be provided with arms if they have been trained in their use (SMR No 54(3)).

Instruments of restraint may only be used for the purpose of safety and security or on medical grounds but not for the purpose of punishment (BPUFF No. 17 read in conjunction with SMR Nos 33, 34 and 54).



## INTERNATIONAL JURISPRUDENCE

### Inter-American Court of Human Rights

#### Case of Neira Algeria *et al.* v. Peru

#### Series C, No. 20, 19 January 1995

“61. In the instant case, Peru had the right and the duty to subdue the uprising of the San Juan Bautista Prison, even more so given the fact that it did not occur suddenly. Rather, the uprising appears to have been prepared in advance, given that the prisoners had made

weapons of different types, dug tunnels, and practically taken control of the Blue Pavilion. It must also be kept in mind that, during the initial phase of the crushing of the riot by the Republican Guard, the prisoners captured one corporal and two guards as hostages, wounded another four guards, and took possession of three rifles and an automatic pistol with which they caused deaths among the forces that entered to crush the riot.

62. The majority's Peruvian Congressional Commission investigative report states that the *'disproportion of the war potential employed is nevertheless inferred from the results of the action. The final demolition, after the surrender which occurred at 14:30 hours on the nineteenth, would not have a logical explanation and would, consequently, be unjustified.'*

Also, the minority report stated as follows: *'It has been shown that the government, in failing to comply with its obligation to protect human life, gave orders which resulted in an unjustifiable number of deaths ... The military force used was disproportionate in relationship to the actual danger present, and no precautionary measures were put into effect to reduce the human cost of crushing the riot' [...].*

69. The Court considers it proven that the Pavilion was demolished by the forces of the Peruvian Navy [...]. The majority and minority reports of the Congress [...] are consistent in regards to the disproportionate use of force. These reports are official and are regarded by this Court to be sufficient proof of that fact.

74. [...] Although it appears from arguments previously expressed in this judgment that those detained in the Blue Pavilion of the San Juan Bautista Prison were highly dangerous and, in fact armed, it is the opinion of this Court, those do not constitute sufficient reasons to justify the amount of force used in this and other prisons where riots had occurred."

## 7.7 Selected references

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## CHAPTER 8 OUTLINE

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## KEY LEGAL DOCUMENTS

### Treaty law

- International Convention on the Elimination of All Forms of Racial Discrimination (CERD, adopted in 1965, entered into force in 1969)
- International Covenant on Civil and Political Rights (ICCPR, adopted in 1966, entered into force in 1976)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, adopted in 1984, entered into force in 1987)
- Convention on the Rights of the Child (CRC adopted in 1989, entered into force in 1990)
- International Convention for the Protection of All Persons from Enforced Disappearance (CPED, adopted in 2006, entered into force in 2010)

### Non-treaty law

- Standard Minimum Rules for the Treatment of Prisoners (SMR, adopted in 1955)
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, adopted in 1985)
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration, adopted in 1985)
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles, adopted in 1988)
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (adopted in 1989)
- Basic Principles on the Role of Lawyers (adopted in 1990)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNRPJ, adopted in 1990)
- United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules, adopted in 2010)

## CHAPTER 8

# ARREST AND DETENTION

### 8.1 Introduction

*“Everyone has the right to life, liberty and security of person.”*

The above statement, which forms Article 3 of the Universal Declaration of Human Rights (UDHR), is one of the oldest basic human rights in existence. The right to liberty and security of person is also taken up in Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) and all regional human rights treaties contain similar provisions (ACHPR, Article 6; ACHR, Article 7; ArabCHR, Article 14; ECHR, Article 5).

At the same time, deprivation of personal liberty has long represented the most common means used by States to combat crime and to maintain internal security. With the gradual displacement of other forms of punishment, such as the death penalty and corporal punishment, imprisonment has even gained in significance over the centuries. It is likely that in the future, too, deprivation of personal liberty will remain a legitimate means of exercising sovereign State authority.

Therefore, Article 9(1) of the ICCPR does not seek to bring about a situation in which deprivation of liberty is absolutely prohibited, as is the case, for instance, for torture and slavery; rather, it represents a procedural guarantee. It obliges a State to define precisely, in its domestic law, the cases in which deprivation of liberty is permissible and the procedures to be applied, and to make it possible for the independent judiciary to take quick action in the event of arbitrary or unlawful deprivation of liberty by administrative authorities or executive officials.

It is important to bear in mind that deprivation of liberty affects an individual's rights far beyond liberty and freedom of movement. Deprivation of liberty leads to a complete disruption of what was previously the person's and his or her relatives' daily routine. In one way or another and to varying degrees it can affect almost all the person's human rights: the right to family life, the right to work or to exercise a profession, freedom of assembly, the right to information, the right to education, the right to practise a religion, etc. To arrest or to detain a person is therefore one of the most serious demonstrations of State authority and power; such powers need to be carefully regulated by law and exercised by law enforcement officials in full conformity with the applicable international laws and standards.

## Definitions

Definitions of the point at which a person is considered to have been “arrested” or of the point at which a person is considered to have been “detained” may vary from one country to another. In some countries, merely asking a person to provide identity documents is already considered an arrest, while in others an arrest consists of formally prohibiting a person from moving away for a reason that lawfully justifies an arrest (in contrast, for example, with keeping people in a specific area for other law enforcement purposes, such as maintaining public order or managing major accidents). “Detention” in some countries may start with transporting an arrested person in a police car, while in others this may only be considered “arrest”, with “detention” starting only once the decision has been made to maintain the person in police custody at the police station or at other detention facilities.

Whatever the definitions applied under national law, from the perspective of international human rights law, certain procedures must be followed and the rights of the individual have to be respected at each and every stage of the proceedings.

For the purpose of this Manual, the following definitions – drawn from the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles) – will be used (see “Use of terms” in the Body of Principles):

- “Arrest” means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;<sup>20</sup>
- “Detained person” means any person deprived of personal liberty except as a result of conviction for an offence (whether or not it is related to a criminal justice process, i.e. pre-trial detention, reasons of protection as in the case of people who are mentally ill or drunk and so on);
- “Imprisoned person” means any person deprived of personal liberty as a result of conviction for an offence;
- “Detention” means the condition of detained persons as defined above;
- “Imprisonment” means the condition of imprisoned persons as defined above;
- A “judicial or other authority” means a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

<sup>20</sup> It is worth noting that in most national laws provision is also made for a “citizen’s arrest.” This is an arrest by a private person in particular circumstances, e.g. when a person is caught in the act of committing an offence. However, in such situations, the private person does not become a law enforcement official and does not act in official capacity. The relation between the two individuals continues to be governed by civil and penal law only and not by human rights law. The “citizen’s arrest” is therefore not covered in the discussion of the rules and standards of international human rights law in this chapter.

## 8.2 Principles governing arrest

The task of enforcing the law and maintaining public order may place law enforcement officials and members of society on opposite sides in a given situation. The interest of States in law and order has resulted in law enforcement officials having not only the responsibility but also the authority to enforce, if necessary, the laws of the State that they serve. In most countries law enforcement officials have discretionary powers of arrest and detention; they may exercise those powers, if so required, in any law enforcement situation. The law usually employs formulations such as “may arrest or detain” and “can be arrested”; formulations such as “must arrest,” “shall be arrested” tend to be the exception.

When exercising their discretionary powers, law enforcement officials have to bear in mind the serious consequences that an arrest has for a person's life, as already outlined above. In particular, they are required to show the greatest respect for the overarching principles of legality, necessity, proportionality and accountability. Failure to show full respect for such principles can have a negative impact on the very fabric of society. Indeed, when people's trust in the system is already fragile, the abusive use of arrest as a repression measure can deepen existing divisions within the country. It can contribute to sustaining/escalating the climate of resentment among all those subjected to arbitrary arrest, their families and society in general.

### 8.2.1 Legality

*“No one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law.”* (ICCPR, Article 9(1))

This provision makes it clear that the reasons for an arrest, as well as the procedures for an arrest, must be regulated in and based on the laws of the State, in full compliance with international standards. This principle of legality is violated if someone is either arrested or detained on grounds which are not clearly established in, or which are contrary to, domestic law.

Grounds for an arrest are usually:

- Conviction by a competent court;
- Non-compliance with a lawful court order or an order to secure an obligation prescribed by law;
- The purpose of bringing a person before the competent legal authority on reasonable grounds of having committed an offence. In this regard it is essential to recall that every individual has the “*right to be presumed innocent until proved guilty*” (ICCPR, Article 14(2)). Therefore, while definitive proof of guilt is not required to justify an arrest, there must nevertheless be reasonable grounds for the belief that the person to be arrested has indeed

committed the offence. Such reasonable grounds must go beyond the personal “gut feeling” of the investigating law enforcement official and be based on objectively verifiable facts and evidence.



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of Shimovolos v. Russia

#### Application No. 30194/09, 21 June 2011

“53. It is significant in this connection that the applicant was not suspected of ‘having committed an offence’. According to the Government, he was arrested for the purpose of preventing him from committing ‘offences of an extremist nature’ [...]. The Court will therefore examine whether the applicant’s arrest could be ‘reasonably considered necessary to prevent his committing an offence’ within the meaning of Article 5 § 1 (c).

54. [...] The Court reiterates in this connection that Article 5 § 1 (c) does not permit a policy of general prevention directed against an individual or a category of individuals who are perceived by the authorities, rightly or wrongly, as being dangerous or having propensity to unlawful acts. It does no more than afford the Contracting States a means of preventing a concrete and specific offence [...].

56. The only specific suspicion against the applicant mentioned in the telexes was the suspicion that he might be carrying extremist literature [...]. However, the Government did not provide any facts or information which could satisfy an objective observer that that suspicion was ‘reasonable’. The Court notes with concern that the suspicion was apparently based on the mere fact that the applicant was a member of human rights organisations. In its opinion, such membership cannot in any case form a sufficient basis of a suspicion justifying the arrest of an individual. Moreover, that suspicion was dispelled, according to the testimony by the escorting police officer, due to the fact that the applicant did not have any luggage with him [...]. The Court concludes from the above that the applicant’s arrest could not be ‘reasonably considered necessary to prevent his committing an offence’ within the meaning of Article 5 § 1 (c).

57. It follows that the applicant’s arrest did not have any legitimate purpose under Article 5 § 1 and was accordingly arbitrary.”

In addition to the aforementioned grounds, which are usually found, with variations, in domestic legal systems, most national laws include a variety of other reasons (e.g. to protect a person from harm in case of drunkenness, to take care of minors, to prevent the spreading of infectious diseases, to deal with persons of unauthorized presence in the country). It must be noted, however, that these laws as well as their application should be justified by legitimate interests of public order and security and that they should not be discriminatory or be applied in a discriminatory manner.



In most countries, a distinction is made between an arrest with a warrant and an arrest without a warrant. An arrest warrant is issued by a judicial authority following a request from the police and/or the prosecutor. The judge will assess the legality, the necessity and the proportionality of the requested arrest on the base of the evidence presented and issue , or not issue, the arrest warrant. Once the warrant has been issued, the law enforcement official in charge of the arrest is required to carry out the arrest in accordance with the warrant.

People may be arrested without a warrant in some countries in connection with a specific list of offences; in other countries arrest without a warrant is limited to exceptional situations. Usually, the following two situations are considered exceptions justifying arrest without a warrant:

- When an offender is caught “red-handed,” i.e. on the spot during or immediately after the commission of the offence (often referred to as “found committing” or being found *in flagrante delicto*);
- When the circumstances make it unacceptable to wait until an arrest warrant is issued, e.g. when a suspected offender is likely to escape justice or when a crime is about to be committed.

An arrest without a warrant that is not in line with the circumstances provided for in the national law would be a violation of the principle of legality and therefore an unlawful arrest.

### 8.2.2 Necessity

In a technical sense every infraction of criminal law or every “*alleged commission of an offence*” (to use the wording in the Body of Principles) could warrant the arrest of the person(s) believed to be responsible for it. However, in law enforcement practice not every alleged commission of an offence automatically leads (or should automatically lead) to such an arrest. There are a number of factors which influence the decision whether or not to carry out an arrest.

The quality and experience (i.e. competence) of law enforcement officials involved will also inevitably have a bearing on the outcome of a particular situation in which discretion over whether or not to arrest someone is exercised.

In practical terms, a law enforcement official will have to assess whether the situation effectively requires an arrest or whether there are less restrictive means of achieving the desired objective.

For instance, in the investigation of a crime, an arrest may be justified in order to secure the effective conduct of the investigation, i.e. to prevent the suspect

from destroying evidence, influencing witnesses or trying to escape justice. In such circumstances, the timely securing of evidence and interviewing of witnesses or seizing the passport of the suspect are measures that might make an arrest unnecessary – always provided that those measures are likely to achieve the desired objective, i.e. to prevent the suspect from negatively influencing or hampering the investigation.

The suspect's behaviour can also influence the decision as to whether to carry out an arrest or not. For instance, if suspects present themselves to the police, this may (but does not necessarily) lead to the conclusion that they will not try to escape investigation and trial. In such cases an arrest could be unnecessary. In this regard, the gravity of the offence and thus the sentence to be expected can also influence the decision, e.g. if a life sentence can be expected, the probability of the suspect not appearing at the trial is higher (and the need to keep the person in custody is consequently greater) than if the expected sentence is only a fine or a probationary sentence.

The principle of necessity also includes the way in which an arrest is carried out. For instance, it will have to be assessed whether it is really necessary to carry out an arrest in the middle of the night or whether it is possible to wait until the following morning. In some countries, there are even provisions in national law that stipulate the usual time when an arrest can be carried out and the circumstances in which exceptions to this rule apply. Being arrested is very often damaging to a person's reputation, even if he or she later turns out to be innocent. As far as possible, law enforcement officials should therefore assess the circumstances and try not to attract unnecessary public attention to the arrest (e.g. if possible, steps should be taken to avoid arresting people at their place of work, as this might lead to the loss of their jobs even if they are subsequently found not guilty).

### **8.2.3 Proportionality**

The arrest should also be proportionate to the objective. In other words, the gravity of the offence committed must be commensurate with the consequences of the arrest for the suspected person.

National legislation often provides for a preliminary assessment of proportionality if the authority to make an arrest is granted only for offences of a certain gravity but not for minor offences (e.g. certain traffic offences).

Nonetheless, in assessing the individual case, law enforcement officials will still have to consider the proportionality of an arrest. In this assessment, account will need to be taken of the fact that arrest may not only affect the right to liberty and freedom of movement but, depending on the circumstances, it may affect almost all other individual rights, i.e. the right to

family life, to exercise a profession or to receive an education, the right to privacy, etc. If this assessment leads to the conclusion that the negative impact of the arrest outweighs the reasons for the arrest (e.g. arresting a single mother of three young children for a minor offence, leading to the need to place the children in state custody with all the related traumatizing consequences for them), may lead to the decision to refrain from an arrest.

The balancing exercise also becomes relevant when the arrest is intended to prevent the possible commission of another offence. If there are reasonable grounds to believe that the suspect might repeat the same offence or commit another offence and this offence is serious (e.g. causing further severe bodily harm in a case of domestic violence), it might be easier to justify the arrest than if a person is merely known to insult people when drunk.

### 8.2.4 Accountability

The international rules and standards, as well as provisions in the national law regarding the procedure to be followed when making an arrest, seek to ensure that law enforcement can be held accountable for an arrest in order to protect the rights of the persons involved (suspects, their families and the victims of the offence). This means that law enforcement officials will have to explain and justify the reasons for an arrest as well as the procedures followed during and after an arrest.

Any person arrested or detained must therefore be given an *“opportunity to be heard promptly by a judicial or other authority”* (Body of Principles No. 11) and *“shall be entitled at any time to take proceedings [...] before a judicial or other authority”* (Body of Principles No. 32) to obtain a decision on the lawfulness of his detention and an order of release if the detention is not lawful (ICCPR, Article 9(4)) – referred to as habeas corpus.

Furthermore, the *“authorities which arrest a person, keep him [or her] under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority”* (Body of Principles No. 9).

These rules are not only concerned with lawful proceedings and compliance with judicial guarantees; they are also a mean of preventing enforced disappearances, extrajudicial killings and torture. This is one of the reasons why Article 17(2)(f) of the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) extends the right to habeas corpus to relatives or other persons having a legitimate interest, requiring each State Party to guarantee in its legislation that:

*“[...] any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise*

*this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful."*

Law enforcement officials shall bring a person arrested or detained on a criminal charge promptly before a "judge or other officer authorized by law to exercise judicial power" (ICCPR, Article 9(3)). In most countries, there is a maximum period during which a person can be held in custody without being presented to the judicial authority. This is usually a period of 24 hours; in other countries this may be 48 hours. Although no fixed period is established under international standards, the principles of necessity and proportionality apply when defining what is to be understood by "promptly" within the meaning of Article 9(3) of the ICCPR. In this sense, "necessity" means that there must be an acceptable reason for delaying the presentation of the arrested person to the authority (e.g. in view of ongoing investigation activities). Moreover, the delay should not be disproportionate in view of the fundamental character of this right. The delay established in national law should therefore not exceed a few days (see CCPR General Comment No. 8 on Article 9 of the ICCPR).

For further details of the international rules and standards governing arrest procedures, see section 8.3.

### **8.2.5 Prohibition of arbitrary arrest**

*"No one shall be subjected to arbitrary arrest or detention."* (ICCPR, Article 9(1))

The prohibition of arbitrariness represents an additional restriction on deprivation of liberty. This injunction is directed both at the national legislative authority and at the enforcement agencies. It is not enough for deprivation of liberty to be provided for by law. The law itself is prohibited from being arbitrary, and the enforcement of the law in a given case is prohibited from taking place arbitrarily. The word "arbitrary" in this sense is understood to imply injustice, unpredictability, unreasonableness, capriciousness and disproportionality.

The prohibition of arbitrariness should be interpreted broadly. Cases of deprivation of liberty provided for by law are prohibited from being manifestly disproportionate, unjust or unpredictable; the specific manner in which an arrest is made may in no way be discriminatory and must be justified as appropriate and proportionate in view of the circumstances of the case.



## INTERNATIONAL JURISPRUDENCE

### Human Rights Committee

#### Case of Marques de Morais v. Angola

CCPR/C/83/D/1128/2002, 18 April 2005

“In accordance with the Committee’s constant jurisprudence, the notion of ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime. No such element has been invoked in the instant case. Irrespective of the applicable rules of criminal procedure, the Committee observes that the author was arrested on, albeit undisclosed, charges of defamation which, although qualifying as a crime under Angolan law, does not justify his arrest at gunpoint by 20 armed policemen, nor the length of his detention of 40 days, including 10 days of *incommunicado* detention. The Committee concludes that in the circumstances, the author’s arrest and detention were neither reasonable nor necessary but, at least in part, of a punitive character and thus arbitrary, in violation of article 9, paragraph 1.”

Arbitrary arrest is also prohibited under the ACHPR (Article 6), the ACHR (Article 7(1) to (3)) and the ArabCHR (Article 14(1)). The ECHR (Article 5(1)) sets out the specific circumstances under which a person may be deprived of his or her liberty.

The behaviour of individual law enforcement officials in arrest situations will determine in each situation the extent to which that behaviour is judged to be arbitrary. The capacity to guarantee equality and to prevent discrimination lies in the hands of the individual law enforcement official – as does the responsibility to ensure respect for the rights, according to the law, of each arrested person.

### 8.2.6 Implications for law enforcement practice

The principles of legality and necessity, along with the prohibition of arbitrariness, require the conduct of law enforcement officials in arrest situations to meet certain expectations. Those expectations relate to the knowledge of the law and the procedures to be observed in specific situations and/or circumstances that might lead to deprivation of liberty. The Body of Principles states that “[a]rrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose” (Principle 2).



## INTEGRATION IN PRACTICE

### Training

The word “competent,” as used in Principle 2 of the Body of Principles, has a double meaning. It means “authorized,” i.e. having the legal authority to carry out an arrest, to detain and to imprison. However, it also refers to the personal skills of law enforcement officials, including their mental and physical aptitude and attitude, in arrest situations. To carry out an arrest that meets all the requirements of legality, necessity and non-arbitrariness calls for far more than mere application of the law. Only training and experience can develop the capacity of law enforcement officials to distinguish between individual situations and to adjust their reactions to the circumstances of a particular case.

## 8.3 Making an arrest

### 8.3.1 Rights of the arrested person and arrest procedures

The rights of a person arrested on suspicion of a crime have already been explained in Chapter 4, section 4.2.1. However, it is worth summarizing the most fundamental rules and procedures to be respected when making an arrest, be it on a criminal charge or for other reasons.

Law enforcement officials are required to carry out the following duties:

- To give information at the time of arrest about the reasons for arrest, and – in case of arrest on suspicion of a crime – about any charges against him or her (ICCPR, Article 9(2), Body of Principles No. 10);
- To inform the arrested person promptly of his or her rights and of how to avail himself or herself of those rights (Body of Principles No. 13);
- To duly record, for each arrested person, the reasons for the arrest, the time of arrest and of the transfer of the arrested person to a place of custody, that person’s first appearance before a judicial or other authority, the identity of the law enforcement officials concerned and precise details of the place of custody, and to communicate those records to the arrested person or to his or her legal counsel in the form prescribed by law (Body of Principles No. 12);
- To bring the arrested person promptly before a judicial or other body authorized to judge the lawfulness and the necessity of the arrest (ICCPR Article 9(3), Body of Principles Nos 11 and 37). In addition, the arrested person is entitled to *“take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of the detention in order to obtain his [or her] release without delay, if it is unlawful”* (Body of Principles No. 32);
- To provide the arrested person with prompt access to a legal counsel and allow adequate opportunity for communication between them (Body of Principles No. 17 and ICCPR Article 14(3)(b)); the amount of time before the arrested person has access to a lawyer shall not exceed 48 hours (Basic Principles on the Role of Lawyers No. 7);

- To ensure that the arrested person is able to communicate with his or her legal counsel and have “adequate time and facilities” for consultation “without delay or censorship and in full confidentiality”; “[i]nterviews [with] a legal counsel may be within sight, but not within the hearing, of a law enforcement official” (Body of Principles No. 18);
- To allow arrested persons to “notify or to require the competent authorities to notify, members of [their] families or other appropriate persons of [their] choice of [their] arrest, detention or imprisonment,” including consular posts or diplomatic missions if the persons arrested are foreigners. This right is renewed after each and every transfer of the person in question (Body of Principles No. 16);
- To ensure prompt access to a medical doctor as part of the routine procedures for anyone being arrested (Body of Principles Nos 24 and 26);
- To refrain from torture or other cruel, inhuman or degrading treatment or punishment during and after arrest (CAT; ICCPR, Article 7; Body of Principles No. 6).



## INTERNATIONAL JURISPRUDENCE

### Human Rights Committee

#### Case of Caldas v. Uruguay

#### UN Doc. Supp. No. 40 (A/38/40) at 192, 21 July 2006

“13.2. With regard to the author’s contention that her husband was not duly informed of the reasons for his arrest, the Committee is of the opinion that article 9(2) of the Covenant\* requires that anyone who is arrested shall be informed sufficiently of the reasons for his arrest to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded. It is the view of the Committee that it was not sufficient simply to inform Adolfo Drescher Caldas that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him.

13.3 The Committee observes that the holding of a detainee incommunicado for six weeks after his arrest is not only incompatible with the standard of humane treatment required by article 10(1) of the Covenant, but it also deprives him, at a critical stage, of the possibility of communicating with counsel of his own choosing as required by article 14(3)(b) and, therefore, of one of the most important facilities for the preparation of his defence.”

\* International Covenant on Civil and Political Rights (ICCPR).

Finally, it should be emphasized that under the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, it is the responsibility of governments to ensure strict control (including a clear chain of command) over all officials involved in arrest, detention, custody and imprisonment – as well as over those authorized to use force and firearms. Police officials with command and supervisory responsibilities are obliged to

ensure that the necessary control measures and chain of command are in place in order to prevent extrajudicial killing during arrests and/or detention.



## INTEGRATION IN PRACTICE

### Doctrine

An example of good law enforcement practice is the production and dissemination of leaflets setting out the rights of arrested persons. In many countries law enforcement agencies produce such leaflets in multiple languages in order to ensure their accessibility. On being taken into police custody, the person concerned is given a leaflet, in a language that he or she can understand, explaining his or her rights and how to avail himself or herself of those rights.

### 8.3.2 Arrest and the use of force

When carrying out an arrest, law enforcement officials may face resistance by the person to be arrested and find themselves having to decide whether to use force or not and to what extent. In such situations, all the principles discussed with regard to the use of force and firearms apply (Chapter 7).

Law enforcement officials must use non-violent means first, attempting to de-escalate a situation and to obtain compliance of the person to be arrested by means of persuasion. Force may only be used as the last resort, i.e. when all other means have failed or seem doomed to fail from the beginning; the response should then be graduated.

In this regard it is also important to bear in mind that a law enforcement official's attitude towards a person being arrested can directly affect compliance or non-compliance by that person. If the approach indicates that the person is going to be treated in a lawful manner with due respect to human rights, resistance or violent reactions are less likely than if the person is afraid of the treatment that he or she will receive once in the hands of the authorities. In view of such understandable fears, it is also clear that resistance to an arrest should not be too readily interpreted as an indication of guilt.

The use of firearms may be considered only in the circumstances described in BPUFF No. 9. In particular, the use of firearms for the purpose of an arrest may only be considered against someone who presents a danger to the lives of others (see BPUFF No. 9: a person "*presenting such a danger*"). In that regard, utmost priority will also have to be given to the protection of uninvolved persons. Although it may appear difficult to accept, the principle of proportionality requires law enforcement officials to refrain from an arrest if it can only be made by resorting to a level of force that will create damage



that clearly outweighs the legitimate interest of arresting a person. BPUFF No. 9 is a clear expression of this requirement: for the purpose of making an arrest, the use of a firearm, i.e. a level of force that can endanger a person's life, is only acceptable (i.e. proportionate) if the person to be arrested presents a danger to the lives of others (for further details, see Chapter 7).



## INTEGRATION IN PRACTICE

### Training

One of the challenges of daily law enforcement work is that law enforcement officials may find themselves in a situation in which they will have to make a spontaneous, almost instantaneous decision to carry out an arrest. In such circumstances it is difficult for law enforcement officials to judge correctly whether the person in question is, for example, dangerous, drunk, mentally disturbed, a foreigner who does not understand what is being said or a person who is able and willing to reason and to comply with lawful orders. Preparation time is usually limited as decisions have to be taken in a fraction of a second. Appropriate reaction in such situations can only be ensured through regular training that exposes law enforcement officials to a broad range of situations and enhances their capacity to quickly assess a situation and make the appropriate choices.

In situations which enable an arrest to be properly planned and, in particular, if the person to be arrested is considered to be dangerous or at least likely to resist arrest, it is crucial to anticipate possible scenarios, taking into account the location (easy or difficult access, risks for uninvolved bystanders, escape opportunities for the person to be arrested, etc.) and the possible reaction of the suspect (e.g. to surrender, to flee, to use violence, to place uninvolved persons in danger or even to take hostages). This should then lead to appropriate choices in terms of the number and type of law enforcement officials, the availability of protective equipment, the range of possible means of overcoming resistance and precautions for the protection of bystanders. All these measures should aim to avoid the use of force and to prevent, as far as possible, any escalation of the situation. The better this planning and the precautionary measures taken, the less it will be necessary to resort to force and to endanger the lives and physical integrity of all persons present (law enforcement officials, bystanders and the person(s) to be arrested).



## INTEGRATION IN PRACTICE

### Doctrine and training

Law enforcement agencies of many countries maintain specialized units or teams for dangerous or difficult arrest situations. Those units or teams consist of law enforcement

officials who are selected and trained to perform a task for which not every law enforcement official can be considered “competent.” The utmost care must be taken in the deployment of such units and particularly in the preparation of the operation; the consequent aim of the training given to such officials is to minimize damage and to protect and preserve life. Law enforcement agencies should also have especially trained “negotiators” who are capable to de-escalate and eventually resolve a critical situation by means of persuasion and dialogue in order to avoid the use of force.

#### 8.4 Interrogation

Key principles governing the interrogation of criminal suspects have already been discussed in Chapter 4, section 4.3.2. At this juncture it is, however, important to recall some fundamental aspects of the interrogation of criminal suspects:

- The presumption of innocence (ICCPR, Article 14(2));
- The right not to be compelled to testify against oneself or to confess guilt (ICCPR, Article 14(3)(g));
- The prohibition of torture and other forms of ill-treatment applies to all persons under any form of detention or imprisonment (ICCPR, Article 7; CAT; Body of Principles No. 6);
- The Body of Principles furthermore prohibits taking “*undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him [or her] to confess, to incriminate himself [or herself] or to testify against any other person*” (Body of Principles No. 21(1));
- Methods of interrogation, violence or threats which could impair the detainee’s judgment are prohibited (Body of Principles No. 21(2)).

With regard to the actual interrogation, the Body of Principles (No. 23(1)) also requires (in addition to the requirements already cited) the following information to be recorded and certified in a form prescribed by law:

- The “*duration of any interrogation*”;
- The “*intervals between interrogations*”;
- The “*identity of the officials who conducted the interrogation*”;
- The “*identity of other persons present at any interrogation.*”

This information must be made available to the detained or imprisoned person or his or her legal counsel (Body of Principles No. 23(2)). Any failure to comply with the above-mentioned principles in obtaining evidence must be “*taken into account in determining the admissibility of such evidence against a detained or imprisoned person*” (Body of Principles No. 27).



## INTEGRATION IN PRACTICE

### Doctrine and training

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) obliges States Parties to “*keep under systemic review interrogation rules, instructions, methods and practices*” (Article 11) and to “*ensure that education and information regarding the prohibition against torture are fully included in the training*” of all persons “*involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment*” (Article 10(1)).

Additional information on the subject of interrogation is provided in Chapter 4, section 4.3.2.

## 8.5 Detention

### 8.5.1 Background information

As already noted, deprivation of liberty represents the most common and long-standing means used by States to combat crime and maintain public order and security. International law sets out to provide adequate rules and guidelines to guarantee its lawful and non-arbitrary application by States and thereby to safeguard a range of other rights. Any person deprived of liberty is entitled to the protection of the law, ensuring treatment that is both humane and respectful of his or her inherent human dignity as well as physical and moral integrity.

It is evident that mere legislation to that end will not suffice. Those State officials (for the most part law enforcement officials) who bear responsibility for people under any form of detention or imprisonment require special training and instruction to equip them to perform their duties satisfactorily.

Even in situations of relative peace and stability, the position of detained or imprisoned persons is all too often marked by abuse, ill-treatment, torture, enforced disappearances and summary or arbitrary executions. When law and order deteriorate or break down and the situation degenerates into disturbances and tensions, or even further into non-international or international armed conflict, there is often a dramatic increase in the number of people placed in detention or imprisonment.

Recognition of the need to safeguard the human rights of persons under any form of detention or imprisonment – except for those limitations that are demonstrably necessitated by the fact of incarceration – has led the United Nations to develop a variety of instruments that build further on the relevant provisions of the ICCPR.

The purpose of those instruments is not only to safeguard the human rights of such persons, but also to try and guarantee their successful social rehabilitation. These objectives presuppose a certain level of quality of the penitentiary system in terms of its infrastructure and personnel and of its position within the administration of justice. Such expectations are naturally extended to law enforcement officials when they carry out tasks and duties concerned with prisoners and detainees.

In the various human rights instruments relating to detention a distinction is made between those persons who have already been convicted for an offence and those who are awaiting trial. The former group are referred to as “prisoners,” whereas the latter group are referred to as “detainees.” However, this distinction is not uniformly applied throughout all instruments. The Standard Minimum Rules for the Treatment of Prisoners (SMR), although applicable to both categories mentioned above, uses only the term “prisoners” and subsequently divides them into “convicted” and “unconvicted” prisoners. Irrespective of the terminology used, the distinction between “convicted” persons and those who are not is important because the rights to which individuals in each of those groups are entitled and the rules for the treatment of the two different categories are not identical.

Throughout the world, a variety of places are used for the detention of the different categories of people being held. In most countries, police custody is understood as short-term detention, sometimes only until the decision of the judicial authority to remand a person in prison for the duration of the investigation or, in other cases, until the investigation makes it possible to conclude whether charges will be pressed or not. Once charges are pressed, the accused is then either released or remanded to prison, sometimes even to specific remand prisons, where he or she will await the trial and remain throughout the duration of the trial.

In practice, suspects may end up staying in “police stations” for a prolonged period, sometimes even beyond the legal term. This may be caused by logistical obstacles such as lack of fuel to transport detainees to court or to prison, lack of coordination between law enforcement officials, the prosecution and the judiciary, proceedings that are unduly delayed – deliberately or by negligence – by the prosecution or the law enforcement agency, etc. This can place a great deal of pressure on police stations, which are not usually equipped to accommodate a large number of detainees or for long periods of detention. The consequences are often overcrowding, poor hygienic conditions, and lack of food, water and access to medical assistance. Prolonged stays at police stations should therefore be prevented through more efficient decisions for release on bail or transfer to a remand prison.

The authorities in charge of detention facilities may also vary. In the majority of cases, police forces are only in charge of persons detained at police stations or posts, while prisons are under the responsibility of a prison service separate from the police and often even reporting to a different ministry (e.g. Ministry of Justice). The police will often still be responsible for the external security of prisons. In other countries, police forces can even be responsible for the oversight of prisons, or at least for certain prisons requiring a high level of security. However, the international rules and standards referred to in this chapter apply independently of the actual authority in charge of a detention facility.

### **8.5.2 Responsibility for the detained person**

The range of possible responses to crime is very broad and the State decides on the cases and crimes for which deprivation of liberty is the adequate response. A State which has decided that the adequate response to a crime is to deprive of their liberty those who have been convicted of committing a crime, or – as a precautionary measure – those suspected of having committed a crime, also assumes responsibility for the fate of those persons and the respect of their rights. This clearly involves paying attention to the humane conditions of detention (see section 8.5.4) as well as – just as importantly – to the fact that the State has to be accountable for those deprived of freedom and their well-being. To ensure full accountability of authorities for all persons in custody and to prevent disappearances, a list of safeguards has been established in Article 17 of the CPED, which aims to prevent a person from becoming unaccounted for and which ensures the full accountability of the State authorities for any person in their custody (see the following box).

#### **CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE (CPED), ARTICLE 17(3)**

“Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:

- (a) The identity of the person deprived of liberty;
- (b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
- (c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
- (d) The authority responsible for supervising the deprivation of liberty;
- (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;

- (f) Elements relating to the state of health of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
- (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.”

### 8.5.3 Pre-trial detention

People who have not yet been convicted may be deprived of liberty for the purpose of the investigation, i.e. to prevent them from escaping justice, from destroying evidence or from influencing witnesses. They may also be detained in order to prevent the commission of another crime or offence and for the purpose of protecting the victim of the crime.

In such cases, law enforcement officials need to have reasonable grounds (principle of legality) to explain why it is necessary to deprive the person of liberty in order to achieve the objective(s) outlined in the preceding paragraph and why they cannot be achieved by other means. Pre-trial detention should be an exceptional measure and as a rule law enforcement officials should first consider other possibilities (principle of necessity). In most countries, one possibility in this regard is to release the suspect on bail (e.g. with another person guaranteeing his or her appearance in court, usually by depositing a certain amount of money). Domestic legislation generally provides for the type of offences for which bail can be granted. While granting bail might be compulsory or at least the rule for lighter offences, it might be legally inadmissible for more severe crimes such as murder or rape (principle of proportionality). The authority to decide whether a person may be released on bail may fall – depending on the domestic legislation – within the competence of the law enforcement agency or the judicial authority. In any case, the decision not to grant bail must be subject to judicial control (principle of accountability).



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of Nerattini v. Greece

#### Application No. 43529/07, 18 December 2008

“38. The court would also emphasise that, under Article 5 § 3, the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his or her appearance at trial. [...]

39. Finally, the Court cannot overlook the fact that in its latest decision no. 5/2008 releasing the applicant on bail, the Indictment Division of Samos Criminal Court took into consideration that the applicant had a known residence in Samos, that he had family and property in

Greece, that he had never been a fugitive and that, on the basis of his criminal record and his social and professional status, it was improbable that he would commit further crimes if he was released. However, the above statement were valid from the first day the applicant was arrested and did not concern new elements that were brought to the authorities' attention during the period the applicant was detained. [...]

40. In view of the above, the Court considers that the applicant's detention on remand was not reasonable or justified. There has accordingly been a violation of Article 5 § 3 of the Convention\*."

\* European Convention on Human Rights (ECHR, see Chapter 2, subsection 2.5.6.1).

Pre-trial detention should not last longer than necessary. For example, if the reason for detention is to prevent the suspect from destroying evidence, the person must be released once the investigation is concluded and all evidence has been secured, provided that there are no other reasons to justify his or her detention. Furthermore, when assessing the lawfulness, and in particular the length, of pre-trial detention in terms of proportionality, the maximum sentence to be expected for the investigated crime should be taken into consideration.

#### **8.5.4 Conditions of detention and treatment of persons deprived of liberty**

Article 10(1) of the ICCPR states: *"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."*

The relevant instruments do not give a precise legal definition of "humane treatment" but the conditions of detention and the treatment of the detained person should show respect for international standards and norms, including the prohibition of torture and cruel, inhuman or degrading treatment. Specific prohibitions include the following:

- *"Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments"* (SMR No. 31);
- *"Chains and irons shall not be used as restraints"* (SMR No. 33);
- In any case, instruments of restraint may never be used to inflict punishment but only for reasons of safety and security (SMR No. 33).

Conditions of detention themselves must not amount to torture or cruel, inhuman and degrading treatment. Authorities must provide for such basic conditions (food, water, sanitation facilities, access to health care, space, clothing, protection from climate-related hazards, light and access to fresh air, possibility to communicate with others) that the mere fact of being deprived of liberty does not lead to a deterioration in the person's health (see also SMR No. 32 for punishment measures).



## INTERNATIONAL JURISPRUDENCE

### **African Commission on Human and Peoples' Rights Cases of Aleke Banda (64/92) and Orton and Vera Chirwa (68/92 and 78/92) v. Malawi, 22 March 1995**

"Article 5 of the African Charter provides as follows:

All forms of [...] torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

The conditions of overcrowding and acts of beating and torture that took place in prisons in Malawi contravened this article. Aspects of the treatment of Vera and Orton Chirwa such as excessive solitary confinement, shackling within a cell, extremely poor quality food and denial of access to adequate medical care, were also in contravention of this article."

As pointed out above, the basic instrument setting out good practice in the treatment of prisoners and the management of penal institutions is the SMR.

The document is divided into two parts:

Part I: Rules of General Application;

Part II: Rules Applicable to Special Categories.

Part I is applicable to all categories of prisoners – women or men, juvenile or adult, criminal or civil, tried or untried. It contains provisions on a wide range of matters, including:

- separation of categories (Rule 8);
- accommodation (Rules 9 to 14);
- personal hygiene (Rules 15 and 16);
- clothing and bedding (Rules 17 to 19);
- food (Rule 20);
- exercise and sport (Rule 21);
- medical services (Rules 22 to 26);
- discipline and punishment (Rules 27 to 32);
- instruments of restraint (Rules 33 and 34);
- information to and complaints by prisoners (Rules 35 and 36);
- contact with the outside world (Rules 37 to 39);
- books (Rule 40);
- religion (Rules 41 and 42);
- retention of prisoners property (Rule 43);
- notification of death, illness, transfer, etc. (Rule 44);
- removal of prisoners (Rule 45);
- institutional personnel (Rules 46 to 54);
- inspection (Rule 55).



The standards set out in these different rules may make considerable demands on detaining authorities, given the disparity in development across the world. This aspect was taken into account when the SMR were drafted; as stated in the Preliminary Observations:

*“In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.”*



## INTEGRATION IN PRACTICE

### Education

Law enforcement officials in charge of places of detention should be aware of the international standards set out above and understand the reasons behind them. This understanding should enable them to find appropriate responses to practical challenges when the circumstances seem to prevent the fulfilment of the standards established in the Standard Minimum Rules for the Treatment of Prisoners (SMR).

## 8.5.5 Detention regimes

### 8.5.5.1 Unconvicted prisoners/prisoners awaiting trial

*“Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.”* (ICCPR, Article 10(2)(a))

Similar provisions can be found in the ACHR (Article 5) and in Article 20(2) of the ArabCHR, but not in the ACHPR or the ECHR. The SMR (Section C) and the Body of Principles provide further details regarding the meaning of *“treatment appropriate to their status as unconvicted persons.”*

A detained person who is unconvicted or awaiting trial is still to be presumed innocent. Consequently, the person’s rights may not be restricted more than is necessary for the purpose of the detention and for security and good order in the place of detention. This refers, for instance, to family visits, access to information and the possibility to carry out certain activities (studying, leisure or even – if possible from within a place of detention – professional activities).

All too often the deprivation of liberty of accused persons is accompanied by invasions of the right to privacy – which includes the secrecy of correspondence and the protection of human dignity – and violations of the prohibition of discrimination, the right to education, freedom of religion and expression,

and the right to information. Often these additional infringements are referred to as limitations inherent in the deprivation of liberty. However, this is neither correct nor are they allowed. The only measures that may be imposed are those that are strictly required for the purpose of the detention, to prevent hindrance to the investigation process or the administration of justice, or to maintain good order in the place of detention.

### 8.5.5.2 Convicted prisoners

The regime governing the deprivation of liberty of persons convicted for an offence (see SMR Section A) differs from that applied to unconvicted detainees as additional rules and restrictions apply to convicted prisoners. These rules and restrictions should be in line with the purpose of the imprisonment, as indicated in SMR No. 58:

*“The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his [or her] return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.”*

In view of the ultimate goal of imprisonment as expressed above, the SMR contain specific rules with regard to treatment, classification, work, education and recreation as well as the prisoner’s social relations and after-care. Their overall goal is the rehabilitation of the offender. These rules are often perceived by the victim and ordinary citizens, but also by law enforcement officials, as a “reward” for offenders, who appear to be granted a “comfortable” life in prison, while the victims and/or their families are left to struggle on alone. However, this subjective perception disregards the serious impact of the deprivation of liberty on the life of the detainee (see section 8.1) and the fact that the regime and the conditions of detention are usually not as comfortable as imagined and often even harsh. Even more importantly, it should also be borne in mind that it cannot be in the interest of society for offenders merely to be “locked up” for a period of time without anything being done to ensure that they will not commit another offence once they are released. This requires treating offenders as responsible human beings during the time that they spend in prison. Inhumane treatment or treatment that does not foster a sense of responsibility, dignity and respect for the law, is unlikely to bring about any change in the person’s mindset and may even be counterproductive.



## INTEGRATION IN PRACTICE

### Education and training

The majority of States have developed a system whereby responsibility for, or exercising authority over, convicted prisoners is the remit of prison officials who have received special

instruction and training for the performance of their duties. The training of police officers does not generally qualify them as competent personnel for duty in penal or correctional institutions. If they were to be assigned such duties, additional instruction and training would be the minimum requirements.

### 8.5.5.3 Administrative detention

Administrative detention (see SMR Section E) is non-criminal detention of a person ordered by the executive branch of the government rather than the judiciary. Its aim is most often to deal with people who pose an imperative threat to security in situations of armed conflict or who pose a threat to State security or public order in non-conflict situations. Only situations associated with the latter group of people are addressed below. It should be noted that administrative detention may not be used as a substandard system of penal repression in the hands of the executive power, i.e. as a means of bypassing the system sanctioned by a country's legislature and courts.

Administrative detention may be applied in broad range of cases. For example, a football hooligan is detained for a few hours to prevent him from attending a match in contravention of an existing court order. In practice, it also happens that asylum seekers are detained while they await a decision on their application or that an asylum seeker whose application has been rejected is detained pending expulsion. Whatever the reason, it is important to note that administrative detention is an exceptional control measure that may not be applied as a substitute for criminal proceedings. However, this does not mean that this type of detention exists in a legal vacuum in which law enforcement officials or other authorities have unfettered discretionary power. On the contrary, outside armed conflict situations (to which IHL applies), administrative detention is governed by the relevant norms and standards of international human rights law. It is beyond the scope of this Manual to elaborate on all aspects of such measures.

However, the most important rules<sup>21</sup> are summarized in the following box:



#### LOOKING CLOSER

"In the context of [...] administrative detention, the principle of legality means that a person may be deprived of liberty only for reasons [...] and in accordance with procedures [...] that are provided for in domestic law," which may not be contrary to international law (see ICCPR, Article 9(1)). If a decision to derogate from the right to liberty of person is taken by

<sup>21</sup> These points are taken from Jelena Pejic, "Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence," *International Review of the Red Cross*, Vol. 87, No. 858 (2005), pp. 375-391.

a State in order to deal with an emergency situation, “such a decision must, inter alia, be officially proclaimed” (see ICCPR Article 4.1) “so as to enable the affected population to know the exact material, territorial and temporal scope of application of that emergency measure.”

The decision to place someone in administrative detention must be taken on an individual basis and not as a collective decision applicable to a group of persons. Group, i.e. non-individual, detention of a specific “category of persons by a State could in no way be considered” necessary or proportionate, “regardless of what the circumstances of the emergency concerned might be. The idea of collective measures of any kind is antithetical to the rules, spirit and purpose of [international] human rights law. Decisions on [...] administrative detention must also not be taken on a discriminatory basis.”

“Any person [...] administratively detained must be informed promptly, in a language he or she understands, of the reasons why that measure has been taken so as to enable the person concerned to challenge the lawfulness of his or her detention” (see Body of Principles No. 14). “The information given [to the person] must also be sufficiently detailed for the detained person to take immediate steps to challenge [...] the lawfulness of the [...] administrative detention.”

“Under the ICCPR, anyone deprived of liberty is entitled to ‘take proceedings before a court, in order that that court may decide without delay on the lawfulness of his [or her] detention and order his [or her] release if the detention is not lawful’ (ICCPR, Article 9(4)).” “While the right to liberty is not among the non-derogable rights listed in [Article 4(2) of] the ICCPR, the jurisprudence of both universal and regional human rights bodies has confirmed that the right to habeas corpus must in fact be considered non-derogable” and that the “right to challenge the lawfulness of the person’s detention before a judicial body must be preserved in all circumstances” (see Body of Principles No. 32; CCPR General Comment No. 29 (11 and 16).

In all cases, administrative detention “must cease as soon as the reasons for it cease to exist. [...] Where an initial decision on detention is maintained on review and appeal, the reasons for continued detention must be provided as well.” A detainee must, likewise, be immediately released if his or her petition for release is upheld. “If a person is kept in [...] administrative detention despite a final release order, that is a clear case of arbitrary detention.”

“The right to effective legal assistance is [...] considered to be an essential component of the right to liberty of person” (see Body of Principles Nos 17 and 18) “regardless of the type of detention involved. [...] Administrative detention will in practice be regulated by the domestic law of the [detaining] State [...], meaning that a person’s ability to challenge the lawfulness of his or her [...] administrative detention will be regulated by those norms.” However, as mentioned above, domestic law must comply with applicable international human rights law.

“Any person [...] administratively detained must be registered and held in an officially recognized place of [...] administrative detention. Information that a person has been taken

into [administrative] custody and on any transfers between places of detention” together with the name of the new place of detention “must be available to that person’s family within a reasonable time, unless he or she has expressed a wish to the contrary.”

If the person administratively detained is a foreign national, the relevant authorities of his or her State of nationality must be informed of such detention unless the person concerned expresses a wish to the contrary. “The relevant diplomatic or consular authorities – provided diplomatic or consular relations exist – must be allowed to communicate with and visit their nationals” (see Vienna Convention on Consular Relations, Article 36).

The obligation to ensure humane conditions of detention outlined in section 8.5.2 also apply to situations of administrative detention. The protection accorded under Part I and Part II, section C, of the SMR also applies (SMR No. 95).



## LOOKING CLOSER

### **Inter-American Commission on Human Rights – Annual Report, 1976 OAS Doc. OEA/Ser.L/V/II.40, Doc. 5 corr. 1 of 7 June 1977, Section II, Part I**

“[T]he declaration of a state of emergency or a state of siege cannot serve as a pretext for the indefinite detention of individuals, without any charge whatever. It is obvious that when these security measures are extended beyond a reasonable time they become true and serious violations of the right to freedom.”

## **8.5.6 Discipline and punishment**

*“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”* (ICCPR, Article 10(1)). This provision is of prime importance with regard to the issue of discipline and punishment for acts or offences committed during detention or imprisonment.

The SMR and the Body of Principles both contain provisions that relate to the maintenance of order and discipline within penal institutions. The Body of Principles (No. 30) makes disciplinary matters subject to law or lawful regulations that are duly published. These regulations must clearly stipulate (i) the types of conduct which will constitute disciplinary offences during detention or imprisonment; (ii) the nature and duration of disciplinary punishment that may be inflicted; and (iii) the authority which is competent to impose such punishment.

Prisoners may be punished only in accordance with the terms of the law or regulation, and *“never twice for the same offence. [...] Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary*

offences" (see SMR Nos 27 to 32). *"Instruments of restraint [...] shall never be applied as punishment"* (SMR No. 33).

The use of force against prisoners (or detainees) must be limited to *"self-defence or [...] cases of attempted escape, or active or passive physical resistance to an order based on law or regulations."* The actual use of force is to be limited to the amount strictly necessary to achieve the objective and must be immediately reported to the director of the institution (BPUFF No. 15; SMR, No. 54(1)).



## INTEGRATION IN PRACTICE

### Training and equipment

"Prison officers shall be given special physical training to enable them to restrain aggressive prisoners." (SMR No. 54(2))

"Except in special circumstances, staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, staff should in no circumstances be provided with arms unless they have been trained in their use." (SMR No. 54(3))

## 8.6 Women in detention

See also Chapter 6, section 6.4.3, on the position of women in the administration of justice.

A basic premise of international human rights law is the principle of non-discrimination. Accordingly, all forms of protection afforded under the international instruments to people deprived of their liberty apply equally to women and men. However, on account of the specific needs and vulnerabilities of women, the United Nations Economic and Social Council (ECOSOC) called on member States to take all appropriate measures, urgently, to eradicate acts of physical violence against women detainees (ECOSOC resolution 1986/29).

Observance of the principle of non-discrimination will not always mean that identical treatment will be accorded to men and women. To ensure that an environment is equally safe for women and men may well involve extending special protection to women. As recognized by the Body of Principles, this is particularly relevant where deprivation of liberty is concerned. The Body of Principles states that *"[m]easures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, [...] shall not be deemed to be discriminatory"* (Body of Principles No. 5(2)).

As far as possible, men and women must be “*detained in separate institutions; in an institution which receives men and women the whole of the premises allocated to women [must] be entirely separate*” (SMR No. 8(a)). It also follows from this rule that women detainees should, as far as possible, be supervised by officials of the same sex. Searches and similar procedures should at all times also be carried out by persons of the same sex as that of the detained person.

Considering that the SMR did not draw sufficient attention to women’s particular needs, in 2011 the General Assembly adopted the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules, A/Res/65/229).

The Bangkok Rules complement the SMR, reiterating and reinforcing numerous rules already contained in the SMR. They also contain specific rules in the area of:

- personal hygiene (Rule 5);
- health-care services, to take account of the specific needs of women in the areas of reproductive health as well as of their vulnerability in terms of exposure to sexual violence and the related needs for health care, in particular with regard to sexually transmitted diseases (Rules 6-18);
- searches by female personnel only and with due respect being shown for the dignity of the woman concerned (Rules 19-21);
- protection of pregnant and breastfeeding women as well as of women with infants in relation to measures of discipline and punishment as well as to instruments of restraint (Rules 22-24) and in relation to the general detention regime (Rules 42, 48-52).



## INTEGRATION IN PRACTICE

### Doctrine

*“Clear policies and regulations on the conduct of prison staff aimed at providing maximum protection for women prisoners from any gender-based physical or verbal violence, abuse and sexual harassment shall be developed and implemented.”* (Bangkok Rule No. 31)

Women in detention are particularly exposed to the risk of sexual violence, both by other inmates or by staff members of the detention facility. Authorities should take all possible precautions to prevent this. The obligation to separate male and female detainees and supervision of female detainees by female staff, to which reference has been made, is also intended to minimize this risk (see also Chapter 6, section 6.4.3).

## 8.7 The special position of juveniles

See also Chapter 4, section 4.4, on the administration of juvenile justice and Chapter 6, section 6.3, on the need for children to be given protection and assistance.

Juvenile detainees have all the same rights as adult detainees. In recognition of their particular vulnerabilities, a number of specific provisions give them the additional protection that they require. As already explained in Chapter 4, section 4.4, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) define a juvenile as *“a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult”* (Rule 2.2 (a)).

The minimum age of criminal responsibility for juveniles must be determined by national law. However, legislative authorities are requested to give due consideration to the person’s level of emotional, mental and intellectual maturity (Rule 4). With regard to the age up to which a person should be treated as a juvenile, this should be at least the age of legal maturity (CRC, Article 1). In recognition of the varying development and maturity of young persons, in some countries juvenile criminal law can be applied even beyond that age. The decision to do so will depend on the level of maturity of the individual young person and will in most cases (depending on the domestic legislation) be applied to the young people up to the age of 21.

While all detainees charged with a criminal offence are entitled to be tried without undue delay (ICCPR, Article 14(3)(c)), Article 10(2)(b) of the ICCPR actually creates a more precise time frame for juveniles through the formulation *“brought as speedily as possible for adjudication.”* The purpose of this provision is to ensure that pre-trial detention for juveniles is kept as short as possible. Furthermore, the term *“adjudication”* is not to be understood only in the formal sense of a judgment by a criminal court; it also covers decisions by special, non-judicial bodies empowered to deal with crimes by juveniles. Where detention of juveniles is unavoidable, they shall be *“separated from adults”* (ICCPR, Article 10(2)(b)).

Additional protection for juveniles is further codified in the Convention on the Rights of the Child (CRC), the Beijing Rules and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNRPJ).

Article 40 of the CRC and the Beijing Rules (Rule 7) focus particularly on the procedural rights to which juveniles are entitled throughout arrest and pre-trial detention and at all stages of the proceedings. These include:

- the presumption of innocence;
- the right to be notified of the charges;



- the right to remain silent;
- the right to legal counsel;
- the right to the presence of a parent or guardian;
- the right to confront and cross-examine witnesses;
- the right to appeal to a higher authority.

Article 37 of the CRC is of particular relevance to the treatment of juvenile detainees. Under this provision it is stated that:

- torture and ill-treatment of juveniles is prohibited (as are capital punishment and life sentences);
- to deprive juveniles unlawfully or arbitrarily of their liberty is prohibited;
- juveniles deprived of their liberty must be *“treated with humanity and respect for [their human] dignity, and in a manner that takes into account the special needs of persons of [their] age”*;
- juvenile detainees are to be kept separate from adult detainees;
- juvenile detainees have the right to maintain contact with their family, to be given prompt access to legal assistance, and to challenge the legality of their detention before a court or other competent authority.

In addition to reiterating those provisions, the Beijing Rules further stipulate that:

- the parents or guardians of juveniles who have been arrested are to be notified immediately (Rule 10.1);
- a judge or other competent authority is to consider, without delay, the *“issue of release”* (Rule 10.2);
- juveniles under detention are to be kept separate from adults in detention (Rule 13.4);
- *“[c]ontacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case”* (Rule 10.3).

The privacy of the juvenile must be respected at all times *“in order to avoid harm being caused to her or him by undue publicity or by the process of labelling. In principle, no information that may lead to the identification of the juvenile offender shall be published”* (Rule 8).

The Beijing Rules also focus on diversion (i.e. removal from criminal justice processing) – emphasizing that consideration should be given to dealing with juveniles without resorting to a formal trial (see Chapter 4, section 4.4). Law enforcement agencies which have the legal authority to deal with juvenile cases are required to do so, where possible, without having recourse to formal procedures (Rule 11).



## INTEGRATION IN PRACTICE

### Doctrine

Where juveniles are concerned, specialization within law enforcement agencies is recommended through the establishment of special units or departments and through the additional training of those law enforcement officials required to deal with juvenile offenders (Beijing Rule 12).

The UNRPJ is an instrument designed to ensure that juveniles are deprived of their liberty and kept in institutions only when it is absolutely necessary to do so. *“The Rules are designed to serve as convenient standards of reference and to provide encouragement and guidance to professionals involved in the management of the juvenile justice system”* (Rule 5).

Juveniles who are detained must be treated humanely, with due regard for their status and with full respect for their human rights. Juveniles deprived of their liberty are highly vulnerable to abuse, victimization and the violation of their rights. Therefore, Rules 17 and 18 stress that pre-trial detention of juveniles should be avoided as far as possible and *“limited to exceptional circumstances.”* Where pre-trial detention is unavoidable, its duration should be kept to an absolute minimum by giving the *“highest priority to the most expeditious processing of such cases”* (Rule 17).

In addition, Rule 18 stipulates the juvenile’s right to be given opportunities to work with remuneration, to continue their education or training and to be provided with educational and recreational material.

### 8.8 Victims of unlawful arrest or detention

See also Chapter 6, section 6.2.

*“Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”* (ICCPR, Article 9(5); see also ArabCHR, Article 14(7)). This provision entitles every victim of unlawful arrest or detention to claim for compensation. Similarly, the analogous provision of Article 5(5) of the ECHR guarantees compensation in the event of a violation of Article 5 of the ECHR. Under the ACHR (Article 10) compensation is payable to a person who is sentenced in a final judgment pronounced as a result of a miscarriage of justice. Unlawful arrest may be an element in a miscarriage of justice. In all instruments, actual compensation is deemed to be a matter of domestic concern, to be dealt with under national legislation.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration) offers some guidance in defining State responsibility and the rights of victims. In its Article 4, it states that victims *“should be treated with compassion and respect for their dignity.”*

It goes on to recommend, in Article 11, that *“[w]here public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted.”*



## INTEGRATION IN PRACTICE

### Doctrine

Law enforcement agencies should have clear regulations governing the manner in which arrests are to be made and the subsequent treatment of arrested persons and detainees. Those regulations must give due consideration to the prohibition of arbitrary arrest and detention, as well as to the rights of the arrested person on and following arrest. Those regulations should also contain provisions that satisfy the requirements regarding reporting, the internal supervision of law enforcement operations and the conduct of law enforcement officials in this particular area.

## 8.9 ICRC work in detention

Through the 1949 Geneva Conventions, the international community has mandated the ICRC to visit both prisoners of war and civilians interned during international armed conflict. Pursuant to Article 3 common to the four Geneva Conventions, the ICRC may also offer its services to parties to a non-international conflict; many of its detention visits take place in those situations. On the basis of its right of humanitarian initiative provided for in the Statutes of the International Red Cross and Red Crescent Movement, the ICRC also visits people detained in situations of violence that do not amount to armed conflict.

ICRC detention visits aim to ensure that, whatever the reason for their arrest and detention, detainees are treated with dignity and humanity, in accordance with international norms and standards. ICRC delegates work with authorities to prevent abuse and to improve both the treatment of detainees and their conditions of detention.

ICRC activities on behalf of people deprived of their liberty have a purely humanitarian aim: to promote detainees' physical and mental well-being and to ensure that their treatment and conditions of detention comply with international humanitarian and human rights law and recognized standards. Through regular visits, the ICRC strives to prevent torture, other forms of

ill-treatment, forced disappearances and extrajudicial executions, and to ensure that detainees enjoy fundamental judicial guarantees. The ICRC also takes action to improve conditions of detention and to maintain contact between detainees and their relatives.

To promote adequate conditions of detention and respect for the dignity of detainees, the ICRC:

- negotiates with detaining authorities to obtain access to people deprived of their liberty wherever they are, in full respect of ICRC visiting procedures;
- visits all detainees in the facilities to which it has access assessing their conditions of detention and identifying any shortcomings and humanitarian needs;
- monitors certain detainees individually (for specific protection, medical or other purposes);
- promotes contact between detainees and their families by facilitating family visits or transmitting Red Cross messages;
- provides detainees with medical and other supplies, either directly or through the detaining authority;
- seeks solutions to humanitarian problems through confidential dialogue with the detaining authority.

The ICRC conducts its visits to places of detention in accordance with strict conditions to which the authorities have to give their consent:

- Access to all detainees in the place of detention;
- Access to all premises used by and for detainees;
- The opportunity to conduct interviews in private (without witnesses) with the detainees of its choice;
- The assurance that the authorities will give the ICRC a list of the detainees in the place of detention and/or authorize it to complete/compile such a list during the visit;
- Authorization to visit a place of detention as often as is necessary.

Visits are one aspect of the ICRC's activities in the field of detention. ICRC visits are a means of collecting first-hand information about the detainees' living conditions, how they are being treated and their detention regime. Private interviews allow detainees to speak freely and confidentially about their situation. This will also allow ICRC to assess the general situation in the detention facilities and to identify specific humanitarian needs requiring ICRC intervention. The ICRC delegates visiting the facilities will register detainees in order to ensure proper follow-up.

Each visit follows a set procedure. ICRC personnel usually start by meeting the person in charge of the detention facility. This is an opportunity to present the

objective of the visit and to discuss both the general situation and the implementation of any ICRC recommendations that have been made previously.

Together with personnel from the detaining authority, the ICRC can tour the premises of the detention facility. This helps it to gain an understanding of how the facility is organized and run.

To respond in an appropriate and sustainable manner, a holistic and comprehensive approach to the functioning of the system must be developed; account must therefore also be taken of the day-to-day reality of the detaining authorities.

At the end of the visit, the ICRC informs the detaining authority of its concerns about the treatment of detainees and of measures needed to improve the conditions of detention and the running of the facility, taking local resources into account. The ICRC will pass information gathered during a private interview to the detaining authority only with the express consent of the detainee in question.

The ICRC submits a confidential report to the detaining authority. This report contains both, the ICRC's findings and its recommendations, the latter being based on humanitarian principles and applicable law. The ICRC's observations are accompanied by specific practical recommendations and sometimes by an offer of assistance from the ICRC so as to place the authorities in a position to take appropriate corrective measures.

To make it possible to discuss sensitive issues frankly and constructively, dialogue between the ICRC and a detaining authority is confidential. The aim is to achieve progress through bilateral and confidential dialogue.

## 8.10 Selected references

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## CHAPTER 9 OUTLINE

### 9.1 Introduction

### 9.2 Searches

9.2.1 General rules

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9.2.3 Searches of premises

9.2.4 Surveillance techniques

9.2.5 Privileged communication

9.2.6 Searches in detention

### 9.3 Seizure

### 9.4 Selected references

## KEY LEGAL DOCUMENTS

### Treaty law

- International Covenant on Civil and Political Rights (ICCPR, adopted in 1966, entered into force in 1976)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, adopted in 1984, entered into force in 1987)

### Non-treaty law

- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles, adopted in 1988)
- Code of Conduct for Law Enforcement Officials (CCLEO, adopted in 1979)



## CHAPTER 9

# SEARCH AND SEIZURE

### 9.1 Introduction

Apart from the use of force and firearms, arrest and detention, the possibility to carry out searches and seizure is an important power of law enforcement officials. There are no international legal definitions of those two powers. In this Manual, they are to be understood as defined in the following two boxes.

#### SEARCH

The act of deliberately looking for a person, an object or information for a legitimate law enforcement purpose.

The above definition covers a wide range of activities, in particular those that occur in the context of a criminal investigation: identity checks, body searches, house searches, searches in offices or cars, computer searches, telephone tapping, checking bank accounts, reading letters or other documents, etc.

#### SEIZURE

The act of taking possession of an object for a legitimate law enforcement purpose.

Any physical object can be seized and there are numerous contexts in which that may occur, i.e. in criminal proceedings, in civil law proceedings and in matters relating to public administrative law or to public order. In the context of this Manual, search and seizure are contemplated in relation to the three duties of law enforcement officials, i.e. prevention and detection of crime, maintenance of public order, and provision of protection and assistance.

Certain types and forms of search and seizure are very common and often form part of the daily activities of law enforcement officials. This may give rise to a sense of routine and an underestimation of the impact which the exercise of search and seizure powers may have on individuals. From the perspective of the individuals concerned, more often than not search and seizure may be perceived as (overtly) intrusive or even humiliating and denigrating. Depending on the circumstances and the manner in which they are carried out, they may also affect the person's reputation, e.g. if others (the employer, colleagues, neighbours) are aware of the search or seizure. They may even

have a traumatizing effect on the person subject to the search and/or seizure. Thus, it must be borne in mind that search and seizure are powers granted to law enforcement officials and that, as such, they must be exercised with care and in due respect of human rights rules and principles. In particular, as for all other law enforcement powers, they are subject to the overarching principles of legality, necessity, proportionality and accountability (see Chapter 3, section 3.3) as well as to the obligation not to discriminate.

## 9.2 Searches

### 9.2.1 General rules

Article 17 of the ICCPR states:

- “1. No one shall be subjected to arbitrary or unlawful interference with his [or her] privacy, family or correspondence, nor to unlawful attacks on his [or her] honour or reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.”

Regional treaties contain similar provisions, e.g. Article 11 of the ACHR, Article 21 of the ArabCHR and Article 8 of the ECHR. The African Charter on Human and Peoples’ Rights (ACHPR) does not contain a similar provision but the concept of privacy has become part of the human rights standards recognized within the African Union, as can be seen from Article 10 of the African Charter on the Rights and Welfare of the Child:

*“No child shall be subject to arbitrary or unlawful interference with his [or her] privacy, family home or correspondence, or to the attacks upon his [or her] honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.”*

The right to privacy must be closely read in conjunction with the right to physical integrity, dignity and freedom of thought, conscience and religion. Each individual has the right to a protected sphere in which he or she can act or express feelings and thoughts without interference or fear of negative consequences. A fundamental need of every human being is for this sphere to be determined and safe. This sphere covers a range of areas: family life, correspondence and telecommunication, privacy of the home and office, communication with a lawyer and with medical or therapeutic personnel, confessions within the exercise of religion, etc. Interference of the State and its agents in this protected sphere must therefore be regulated by national laws with strict respect being shown for the principles of necessity and proportionality. The European Convention on Human Rights (ECHR) provides an illustrative example of a balancing act of that kind in its Article 8:

*“Right to respect for private and family life*

- 1. Everyone has the right to respect for his [or her] private and family life, his [or her] home and his [or her] 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.”*

### **Legality**

Law enforcement officials must respect the framework set by national law when deciding whether or not and how to carry out a search. Fundamentally, this means that law enforcement officials may only carry out a search on grounds and in accordance with procedures established by law (principle of legality).

A search is usually carried out for one or more of the following reasons:

- Securing a suspect or another person relevant to an investigation;
- Securing evidence in the course of an investigation;
- For the purpose of safety and security, e.g. in order to seize prohibited or dangerous goods (weapons, drugs) or to prevent the commission of a crime;
- To end an unlawful situation (e.g. to find a hostage, to arrest an escaped prisoner or to find stolen property in order to return it to the owner);
- To comply with court orders issued in the course of civil or other proceedings.

Depending on the nature of the search to be carried out, national legislation will establish the procedure to be followed, i.e. the rights of the person affected by the search, whether and in what circumstances a warrant or a court order is required, whether witnesses should be present, documentation of the action (e.g. detailed reporting on time, place and duration, the need to issue receipts for seized objects), etc. This will depend on the importance of the reason justifying the search as well as how intrusive the search will be. It is worth noting that it is in the interest of law enforcement officials to comply fully with the proscribed procedures as doing so safeguards them against false accusations of theft, of falsifying evidence or of otherwise behaving unlawfully. It will also ensure that evidence is admissible in court as it will have been obtained lawfully.

### **Necessity**

Searches should only be conducted as far as is necessary to achieve their legitimate objective, for example:

- A search might not be necessary if the person is prepared to hand over the item or to provide the information sought;
- Law enforcement officials must stop a search when the item or information sought is found;

- Law enforcement officials should not search in places or for objects that obviously have no link with the legitimate objective of and the reason for the search;
- The time and duration of searches must be organized in such a way as to limit the impact of the search as much as possible (e.g. to avoid attracting unnecessary public attention to the search and consequently causing unnecessary harm to the reputation of the person being searched).

### Proportionality

A further point that should be borne in mind is that a search should not lead to human rights restrictions that outweigh the legitimate objective to be achieved (principle of proportionality). National law will often provide for the assessment of proportionality, e.g. certain types of searches are only authorized in the context of investigations into specific, serious crimes but not in the case of minor offences.



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of Buck v. Germany

#### Application No. 41604/98, Judgment of 28 April 2005

"47. As to the proportionality of the search and seizure order to the legitimate aim pursued in the particular circumstances of the case, the Court, having regard to the relevant criteria established in its case-law, observes in the first place that the offence in respect of which the search and seizure had been ordered concerned a mere contravention of a road traffic rule. The contravention of such a regulation constitutes a petty offence which is of minor importance and has, therefore, been removed from the category of criminal offences under German law [...]. In addition to that, in the instant case all that was at stake was the conviction of a person who had no previous record of contraventions of road traffic rules.

48. Furthermore, the Court notes that, even though the contravention in question had been committed with a car belonging to the company owned by the applicant, the proceedings in the course of which the search and seizure had been executed had not directed against the applicant himself, but against his son, that is, a third party.

51. Finally, [...] the Court observes that the attendant publicity of the search of the applicant's business and residential premises in a town of some 10,000 inhabitants was likely to have an adverse effect on his personal reputation and that of the company owned and managed by him. In this connection, it is to be recalled that the applicant himself was not suspected of any contravention or crime.

52. [...] Having regard to the special circumstances of this case, in particular the fact that the search and seizure in question had been ordered in connection with a minor contravention of a regulation purportedly committed by a third person and comprised the private residential premises of the applicant, the Court concludes that the interference cannot be regarded as proportionate to the legitimate aims pursued."

## Accountability

The final consideration is that law enforcement officials have to be accountable for the search carried out. This entails compliance with certain procedures (e.g. the need for judicial authorization to carry out a search) as well as the right of the person concerned to be informed of the reasons for the search, in particular what or who is sought. The search itself as well as all relevant aspects of the search must be thoroughly documented. Law enforcement officials must be in a position to present objectively verifiable facts on the basis of which the search was reasonably justified in accordance with the framework and the criteria established by law.



## INTEGRATION IN PRACTICE

### Doctrine

Particularly if national legislation does not contain sufficiently precise proceedings for (certain types of) searches, standard operational procedures should clearly establish the procedural requirements, mandatory documentation and other steps to be taken when carrying out a search. The procedures should be formulated in such a way as to prevent unnecessary, excessive or otherwise unlawful searches, to document the lawfulness of the action, to prevent evidence becoming inadmissible in court and to prevent false accusations against law enforcement officials.

It is important to note that any unnecessary or otherwise excessive damage may warrant compensation for the losses experienced by the person concerned (see Victims Declaration, Principle 19).

Lastly, *“matters of a confidential nature in the possession of law enforcement officials [must remain] confidential, unless the performance of duty or the needs of justice strictly require otherwise”* (CCLEO, Article 4).

In view of the wide range of search activities and their varying impact on the rights of the individual, the most common types of searches will be discussed in the following two sections, in particular in the light of the principles of legality, necessity, proportionality and accountability.

### 9.2.2 Body searches

Body searches are among the most common search activities carried out by law enforcement officials. They can take different forms and thus affect a person's dignity and right to privacy in very different ways. They can extend from simple pat-down searches (see below) to check for weapons, to strip searches or searches of intimate parts of the body, to DNA probes and X-rays, or even to medical interventions intended to physically extract evidence from the body.

All types of searches have to be carried out in a manner that preserves the person's dignity. Obviously, the more intrusive the searches, the more safeguards are needed to ensure that they are performed in a professional manner and cause no trauma. The Human Rights Committee has provided in its General Comment No. 16 on Article 17 of the ICCPR for the following minimum requirements of a body search:

*“So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.”*

Body searches should only be carried out if there are reasonable facts that justify a search for lawful law enforcement purposes (e.g. the possible justifications for a search presented in section 9.2.1). The assessment as to whether there are such reasonable grounds must be carried out in a non-discriminatory manner and be based on objectively verifiable facts. The problematic aspects of ethnic profiling and the associated excessive stopping and searching of members of a particular ethnic group have already been highlighted, both in terms of their discriminatory effect and their inefficiency (see Chapter 4, section 4.2.3).

Body searches should not unnecessarily affect the person's dignity<sup>22</sup> Simple body searches, also referred to as “pat-down searches,” must be carried out in a professional manner without any equivocal gestures, particularly when such searches involve the private parts of the body. Exceptionally, a pat-down search may involve visual inspection of the mouth. Where possible, the humiliation of being subjected to a body search in full view of the general public should be avoided.

A “strip search” involves viewing and inspecting an unclothed person in a non-intrusive manner, without any physical contact between the person searched and the person conducting the search. However, it may involve active participation by the person being searched in showing sensitive parts of the body so that those conducting the search are able to ascertain that nothing is hidden there. Strip searches may only be justified if the item sought is of such a nature that it can be hidden under the clothing and be undetectable through normal pat-down body searches.

Strip searches must always be conducted in the least denigrating and humiliating way possible. In particular, the person should never be asked to undress

<sup>22</sup> For further details, see Reyes, Hernán, *Body searches in detention*, ICRC, Geneva, and the World Medical Assembly, *WMA Statement on Body Searches of Prisoners*, adopted at the 45th World Medical Assembly, Budapest, Hungary, October 1993, and editorially revised at the 170th WMA Council Session, Divonne-les-Bains, France, May 2005.

completely; the search should be carried out in two stages, with the person being searched first removing the clothes above the waist and then, after having put them on again, removing the clothes below the waist. Although there is no physical contact with the person being searched, and even if the search is carried out in the most professional manner, it nonetheless retains a degree of degradation and humiliation. Such searches should therefore never be carried out as a routine measure but only if there are reasonable grounds for conducting them.

A strip search, when authorized, should be carried out:

- by a person of the same sex and without the presence of any member of the opposite sex;
- in a place where the person being searched cannot be seen by anyone not required to be present;
- in a professional manner respecting the dignity of the person and reducing embarrassment to the minimum possible;
- in suitable hygienic conditions;
- under the authority (and possibly also the supervision) of a superior officer.

Strip searches are not carried out for medical reasons and there is thus no reason for medical personal to be involved. Medical personal should therefore not be obliged to participate in such searches.



## INTEGRATION IN PRACTICE

### Doctrine

Operational procedures should provide for the availability of male and female law enforcement officials to ensure that a body search is carried out only by a person of the same sex as the person being searched. In particular, it must be standard and obligatory practice to staff checkpoints and other places where searches are likely to occur with both male and female law enforcement officials.

“Body-cavity searches” involve the intrusive examination of body orifices. They are naturally far more intrusive than pat-down or strip searches and it is therefore even more important than the safeguards established to protect the dignity of the person being searched be respected.

Obviously, in application of the principle of proportionality, there must be serious reasons for any decision to carry out a body-cavity search, i.e. a situation in which there is a risk to people’s lives (including to the life of the person searched), and there should be no other way to achieve the objective (e.g. a strip search or waiting for the item sought to be expelled by normal digestive processes); all other measures must be tried first (principle of necessity).

Body-cavity searches should be conducted by trained personnel only and should never be carried out by force or any other type of coercion. That would amount to ill-treatment of the person searched.



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of Jalloh v. Germany

#### Application No. 54810/00, Judgment of 11 July 2006

“71. However, any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual’s body real evidence of the very crime of which he is suspected. The particularly intrusive nature of such an act requires a strict scrutiny of all the surrounding circumstances. In this connection, due regard must be had to the seriousness of the offence in issue. The authorities must also demonstrate that they took into consideration alternative methods of recovering the evidence. Furthermore, the procedure must not entail any risk of lasting detriment to a suspect’s health [...].

82. Having regard to all the circumstances of the case, the Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3 [of the ECHR]. The authorities subjected the applicant to a grave interference with his physical and mental integrity against his will. They forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure entailed risks to the applicant’s health, not least because of the failure to obtain a proper anamnesis beforehand. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering. He has therefore been subjected to inhuman and degrading treatment contrary to Article 3.”

Like strip searches, body-cavity searches are not usually carried out for medical reasons and thus do not require the participation of medical personnel, who should therefore not be asked to carry them out unless there is – exceptionally – a medical reason (e.g. relating to pregnancy or to certain illnesses of the person being searched) that indicates the need for qualified medical personnel to conduct the body-cavity search. Another reason might be the explicit request of the person being searched, if there is a legitimate reason for such a request. In both cases, the medical personnel then act as medical experts and not as health care providers. This must also be made clear to the person being searched, as the customary confidential relationship between medical personnel and their patients will not apply.





## INTEGRATION IN PRACTICE

### Doctrine

As neither strip searches nor body-cavity searches should be routine measures, clear operational procedures should indicate the possible circumstances and reasons for such types of searches to be carried out, the person competent to authorize them as well as the procedure to be followed in the conduct of the search. They should furthermore determine the personnel authorized to carry out such searches and ensure adequate supervision to prevent any form of abusive behaviour.

Other search activities in relation to the human body concern fingerprints, blood samples and DNA samples. In particular, the collection of DNA samples has gained considerable importance in law enforcement matters. The uniqueness of the genetic code of each human being offers a particularly efficient tool for the investigation of crime and is today often far more relevant than fingerprints. As samples can be obtained easily (even without the person concerned realizing it), DNA sampling has become so important that it has almost become a routine activity for law enforcement officials. Nevertheless, it should be borne in mind that a person's DNA is part of his or her most personal information. The matter of obtaining a DNA probe from a person should therefore not be taken lightly and should be based on stringent provisions of domestic law. Similar concerns are associated with taking blood samples.

The following minimum safeguards should be respected:

- Domestic legislation should clearly define the situations and circumstances in which blood samples or DNA probes may be taken and indicate the authority competent to decide on their being taken;
- They should only be taken when necessary for the purposes indicated in the legal provisions;
- In the investigation of a crime, the presumption of innocence must be respected. Random collection of DNA or blood samples without any reasonable grounds for suspicion should be prohibited by law;
- Blood samples and DNA should remain confidential and only the relevant information needed (e.g. whether the DNA is identical or not with another lawfully obtained probe) should be revealed in the course of the investigation;
- Storage of DNA or blood-related data need to be regulated by law; such data should only be stored and used for the purposes for which the samples were initially taken;
- The use of the information obtained should be subject to judicial control, i.e. the person concerned should be able to challenge the use of his or her DNA.



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of *S. and Marper v. the United Kingdom*

#### Applications Nos 30562/04 and 30566/04, Judgment of 4 December 2008

"113. In the present case, the applicants' fingerprints and cellular samples were taken and DNA profiles obtained in the context of criminal proceedings brought on suspicion of attempted robbery in the case of the first applicant and harassment of his partner in the case of the second applicant. The data were retained on the basis of legislation allowing for their indefinite retention, despite the acquittal of the former and the discontinuance of the criminal proceedings against the latter.

122. [...] It is true that the retention of the applicants' private data cannot be equated with the voicing of suspicions. Nonetheless, their perception that they are not being treated as innocent is heightened by the fact that their data are retained indefinitely in the same way as the data of convicted persons, while the data of those who have never been suspected of an offence are required to be destroyed.

125. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society."

### 9.2.3 Searches of premises

Searches carried out on premises such as houses or offices affect the human rights of a person into a particularly serious manner. They give law enforcement officials the deepest insight into the lifestyle or work pattern of the people living or working on those premises. Such searches are thus experienced as particularly intrusive and often even humiliating. Consequently, in the national law of most countries, they are subject to a judicial decision such as a search warrant issued by a judge; searches without such a warrant are usually limited to strictly exceptional circumstances in which it is not considered possible to wait for a judicial decision as the search objective will then not be achieved, e.g. the evidence sought will be destroyed or the person sought will have escaped. There are often additional requirements as to the reasons for the search (e.g. only for the investigation of an offence of a certain gravity or only with a specifically defined high level of suspicion) and/or additional proceedings to be respected (e.g. the presence of a witness or additional restrictions for searches at night time).



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of Dobrev v. Bulgaria

#### Application No. 55389/00, Judgment of 10 August 2006

"162. The Court notes that domestic legislation provided, at the relevant time, that a search of premises could be ordered by the trial court (during the trial phase) or by the prosecutor (during the pre-trial phase) only if there was probable cause to believe that objects or documents which may be relevant to a case would be found in them [...]. Such a search could also be conducted in the course of an enquiry, but only in the course of examining a crime scene and if its immediate execution was the only possibility to collect and secure evidence [...].

163. In the instant case, the Court finds that it is unclear in the context of what kind of proceedings the search of the applicant's home was conducted, in so far as at the time in question no enquiry or preliminary investigation had been opened. It notes in this respect that the Government have [*sic*] failed to argue otherwise. In addition, the search was conducted only in the presence of two witnesses and without the applicant, an adult representative of the household, the residence's manager or a representative of the municipality being present [...]. Accordingly, it appears that the prerequisites for performing such a search were not present and its execution was not in compliance with the relevant domestic law provisions [...].

165. In view of the above, the Court must conclude that the search of the applicant's home of 26 August 1999 was not conducted 'in accordance with the law' within the meaning of paragraph 2 of Article 8 of the Convention\*."

\* European Convention on Human Rights (ECHR).

Law enforcement officials should avoid making a house search more intrusive than necessary. Unfortunately, on occasion, law enforcement officials still create unnecessary disorder or destruction, carry out the search in a violent, threatening manner, make inappropriate comments or jokes over aspects of the private life viewed during the search, or act in other ways that are clearly not justified by the need for a search and leave lasting humiliating or traumatizing effects on the people concerned. Law enforcement officials should obviously refrain from such behaviour, which is both unlawful and unprofessional. Worse, it can lead to doubts about the objectivity and impartiality of the investigation and thus negatively affect the credibility of evidence to be presented in court.

### 9.2.4 Surveillance techniques

Surveillance is a standard law enforcement action used in the fulfilment of the responsibility to prevent and detect crime. Here again, the range of activities is very broad, extending from simple observation, photographing

and reading letters to technical surveillance measures such as tapping of telephone lines or internet connections, camera surveillance in private and public places, the technical interception of communications, etc. In an increasingly technical and globalized world, with a growing number of security threats at an international level, security forces obviously seek to establish surveillance techniques that are appropriate for that context. Nonetheless, these techniques can be highly intrusive, invading the most personal and private aspects of a person's life. The legitimate interest of the State in establishing effective means of preventing and detecting crime must therefore be carefully balanced against the individual's right to privacy as a fundamental aspect of human dignity and the presumption of innocence, and hence the prohibition of random interference in human rights without reasonable grounds for doing so. Any such techniques therefore require a clear legal base and the appropriate safeguards to protect the rights of the affected person.



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of Bykov v. Russia

#### Application No. 4378/02, Judgment of 10 March 2009

"78. The Court has consistently held that when it comes to the interception of communications for the purpose of a police investigation, 'the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence' [...].

79. In the Court's opinion, these principles apply equally to the use of a radio-transmitting device, which, in terms of the nature and degree of the intrusion involved, is virtually identical to telephone tapping.

80. In the instant case, the applicant enjoyed very few, if any, safeguards in the procedure by which the interception of his conversation with V. was ordered and implemented. In particular, the legal discretion of the authorities to order the interception was not subject to any conditions, and the scope and the manner of its exercise were not defined; no other specific safeguards were provided for. [...]

82. The Court concludes that the interference with the applicant's right to respect for private life was not 'in accordance with the law', as required by Article 8 § 2 of the Convention\*."

\* European Convention on Human Rights (ECHR).

Furthermore, the actual decision to intercept a person's communication must be justified on a case-by-case basis in accordance with requirements of the specific legal basis.



## INTERNATIONAL JURISPRUDENCE

### Inter-American Court of Human Rights

#### Case of *Escher et al. v. Brazil*

#### Judgment of 6 July 2009

"131. Taking into account that telephone interception can represent a serious interference in the private life of an individual, this measure must be based on a law that must be precise and indicate the corresponding clear and detailed rules, such as the circumstances in which this measure can be adopted, the persons authorized to request it, to order it and to carry it out, and the procedure to be followed.

139. On previous occasions, when examining judicial guarantees, the Court has emphasized that decisions adopted by domestic bodies that could affect human rights must be duly founded and justified; otherwise such decisions would be arbitrary. Using rational arguments, the decisions should explain the grounds on which they were based, taking into consideration the arguments and the body of evidence provided to the proceedings. The obligation to state the reasons for the decision does not require a detailed response to every argument included in the application, but may vary according to the nature of the decision. In each case, it is necessary to assess whether this guarantee has been satisfied. In proceedings whose juridical nature requires the decision to be issued without hearing the other party, the grounds and justification must show that all the legal requirements and other elements that justify granting or refusing the measure have been taken into consideration. Hence, the judge must state his or her opinion, respecting adequate and effective guarantees against possible illegalities and arbitrariness in the procedure in question."

The measures should also demonstrate respect for the principles of necessity and proportionality. They should hence only be conducted to the extent necessary for the purpose of the investigation, i.e. where less intrusive measures are likely to achieve the objective, these should be given priority. The measures should not last longer than needed for the purpose of the investigation and the degree of interference should be proportionate to the seriousness of the case investigated. Accountability must be ensured through appropriate control by judicial or similar authorities. The relevant procedures (requirement of a warrant, reporting and documentation) should be established by law.

Given the (actual or perceived) high level of security threats, including terrorism, in today's world, there are growing calls for law enforcement officials to be given enhanced surveillance powers and for the safeguards for their implementation to be lowered. Such calls are, for example, for unrestricted surveillance of internet, landline and mobile telephone connections and of financial transactions as well as for unlimited storage of personal data.

However, it is worth noting that such measures are often unnecessary. A great deal of information is available today through open sources and does not require interference with the right to privacy. Lowering safeguards such as strict judicial control and the need to justify measures in each individual case would undermine the presumption of innocence as a fundamental pillar of the justice system. It is also questionable whether this would ultimately increase the efficiency of law enforcement work. It could merely lead to a dispersion of investigation efforts as a result of information being sought for the sake of collecting information. Resources that are already in short supply would have to be used not only to gather an immense volume of information but also to process it, to analyse it and to use it for the purpose of investigations. There is also an inherent risk of the really important part of the huge amount of information available being overlooked, which would ultimately lead to less rather than greater security.

### 9.2.5 Privileged communication

Communication with a lawyer, whether directly in person, by telephone or in writing through letters or email, is considered to be particularly protected against investigatory measures. This “lawyers’ privilege” is a direct result of the right to a fair trial in combination with the right to effective defence and to legal counsel as well as with the right not to be compelled to confess guilt. If the right to legal counsel and to effective defence is not to remain a theoretical concept, communication with a lawyer must be protected. Individuals who are suspected of having committed a crime must be certain that they can talk to a lawyer in full trust and confidence that this communication will remain confidential. Without that guarantee, communication between suspects and their lawyers will be seriously hampered and it will be difficult to establish an effective defence if suspects cannot discuss each and every aspect of the case openly with their lawyer without fear that this information may be used against them.

- “3. *The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.*
4. *Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.*
5. *Communications between a detained or imprisoned person and his [or her] legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.” (Body of Principles No 18)*

This privileged relationship must be respected in the course of criminal investigation and particularly during searches conducted by law enforcement officials.



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of Smirnov v. Russia

#### Application No. 71362/01, Judgement of 7 June 2007

“48. As regards the manner in which the search was conducted, the Court further observes that the excessively broad terms of the search order gave the police unrestricted discretion in determining which documents were ‘of interest’ for the criminal investigation; this resulted in an extensive search and seizure. The seized materials were not limited to those relating to business matters of two private companies. In addition, the police took away the applicant’s personal notebook, the central unit of his computer and other materials, including his client’s authority form issued in unrelated civil proceedings and a draft memorandum in another case. As noted above, there was no safeguard in place against interference with professional secrecy, such as, for example, a prohibition on removing documents covered by lawyer-client privilege or supervision of the search by an independent observer capable of identifying, independently of the investigation team, which documents were covered by legal professional privilege [...]. Having regard to the materials that were inspected and seized, the Court finds that the search impinged on professional secrecy to an extent that was disproportionate to whatever legitimate aim was pursued. The Court reiterates in this connection that, where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention\* [...]”

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\* European Convention on Human Rights (ECHR).

It is important to bear in mind that the privilege of confidential communication protects the client and not the client’s lawyer. It should therefore be noted that if a lawyer is suspected of having committed a crime, he or she is not protected against interception or investigation of his or her communications with clients. Any evidence that is found in the course of such investigations may be used against the lawyer but cannot be used against any of the lawyer’s clients.

In many countries, similar privileges exist for other professions, i.e. doctors or other medical staff, psychologists, journalists, members of religious communities who receive confessions, and others. All these rules are expressions by the legislator of the principle of proportionality. It is considered that the necessary trust and confidence of persons in the confidentiality of their communication with such professionals is generally of greater importance than the public interest in the outcome of the criminal investigation. Possible exceptions to this decision and the procedures to be respected (e.g. whether a court order is necessary) are equally provided for in the domestic law. Law enforcement officials must respect this decision by the legislative power and

may only try to derive evidence from such communications within the strict exceptions provided for by law and in full respect of the procedural safeguards.



## INTEGRATION IN PRACTICE

### Education

Law enforcement officials must be aware of the different professional privileges that exist under national law and understand their importance. They should be familiar with the possible exceptions as well as the relevant procedures applicable to those exceptions. Finally, they should be aware that violations of the provisions in domestic law regarding professional privileges can lead to the inadmissibility of evidence in court. The effect produced would be contrary to the original intention in carrying out the search activity, i.e. to secure evidence that leads to proving someone's guilt and ultimately to the conviction of the offender.

### 9.2.6 Searches in detention

The fact that a person is deprived of freedom does not confer greater authority to carry out a search. Obviously, authorities have justified concerns regarding safety and security in detention facilities; however, those concerns may not be used to justify arbitrary and excessive measures.

The conduct of searches in detention is subject to the same rules and principles as searches outside detention facilities; the same respect must be shown for the principles of legality, necessity, proportionality and accountability.

In particular, as for any other measure interfering with the human rights of detainees, searches must be subject to remedy and review by a judicial or other authority:

*“Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.”* (Body of Principles No. 4)

*“The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”* (Body of Principles No. 9)

Body searches are carried out systematically in detention facilities. However, this should not be done without safeguards and clear procedures and there are clear limits as to what may constitute a routine body search (see section 9.2.2).<sup>23</sup> In high-security prisons, strip searches are often conducted systematically for all

<sup>23</sup> See footnote 22.



prisoners entering the facility. While – depending on the context and the circumstances – the high risk that a prisoner may conceal a dangerous object may indeed justify such a practice, such searches should not be allowed to become standard practice without any form of control or accountability. The authorities establishing such rules must ensure that strip searches are not conducted as a means of harassing prisoners. This can only be prevented by ensuring the availability of trained staff and close supervision.



## INTERNATIONAL JURISPRUDENCE

### European Court of Human Rights

#### Case of Van der Ven v. The Netherlands

#### Application No. 50901/99, Judgment of 4 February 2003

“58. [T]he Court observes that, pursuant to the EBI [maximum security prison] house rules, the applicant was strip-searched prior to and following an ‘open’ visit as well as after visits to the clinic, the dentist’s surgery or the hairdresser’s. In addition to this, for a period of three and a half years he was also obliged to submit to a strip-search, including an anal inspection, at the time of the weekly cell inspection [...], even if in the week preceding that inspection he had had no contact with the outside world [...] and despite the fact that he would already have been strip-searched had he received an ‘open’ visit or visited the clinic, dentist or hairdresser’s. Thus, this weekly strip-search was carried out as a matter of routine and was not based on any concrete security need or the applicant’s behaviour. [...]

62. The Court considers that in a situation where the applicant was already subjected to a great number of surveillance measures, and in the absence of convincing security needs, the practice of weekly strip-searches that was applied to the applicant for a period of approximately three and a half years diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him. [...]

63. Accordingly, the Court concludes that the combination of routine strip-searching and the other stringent security measures in the EBI amounted to inhuman or degrading treatment in breach of Article 3 of the Convention\*.”

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\* European Convention on Human Rights (ECHR).

Body-cavity searches should never be part of a routine, even in high-security prisons. They should only be carried out if there are reasonable grounds to suspect a breach of security and, even then, only as a last resort, i.e. when all other means have failed.



## INTERNATIONAL JURISPRUDENCE

### Inter-American Commission on Human Rights

#### Case of Ms X v. Argentina

#### Report No. 38/96, Case 10.506, 15 October 1996

"68. The Commission does not question the need for general searches prior to entry into prisons. Vaginal searches or inspections are nevertheless an exceptional and very intrusive type of search. The Commission would like to underline the fact that a visitor or a family member who seeks to exercise his or her rights to family life should not be automatically suspected of committing an illegal act and cannot be considered, on principle, to pose a grave threat to security. Although the measure in question may be exceptionally adopted to guarantee security in certain specific cases, it cannot be maintained that its systematic application to all visitors is a necessary measure in order to ensure public safety.

72. The Commission considers that the lawfulness of a vaginal search or inspection, in a particular case, must meet a four-part test: 1) it must be absolutely necessary to achieve the security objective in the particular case; 2) there must not exist an alternative option; 3) it should be determined by judicial order; and 4) it must be carried out by an appropriate health professional.\*

#### **a) absolute necessity**

73. The Commission believes that such a procedure must not be carried out unless it is absolutely necessary to achieve the security objective in the particular case. The requirement of necessity implies that inspections and searches of this kind should only be applied in specific cases where there is reason to believe either in the existence of a real threat to security or that the person in question may be carrying illegal substances. The Government argued that the exceptional circumstances surrounding Mr. X's case justified measures that severely restricted personal liberties, because they were taken for the common good, i.e. preserving security for the prisoners as well as the prison personnel. Nevertheless, according to the Chief of Security the measure was consistently applied to all visitors of Unit 1. Arguably the measure may have been justifiable immediately after Mr. X was found to be in possession of explosives, but the same cannot be said of the numerous times the measure was applied prior to that occasion.

#### **b) non-existence of an alternative option**

74. The Commission considers that the practice of vaginal inspections and searches, and the consequent interference with visits, must not only satisfy an imperative public interest, but also that 'if there are various options to achieve this objective, that which least restricts the right protected must be selected.'

82. [...] When there is no control and the decision of subjecting a person to this kind of intimate search is left at the entire discretion of police or security personnel, without the existence of any kind of control, this practice is liable to being employed in circumstances when it would be unnecessary, used as a form of intimidation, and/or otherwise abused. The determination that this type of search is a necessary requirement for the personal contact visit ideally should be made by a judicial authority.

85. By conditioning the visit with an intrusive measure but not providing appropriate guarantees, the prison officials unduly interfered with Ms. X's and her daughter's rights."

\* As already mentioned (section 9.2.2), health professionals then function not as care providers but as medical experts, to whom the customary confidentiality between care provider and patient does not apply. The view represented in this Manual is that under normal circumstances, there is no need for this activity to be carried out by medical practitioners. Exceptions are made on medical grounds or in response to a detainee's request.

Such searches must then be ordered by the competent authority and carried out by staff sufficiently trained in the anatomy of the body and the hygienic requirements for such a search. As mentioned above (section 9.2.2), under normal circumstances there is no need for this activity to be carried out by medical personnel. In particular, prison doctors might find themselves in a conflict of interest – on the one hand providing medical care for the prisoner and on the other hand acting on behalf of the prison authorities as a medical expert. If there is a medical reason why medical personnel should be involved or if the prisoner asks for the search to be carried out by such personnel, the situation should be clearly explained to the prisoner (including the fact that the usual confidentiality between the provider of care and the patient ceases to apply).

### 9.3 Seizure

When law enforcement officials take an object into their possession by virtue of the powers granted to them, this will, in most cases, affect the right to property protected under Article 17 of the Universal Declaration of Human Rights (UDHR):

*"(1) Everyone has the right to own property alone as well as in association with others.*

*(2) No one shall be arbitrarily deprived of his [or her] property."*

Furthermore, depending on the object to be seized, the range of rights that might be affected is extensive; virtually any human right can be affected, i.e. the right to privacy, the right to the exercise of religion, the right to exercise a profession, the right of access to information, the right to freedom of movement, etc.

Law enforcement officials may therefore only seize an object on grounds and in accordance with procedures that have been established by law (principle of legality). The following are the most common reasons for seizure:

- To secure a piece of evidence during an investigation;
- To ensure that the investigation can be carried out unimpeded, e.g. seizing the passport of a suspect to prevent him or her to leave the country;
- For safety and security purposes (e.g. seizing weapons or other dangerous instruments);
- To end an unlawful situation (for the purpose of returning stolen property or in the case of prohibited goods such as drugs);
- To fulfil a court order (e.g. as a result of a civil claim).

An object should only be seized if it is necessary to achieve the legitimate objective. If the purpose can be achieved without seizing an object, the latter option must be given priority. If an item has been seized in order to secure evidence, e.g. fingerprints that may be found on the item, and examination of it has been completed without any relevant evidence being found, it must be returned to its owner.

In application of the principle of proportionality, the legitimate objective to be achieved through the seizure should not outweigh the negative consequences for the person (e.g. the seizure of life-saving medicines). For instance, law enforcement officials should be aware of the effects of seizing documents or items that are indispensable for the exercise of a profession. This can affect the entire operation of a company, including the rights of other persons with whom or for whom this company is working. Law enforcement officials should carefully assess whether the investigation is of sufficient importance to justify a seizure with such serious consequences. It goes without saying that random seizure of a maximum quantity of items and documents would be disproportionate if this cannot be duly justified for the purposes of the investigation. Furthermore, the seized objects should be analysed/examined in a timely manner so that the objects can be returned as soon as possible, particularly if they are no longer needed for the investigation.

In terms of accountability, law enforcement officials must respect the applicable procedures, e.g. a court order is required before certain items can be seized. The seized item must be duly recorded and the person concerned must be informed as soon as possible of the seizure as well as of his or her rights in relation to the seizure. Due care must be taken of the seized object. Any unnecessary damage or loss may warrant compensation of the person affected (see Victims Declaration, Principle 19).

A special seizure situation is the retention of prisoners' property in a detention facility. SMR No. 43 points out that this should be governed by pre-established regulations, which include the need to keep records of any property retained and the obligation to return the property to the person on the latter's release.



## INTEGRATION IN PRACTICE

### Doctrine

Operational procedures should give clear instructions on how to proceed with a seized object – in terms of reporting and documenting the seizure, informing the affected person of his or her rights, and handling the object – both in order to effectively secure the evidence sought and in order to ensure that appropriate care is taken of the seized object and to prevent unnecessary damage so that it can be safely returned to the owner once the objective of the seizure has been achieved.

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**Part IV**

**COMMAND,  
CONTROL AND  
ACCOUNTABILITY**

## CHAPTER 10 OUTLINE

### 10.1 Introduction

### 10.2 Law enforcement organization

10.2.1 Structure, change and development

10.2.2 Command and leadership

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10.3.2 Education and training

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## KEY LEGAL DOCUMENTS

### Treaty law

- United Nations Convention against Corruption (UNCAC, adopted in 2003, entered into force in 2005)

### Non-treaty law

- Code of Conduct for Law Enforcement Officials (CCLEO, adopted in 1979)
- International Code of Conduct for Public Officials (adopted in 1997)



# CHAPTER 10

## COMMAND AND MANAGEMENT

### 10.1 Introduction

The structure of agencies in charge of law enforcement varies considerably from one country to another. It can range from a single body with a highly centralized top-down structure to quite complex security structures with a multitude of agencies that have complementary or sometimes overlapping responsibilities and competences. Most of them are civilian in nature and are under the authority of the Ministry of the Interior or the Ministry of Justice. Others are attached to the Ministry of Defence and are (para)military in nature. Irrespective of their nature and attachment, most law enforcement organizations tend to have a strict hierarchical (military-type) set-up with as many functional levels as there are different ranks. They are mainly closed systems and most decision-making processes are of the “top-down” variety. Despite this hierarchical structure, the broad discretion of law enforcement officials in addressing individual situations on the spot is also a key characteristic of daily law enforcement practice.

Regardless of the system or structure adopted, all law enforcement organizations need to ensure their capacity to address and swiftly respond to local needs as well as to situations, threats or challenges at the national level. This requires a broad range of institutional strategies, policies and responses that allow the law enforcement agency to be both reactive and pro-active, anticipating possible needs, threats and challenges. They therefore need to adopt the right mix of a centralized, hierarchical top-down structure and decentralized responsibilities and competences in order to ensure that the appropriate response is given to the wide range and great variety of situations requiring law enforcement action. There is no single recommended model for a law enforcement agency and each country has to make informed choices in accordance with its own specific situation, its needs and the capacities available. This chapter does not seek, therefore, to promote a specific policing model, as copying models from elsewhere without adapting them to the local context would lead to a law enforcement structure that is separated and alienated from the community within which it is intended to function; that would therefore inevitably mean less efficient and less effective policing. Rather, it focuses on the parameters that should lead to effective and efficient policing in full respect of the rule of law, including human rights. The underlying understanding is that “good” policing cannot be based merely on the number of crimes solved and of persons successfully arrested and brought to trial. “Good” policing has to respond to a number of far broader requirements. The following sections will elaborate on those requirements and seek to explore the ways in which law enforcement officials charged with

command and/or management responsibility can institutionalize mechanisms that help to ensure adequate and appropriate law enforcement practice.

## **10.2 Law enforcement organization**

### **10.2.1 Structure, change and development**

When analysing law enforcement over the past few decades, one essential conclusion is that the objectives of policing in terms of the maintenance of peace and order, the provision of security and the prevention and detection of crime cannot be met by law enforcement officials alone. Law enforcement necessarily takes place within society, implying daily interaction between law enforcement officials and (members of) the society. To enable them to carry out their tasks, law enforcement officials rely heavily on the support and acceptance of the population and its willingness to cooperate with what it perceives as a legitimate law enforcement agency and its members. The legitimacy of a law enforcement agency and consequently of each and every law enforcement official depends very much on the population's perception of how policing work is carried out. That is something that extends far beyond mere crime rates and arrest figures. Whether the population is ready to turn to the police in case of problems or to seek protection and assistance will depend on the overall image of the law enforcement agency as being legitimate, professional and law-abiding. A high level of fear due to serious human rights violations committed by law enforcement officials will turn people away from the agency and thus seriously affect the latter's legitimacy – particularly if such violations occur in an environment of general impunity. A similar attitude to the law enforcement agency will prevail if the police fail to act when required; the result may be increased levels of self-justice.

One consequence is that law enforcement agencies, or rather their strategic management officials, have realized the extent to which effectiveness and efficiency are being impeded by highly bureaucratized and centralized structures.

Nonetheless, the conviction that bureaucracy and hierarchical systems are probably less desirable features in a dynamic, ever-changing, environment has not yet taken hold in many law enforcement agencies. The incentive to change tends to originate more from the increasing (political) pressure being brought to bear from outside the agency. That pressure comes from political decision-makers who are dissatisfied with the current levels of effectiveness and efficiency achieved by the (traditional) law enforcement agency. This dissatisfaction is frequently the result of hostile public opinion that has been nurtured by negative perceptions or experiences of law enforcement action. A glance at the steadily growing private security market is sufficient to see that companies operating in this sector are selling the protection and security that national law enforcement agencies are failing to provide. It is hence clear

that mounting dissatisfaction within the community is what prompts law enforcement agencies to change.

Irrespective of the reasons for change, a gradual shift towards decentralized and less bureaucratic law enforcement structures can be observed throughout the world. New management concepts are being introduced and tested. The top-down style of decision-making is being abandoned and replaced by a concept of “self-management” and delegated responsibility for results. Those concepts set out to involve all levels of the organization in taking responsibility for the results of law enforcement work. Concepts such as “community policing” are gaining ground, while at the same time “lifetime employment” is being called into question with the introduction of temporary contracts for all law enforcement officials. Attempts are being made to make law enforcement strategies both more proactive and more responsive to community needs.

One essential factor in these developments is representativity. For a number of reasons, a law enforcement agency should be representative of the community that it serves. That implies a balanced ratio of male to female officers as well as a geographical balance and the representation of different groups that may exist within a society: religious or ethnic groups, minority groups, etc. The benefits of representativity are obvious: it leads to greater competence within the agency. Better knowledge and understanding of the different groups that form the society in a given country enhance the appropriateness of the responses to these groups (both reactive and proactive in terms of anticipated challenges or threats). The ability to communicate with all parts of the community – not only from a linguistic point of view but also taking religious or cultural specificities into account – is better in a representative law enforcement agency. More importantly perhaps, a society that feels generally represented in a law enforcement agency tends to demonstrate greater acceptance of the policing work and to perceive it as being impartial and fair. By contrast, where a law enforcement agency is composed only of members of a specific group (regardless of whether it is the majority or a minority group), it will lack legitimacy in the eyes of the population or at least in some sections of it. Consequently, policing work will often be perceived as biased, discriminatory and arbitrary. A perception of that kind obviously harbours the risk of generating a hostile relationship that is counterproductive to good and efficient policing.

### **10.2.2 Command and leadership**

The senior command level has particular responsibility as the leadership of the institution to ensure the latter’s legitimacy and consequently the support of the population, both of which are indispensable for effective law enforcement. It needs to make clear that “good” law enforcement starts with effective respect for the law. Overall respect for the rule of law is absolutely crucial and the leadership

of a law enforcement agency is responsible for ensuring that this is fully understood, accepted and practised within the agency. All standing orders, rules and regulations as well as their effective application must affirm the rule of law.

In this regard, it is worth looking at what is referred to as “zero-tolerance” or “tough-on-crime” policies. While it is not the task of this Manual to judge such policies from the operational point of view, it is nevertheless worth highlighting the degree of risk that is inherent in them. They may actually be interpreted by individual law enforcement officials as a “the-end-justifies-the-means” approach. Obviously, that may easily lead to abuse of power, as it becomes more important to achieve the objective of a law enforcement initiative than to do so in a law-abiding manner. When formulating its policies and strategies, the leadership of a law enforcement agency is responsible for taking all necessary measures and precautions to ensure that unlawful or otherwise abusive behaviour is not fostered. That requires, on the one hand, clear communication and explanation of the established policies. Vague formulations such as “law enforcement officials are requested/ordered to take *all necessary measures* to ...” should be avoided and the type of conduct and action expected of law enforcement officials in line with the policy should be clearly explained. Furthermore, firm reminders should be given that the policy does not imply a departure from absolute respect for applicable domestic and international law. On the other hand, there is also a need for complementary measures, e.g. ensuring enhanced scrutiny of policing work by the public and by independent oversight bodies,<sup>24</sup> consultation processes which take account of the view of the population, and other forms of increased contact and communication with the population – in short, all types of measures that make sure that policing work is carried out in a transparent manner and with sufficient checks and controls so as to prevent any abuse of power or violations of the law.

Finally, rules and regulations as well as standing orders and procedures should be complemented by a general ethical framework adopted by the institution (see Chapter 3, section 3.4) that expresses a clear commitment to the highest standards of professionalism, integrity and respect for applicable domestic and international law. Exemplary conduct and attitude on the part of commanding officers are also essential to foster this general commitment to the rule of law within a law enforcement agency.

Article 7 of the Code of Conduct for Law Enforcement Officials (CCLEO) requires law enforcement officials not only to abstain from any act of corruption but also to “*rigorously oppose and combat all such acts.*”

The commanding leadership of a law enforcement agency has particular responsibility in this regard. The phenomenon of corruption is one of the most serious threats to efficient, professional and law-abiding law enforcement. It

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<sup>24</sup> For the different types and mandates of independent oversight bodies, please see Chapter 11, section 3.

undermines the law enforcement institution, its endeavours to achieve justice and security and the ethical values for which it should stand. Endeavouring to effectively combat even minor forms of corruption should therefore be a constant concern of the leadership of a law enforcement agency.

The definition of corruption is naturally subject to national law. Nevertheless, within the framework of law enforcement, the understanding of what represents acts of corruption is very broad and encompasses the commission or omission of an act *“in the performance of, or in connection with one’s duties, in response to gifts, promises or incentives demanded or accepted, or the wrongful receipt of these once the act has been committed or omitted”* and includes any *“attempted corruption”* (CCLEO, Article 7, Commentary (b) and (c)). Such acts may, for instance, comprise:

- the acceptance of financial or other advantages as a pre-condition for acts or omissions that are part of the duties of law enforcement officials;
- the commission of unlawful acts with a view to obtaining any such advantages; or
- the acceptance of such advantages in a way that may impair or otherwise cast doubt on the impartiality and objectivity of a law enforcement official in the fulfilment of his or her duties.

The commanding leadership must take all possible measures to prevent such acts from occurring and thus affecting the credibility and efficiency of the institution as a whole. The United Nations Convention against Corruption (UNCAC) contains a list of measures that States are asked to take in order to fight corruption effectively; these include measures that can be implemented by a law enforcement agency, as shown in the following box.



## INTEGRATION IN PRACTICE

### Doctrine

Article 8(2) of the UNCAC refers to the need to establish *“codes or standards of conduct for the correct, honourable and proper performance of public functions.”* An example of a standard of this kind is provided in the International Code of Conduct for Public Officials adopted by the General Assembly of the United Nations in its resolution A/51/610 of 12 December 1996.

### Education and training

Article 7(1)(d) of the Convention against Corruption (UNCAC) recommends State authorities to promote education and training programmes to enable public officials to *“meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.”*

## System of sanctions

- Article 8(4) draws attention to the need to establish “*measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.*”
- Article 8(6) enjoins States to take “*disciplinary or other measures against public officials who violate the codes or standards established.*”

### 10.2.3 Orders and procedures

The importance of the existence of orders and procedures that are in full compliance with the law and in respect of the applicable human rights rules and standards has already been stressed several times in this Manual. It is nonetheless worth recalling that this goes much further than the mere repetition of the law or recalling the obligation for law enforcement officials to abide by the law. Orders and procedures have an important function in that they provide a clear operational framework for law enforcement officials that enables them to carry out *effective, efficient and lawful* law enforcement actions and operations. It is indeed a challenging task to strike an appropriate balance between the need to provide an effective operational framework, without creating a straitjacket that would leave no discretion for the law enforcement officials concerned to determine an appropriate response to a particular, often unique, situation.

It is not feasible within this Manual to deal with all possible types of orders and procedures, which can range from individual orders by a superior officer to carry out an arrest to standing orders in relation to specific law enforcement actions such as the use of firearms or pre-established procedures for large operations in the framework of public assemblies, crisis situations or high-risk arrests. Nevertheless, whatever their scope, it is important for orders and procedures to fulfil certain criteria, as indicated here:

- They should establish a clear chain of command with clear responsibilities and decision-making processes. This is obviously necessary in large-scale law enforcement operations such as managing public assemblies, but is equally applicable to the day-to-day work at police stations, for example. Responsibilities, the level of discretion, decision-making competences and supervisory mechanisms need to be clearly established. Only this will allow efficient functioning of the law enforcement agency and a clear system of accountability for all acts and operations at the appropriate level.
- Orders and procedures should be guided by the principles of legality, necessity and proportionality and provide for criteria regarding their application in relation to the specific subject being addressed (including, for instance, clear limits for specific law enforcement actions, e.g. with regard to the use of certain types of equipment).

- Due consideration must be given to all possible precautions for all types of law enforcement actions – with regard, for example, to necessary intelligence prior to an operation, the appropriate equipment and its use, the choice of the time and place for a law enforcement action, or relevant measures to minimize damage.
- Supervisory and reporting mechanisms should be established to allow for proper analysis of law enforcement actions with regard to their lawfulness and efficiency. If effective, those mechanisms should ensure the accountability of those involved and/or those with supervisory responsibility, including the decision to open disciplinary or criminal proceedings. They should enable conclusions to be drawn on the need to revise procedures or not, to adapt equipment, to improve training or otherwise to change arrangements for the type of operations in question.

## **10.3 Human resources**

### **10.3.1 Recruitment and selection**

The effectiveness of law enforcement largely hinges on the qualifications of individual law enforcement officials in terms of their knowledge, skills, behaviour and attitudes. Law enforcement is by no means a mechanical production process with distinct possibilities for quality control prior to the sale of finished products. The law enforcement “factory” mainly produces services. Most of those services are provided “on the spot,” outside the span of control of the officials charged with monitoring and/or reviewing responsibilities. Notwithstanding variations regarding the distribution of authority to individual officers, the powers and authorities assigned by the State to the law enforcement function are in effect powers and authorities exercised by individual law enforcement officials in individual law enforcement situations.

As human capital is the prime driving force behind quality performance in law enforcement, it becomes self-evident that levels of recruitment and selection, as well as the quality of education and training, are of critical importance. Basic qualifications of law enforcement personnel can be influenced both by raising entry-level requirements in the recruitment and selection process and by modifying basic and advanced education and training. The selection of future law enforcement officials is (or should be) based on checking a candidate’s profile and qualifications against the profile and qualifications of the law enforcement official sought. The latter profile is a mixture of personal qualities deemed necessary to meet the essential job requirements. All too often, however, this is not how the recruitment and selection of law enforcement officials actually take place. It is obvious that in situations where standards are low or virtually non-existent, the average qualifications of law enforcement officials will be low. If the existing levels of education and training are also poor, the quality of law enforcement performance is likely to fall short of expectations.

### Three crucial aspects of recruitment

- **Recruitment criteria**

These should certainly go beyond mere physical criteria, such as height, weight, general fitness and the absence of certain types of disabilities or malformations. Criteria relating to the intellectual capabilities and the personality of the recruits also need to be clearly defined and evaluated in the recruitment process. The work of a law enforcement official is very demanding in view of the large variety of situations to be analysed, the high level of discretion for decisions to be taken on the spot and the need to understand sometimes complex legal provisions. As far as possible, the educational level of recruits should at least allow indispensable analytical and decision-making skills to be developed.

It goes without saying that a clean police record must be a basic pre-condition for recruitment. However, the candidate's integrity must be assessed in far greater depth. Respect for each and every human being, and in particular for victims, including the compassion to which they are entitled (Victims Declaration, Article 4), the absence of prejudices (e.g. attitude towards minority groups) or otherwise extremist positions, whether he or she has a sufficiently strong character that is unlikely to succumb to pressure from others or to take irrational decisions, and a clear law-abiding attitude are important aspects. Recruiting fewer, but more appropriate, human resources ultimately enhances the effectiveness and efficiency of the law enforcement organization; opting for huge numbers of insufficiently qualified personnel will merely lead to higher costs in the end.

- **Attracting the right people**

Salaries and working conditions should be sufficiently attractive to people who fulfil the adequate education requirements. The work of a law enforcement official is highly demanding and dangerous. Therefore, employment conditions should reflect the employer's appreciation of the law enforcement personnel. Again, it may be more cost-efficient in the long run to invest in better qualified candidates from the onset than having to invest more in the education and training of the new recruits or to accept policing work of an inferior quality.

Furthermore, the job as a law enforcement official should not be attractive because of the opportunities that it presents for financial extortion. A clear anti-corruption policy that also effectively combats impunity should prevent people from applying to become law enforcement officials for the wrong reasons.

- **Adapting to reality**

Where the overall level of education in a country is low, all areas will have



to be adapted, e.g. the use of sophisticated equipment should be generally limited and restricted to those trained in, and equipped with, all the necessary skills required to use it correctly. Furthermore, the lower the entry level, the longer the initial training period needs to be before recruits are deployed for duty and the higher the frequency of regular training and education throughout their career (see section 10.3.2).

### 10.3.2 Education and training

As with recruitment and selection, there are huge differences in the levels and quality of education and training of law enforcement officials around the world. The basic training of a law enforcement official can take six weeks in certain countries and up to several years in others. Advanced education and training is non-existent in some countries, in others it is provided only for officers and in others still it is mandatory for all personnel. Some countries place the main emphasis on theoretical knowledge, whereas others give priority to practical skills or to a combination of both. In some countries education and training are dictated by traditional views of law enforcement, with the stress of law, order, authority and enforcement tactics. In other countries the tide is turning and the concepts of community service, social skills, consensus and prevention tactics are gradually prevailing over the traditional views.

Law enforcement is performed in a dynamic environment with evolving views and relations. Through its individual officials, the law enforcement organization must develop a capacity to adapt and change in order to keep in step with the development and progress of the society in which it operates. Therefore, education and training programmes cannot be closed systems with a predetermined future. Like the organization itself, they too need to be open to change and further development as dictated by the requirements of a changing environment. Only in this way can law enforcement officials meet the wants and needs of the community that they serve, and thus fulfil its expectations.

Finally, it must be stressed that education and training cannot be a non-recurrent exercise that takes place only on entry into the service. Throughout their career, law enforcement officials should receive regular refresher education and training courses as well as courses that enable them to acquire new knowledge and skills in accordance with the requirements of their position.



## INTEGRATION IN PRACTICE

### Education and training

All too often, basic training and training later in a law enforcement official's career is carried out in a "military drill" approach that places considerable emphasis on physical capabilities and discipline. Such a concept falls short of the requirements of the complex working

environment of law enforcement officials. In particular, the high level of discretion in dealing with rapidly evolving situations where they occur requires law enforcement officials to have a clear understanding of the repercussions of their work. In particular, they have to understand why they are supposed to do certain things in a certain way as well as the reasoning behind the laws, rules and regulations that they are required to apply. This should, of course, include an understanding of the relevant human rights rules and standards, their reasoning and why it is crucial for law enforcement officials to comply with them. Only this understanding will enable officials to make the appropriate choices in their everyday work. Practical training activities using realistic scenarios and including dilemma situations are indispensable to ensure that law enforcement officials acquire the skills needed to apply this knowledge correctly in their daily work, including in situations of chaos or danger.

### **10.3.3 Human resources management**

At the risk of sounding trivial, it is important to underscore the fact that law enforcement agencies are made up of human beings who deserve to be treated as such. In the long run, the personnel cannot be expected to be law-abiding and concerned to show respect for human rights if they are not treated in accordance with their own rights and dignity. Low or sometimes even no pay for extended periods of time, excessive working hours, insufficient or no leave, absence from the family that may last for years, insufficient consideration for their own security (e.g. in terms of adequate equipment and training), degrading treatment by superior officers, excessive disciplinary sanctions without due process of law, no social security to cover work-related injuries, no care for the family if officials die while on duty – this is only a short list of the harsh living and working conditions still faced by law enforcement officials in many countries. While such conditions can in no way justify any abuse of power or otherwise unlawful behaviour, it goes without saying that such conditions are not conducive to law-abiding behaviour or respect for human rights by law enforcement officials. In this regard, the leadership has to bear in mind that law enforcement officials have human rights, too, and that it is the responsibility of the senior and command level to ensure that these rights are upheld.

In many law enforcement organizations, promotion is still based on seniority and often occurs almost automatically after a given period of time. No account is taken of the individual officer's merits or the qualifications or of the level of responsibility borne in the particular position. Systems of that kind offer little incentive for professional policing and compliance with the law. Consequently, many law enforcement agencies have now introduced regular appraisal systems and have established obligatory qualification courses as pre-conditions for promotion and higher levels of responsibility. Those measures actually form an indispensable aspect of the concept of integration.



## INTEGRATION IN PRACTICE

### System of sanctions

The human rights record of a law enforcement official should be an important factor in all promotion decisions. A negative, punitive approach may be adopted, i.e. a record of unlawful behaviour or abuse (if not leading directly to dismissal) should prevent the law enforcement official from being promoted. On the other hand, a positive, rewarding approach could also be implemented, i.e. where a law enforcement official has shown particular positive capabilities and attitudes with regard to respect for human rights (e.g. with regard to protecting and assisting the population), this should be taken as a positive factor in the decision regarding his or her promotion and thus present an incentive for law enforcement personnel to adopt such behaviour.

## 10.4 Supervision and control

Supervision and control are key responsibilities of the senior command leadership of any law enforcement agency. They are crucial:

- to ensure the fulfilment of the State's obligations under international law;
- to detect unlawful behaviour by law enforcement officials (legal accountability);
- to ensure respect for internal rules, regulations and the chain of command (internal accountability);
- to evaluate the general performance of individual law enforcement officials and of the law enforcement agency as a whole (performance accountability).

### 10.4.1 International obligations

Supervision and control are part of the international obligations of a State when it comes to ensuring the full respect and implementation of international human rights law.

The obligations created by international human rights treaty and customary law for States are twofold. The first obligation is to adopt (or enact) legislation at the national level to ensure compliance with the applicable requirements of human rights law. The second requires States to refrain from practices that are in contravention of human rights law. States are thus responsible for violations of human rights that can be attributed to them (for further information on State responsibility, see Chapter 1, section 1.3.1). In situations where such violations can be attributed to law enforcement officials, those practices are recognized at the international level as practices of the State, for which it can be held responsible. In other words, human rights violations by law enforcement officials entail the responsibility of their State. States are required to take positive steps to ensure both the effective implementation and the observance of the obligations deriving from human rights law by all

State officials. For law enforcement this translates into an obligation for the senior command leadership to keep law enforcement procedures under constant review, ensuring their compliance with international human rights law, and to ensure through effective supervision and control that they are put into practice accordingly.

#### **10.4.2 Legal accountability**

Supervision and control are also indispensable to ensure legal accountability of the law enforcement agency as a whole and of each and every single law enforcement officer at the domestic level. Legal accountability for the conduct of law enforcement operations is placed at three levels:

- the individual law enforcement official;
- the superior in the chain of command;
- the State.

Law enforcement officials are expected to “*respect and protect human dignity and maintain and uphold the human rights of all persons*” (CCLEO, Article 2). All law enforcement practices must be based on positive law. They must be required by the given circumstances and the gravity of the measures taken may not be excessive in relation to the specific situation. The individual responsibility of every law enforcement official to respect and strictly observe the requirements of the law goes beyond a mere knowledge of the law. It sets distinct requirements as to attitudes and skills acquired or developed through appropriate training, which, combined with the necessary knowledge, can guarantee prompt, adequate and appropriate application of the law without any adverse distinction. Individual law enforcement officials are therefore required – through reporting and review procedures – to subject themselves to supervision, control and scrutiny. They are equally expected to maintain and uphold the levels of knowledge and skills needed for the correct and effective performance of their duties.

It is common knowledge that not all law enforcement operations are conducted “by the book” and that human rights rules and principles are sometimes easily “bent.” Equally often, such practices remain undetected. For example, during a criminal investigation, law enforcement officials may gather information using methods and/or means that do not strictly comply with human rights law. Since information thus obtained is used only as “soft information” – meaning that it will not be used or included in a (final) report – the practice generally remains undetected. It is important to draw the attention of law enforcement officials to this phenomenon of “grey policing,” especially because law enforcement officials tend to believe that what they do is permissible, or at least justifiable, in the given circumstances. Grey policing is neither permissible nor justifiable. In criminal investigations it is likely to violate a suspect’s (or an accused person’s) right to a fair trial. It may

also constitute an unlawful and/or arbitrary interference with privacy, family, home or correspondence.

Supervision and control must ensure that such practices can be detected and that corrective measures are taken accordingly; it is the duty of senior officials to offer guidance and to impose correctional measures whenever a given situation so demands. If necessary, such corrective measures must extend as far as disciplinary action and/or criminal charges against an individual official. Senior officers will be held accountable if they knew, or should have known, that their subordinates have resorted to unlawful practices and failed to take corrective action. This includes both disciplinary consequences for not exercising their supervisory function and possibly even criminal liability for the acts of their subordinates.

The established system of supervision and control must therefore ensure that the (un)lawfulness of each and every law enforcement action can be assessed. This can only be achieved through a set of measures that take account of the specificities of law enforcement work, in particular the fact that law enforcement officials often work alone or in pairs and have to respond quickly to situations without supervision and without any opportunity to contact their superiors for orders or advice.

- Clear orders and standard operational procedures must be established so as to provide a reliable framework for law enforcement action. While they cannot be a "straitjacket" – which would be inappropriate in view of the large variety of situations with which a law enforcement official has to deal – they should nevertheless provide a firm basis on which law enforcement officials feel comfortable to operate. It is in the interest of the law enforcement agency as a whole as well as of each individual law enforcement official for them to know what is expected of them, rather than to find themselves in a limbo of uncertainty when reacting to a situation on the spot. It is particularly important for a law enforcement agency to have clear orders and procedures in relation to the use of force in general and the use of firearms in particular.
- Reporting procedures must be in place so as to make it possible to evaluate compliance with the legal framework as well as with the relevant orders and procedures. Particularly with regard to the use of force as well as arrest and detention, reporting procedures should be very precise: any use of force should be subject to obligatory reporting; the reason for the use of force, the (non-)availability of other options (non-violent means, possibilities for de-escalation, retreat, etc.) should be explained; the discharge of any firearm (even if not causing injury or death) should be subject to obligatory reporting, as should any casualties. One effective way of reporting on the use of firearms can be to use a strict system of ammunition control in which law enforcement officials are accountable for the ammunition received.

Detailed forms for the recording of all relevant facts about arrest and detention as stated in Article 17(3) of the International Convention for the Protection of All Persons from Enforced Disappearances (ICRMW) and in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles Nos 12 and 23) should be pre-established and their use mandatory (e.g. regarding the date, time and reason for the arrest, recording the facts of interrogation, when and how access to lawyer and eventually medical assistance was granted, the names of the officers involved).

- Whether the system of reporting will allow for effective supervision and control will still depend on the willingness of the individual law enforcement official to report effectively and truthfully on his or her action. Here, the fact that law enforcement officials often work in pairs without direct supervision by a superior becomes an important, but delicate, factor. Law enforcement officials who work together will have to trust each other fully and feel confident of the support of their colleague in the most dangerous situations. This situation often creates a very close relationship between officers and may extend to mutually covering up unlawful or otherwise incorrect behaviour. “Whistle-blowing” – reporting on a colleague’s behaviour or action – is too often perceived very negatively and law enforcement officials who are willing to report on unlawful behaviour by colleagues often face very harsh reactions from their peers, including mobbing, harassment and threats. Here again, clear orders from the leadership to the effect that this cannot be tolerated are essential. It must be part of the common self-understanding of the whole agency that any unlawful behaviour by a colleague must be reported and that the omission of such reporting is an offence in its own right (see Chapter 3, section 3.4).
- To establish the indispensable climate of trust and confidence within a law enforcement agency and among all its members and to make sure at the same time that “whistle-blowing” is not considered as “treason” or “denunciation” is a huge challenge for the command leadership of any law enforcement agency. Whether commanding officers are able to strike this delicate balance will very much depend on the established system of correctional measures: the availability of senior officers for coaching and advice, the possibility to provide specific training on identified shortcomings and – not least – the fairness of the disciplinary system. All these elements will determine the extent to which law enforcement officials will be willing to report effectively on their own actions and on those of their colleagues.

Finally, in addition to the individual law enforcement official, the law enforcement agency as a whole – in particular in case of systemic failures – will be held accountable for any wrongful act, e.g. regarding compensation for victims of unlawful law enforcement action. This aspect will be examined in greater detail in Chapter 11.

### 10.4.3 Internal accountability

Internal accountability refers to the measures and mechanisms applied to ensure respect of internal rules, regulations and procedures as well as the chain of command. Supervision and control are crucial to balancing the broad discretion of law enforcement officials in action. The measures to ensure effective supervision and control are basically the same as those referred to in section 10.4.2.

Where such measures and mechanisms expose non-compliance with internal rules or orders by a law enforcement official, this conduct will be subject to the internal disciplinary system. However, the internal disciplinary system should not replace external legal accountability with regard to criminal or civil liability for unlawful law enforcement action. While disciplinary measures are distinct from those proceedings, they should nevertheless comply with minimum standards.



#### INTEGRATION IN PRACTICE

##### System of sanctions

For a disciplinary system to be effective, it must be fair, transparent, timely and just. This means that law enforcement officials subject to a disciplinary process should be informed of the reason for the process and should have an opportunity to defend themselves. A disciplinary process that is intended to prevent further wrongful behaviour should also take place in a timely manner. Reacting one year after the identification of wrongful behaviour is more likely to be perceived as arbitrary than if the reaction had followed a fairly short time after the act. Furthermore, the disciplinary regime should be just. In other words, the system should be pre-established and known to all law enforcement officials. It must provide a clear framework in which there is no doubt about the type of behaviour considered wrongful and therefore subject to disciplinary consequences. A vague set of rules is likely to create a situation of uncertainty for law enforcement officials, making them afraid to act because of the possible personal consequences, with the concomitant effect on the quality and efficiency of law enforcement action. The disciplinary system should not be draconian but should respect the principle of proportionality (i.e. the disciplinary measure should match the seriousness of the act). It should also provide for the possibility to appeal against the disciplinary decisions taken.

Only a disciplinary regime that follows the standards of fairness, transparency, timeliness and justice referred to in the above box is likely to effectively enhance respect for the internal rules and regulations and the chain of command of a law enforcement agency.

Finally, it is worth noting that disciplinary sanctions are not the only possible response to wrongful behaviour. Other corrective measures can include

additional training, correcting complicated procedures that have proved too difficult to implement, improving working conditions, reducing stress, and providing counselling for law enforcement officials who have been through traumatic experiences. It is the responsibility of superior officers and of the commanding leadership of law enforcement agencies to make the appropriate choices and not merely to opt for drastic disciplinary measures.

#### **10.4.4 Performance accountability**

Supervision and control form an essential tool with which to evaluate the effectiveness, quality and performance of the law enforcement agency in the fulfilment of its tasks and responsibilities. Ultimately, this is simply another form of accountability. Law enforcement agencies are not only accountable for their work and action in legal terms but also in terms of the quality of their work and the use of resources. The community, the government and the legislator are entitled to a law enforcement agency that is making the best use of the available resources in the effective and efficient fulfilment of its responsibility to prevent and detect crime, to maintain peace and order and to protect and assist those in need.

A variety of reasons can be given as to why the individual performance of law enforcement officials requires regular recording, measuring and evaluation. The most prominent of those reasons is to ensure consistency in the quality of law enforcement “products” and “services” to the general public. As explained above, the quality of law enforcement performance is largely dictated by the individual qualities and qualifications of law enforcement officials. An additional reason for measuring and evaluating performance is therefore to encourage individual law enforcement officials to develop their capabilities. Regular performance reviews, guidance, career planning and continued education and training are a few of the tools that can be used to this end.

Although this may not be true of all aspects of law enforcement, it can in general be said that law enforcement is a community service. Expectations as to the type of services provided by the law enforcement organization and its members, as well as the appropriateness and adequacy of those services, are therefore justifiable. Both aspects – type and quality of services – depend on the capacity of a law enforcement organization to detect and interpret the wants and needs of the community that it is serving. This implies more than the availability of emergency telephone lines for people in distress. Quantitative indicators such as crime rates and crime-solving rates are also insufficient or even inadequate to fully assess the performance of a law enforcement agency. Access to all levels of the population and connections with all groups within society are required. At the same time, easy accessibility of the law enforcement organization itself and the existence of mutual trust between citizens and their law enforcement officials must be ensured. Such



relationships do not come naturally, nor do they mature overnight. They require sound investment of both time and resources in analysis, reflection and trust-building, combined with clarity of vision and objectives.

“Responsiveness” means the capacity of law enforcement organizations to respond – reactively or proactively – to the wants and needs of society. This attribute is naturally closely linked to and dependent on the existing levels and quality of relations with the general public.

Law enforcement organizations often have a relatively low capacity to proactively analyse and identify external developments within the society and to define appropriate responses in anticipation of expected events. Consequently, they concentrate on reactive response management. It is probably for this reason that law enforcement focuses predominantly on people who are in some form of distress or who are breaking the law as obvious situations requiring a law enforcement response. Proactive responses call for a much wider focus, which takes account of the various elements that constitute a society and determine its law enforcement needs. Economic status and developmental aspects, the composition of the population, levels of urbanization and demographic data all provide insight into the current and future development of society. On the basis of such insights, useful and accurate prognoses can be made as to developments in public order and security. Preventive strategies are not always a strong point in law enforcement, nor are they always appreciated or supported by law enforcement officials. It is often felt that the effects of prevention cannot be measured objectively, making it difficult to assess the value of individual tactics. Indeed, it is difficult to say how many car accidents are prevented by posting a uniformed official at a dangerous intersection or how many burglaries are prevented by night-time police patrols in residential areas. The requirement of responsiveness has nonetheless prompted law enforcement organizations to take community opinions into account and to design proactive rather than reactive responses.

Lastly, the evaluation of the performance of a law enforcement agency cannot be separated from the expectations and perception of the community that it is supposed to serve. Whether a community “feels” safe and whether it considers that the law enforcement agency enforces the law effectively (in particular, that it does so in a law-abiding manner) will considerably influence the willingness of the community to cooperate with law enforcement officials and to turn to them in case of need. This will, in turn, affect the ability of the law enforcement agency to effectively carry out its work. It is therefore important to go beyond mere quantitative indicators such as crime rates and to evaluate more qualitative indicators: how the population perceives the quality of law enforcement, general trust and confidence in the law enforcement agency and its members, whether it is considered to be generally law-abiding or acting

in violation of the law, etc. Only a combination of quantitative and qualitative indicators will effectively evaluate the performance of a law enforcement agency, identify shortcomings and enable appropriate policies and strategies to be defined as a result.

### **10.5 Complaint mechanisms**

The fundamental premise underlying law enforcement is respect for and obedience to the law. Evidently, this may lead to situations where individuals are not satisfied with a particular decision or action taken by individual law enforcement officials, even if such actions actually meet with requirements of the law. For instance, the release of a suspect for lack of evidence may easily create frustration and anger on the part of the victim or even of the general public. Situations in which such decisions and actions fail to comply with the law will give even more reason for complaints. Law enforcement practice is prone to trigger complaints from individual citizens, who feel victimized through decisions made or actions taken. The existence of complaints should hence not be viewed as an inevitable consequence of law enforcement, needing no specific attention or care.

Several of the international human rights instruments recognize the right of individuals to complain about the behaviour of State officials and accord victims of crime and/or abuse of power an enforceable right to compensation (see, for instance, ICCPR, Article 9.5, in relation to unlawful or arbitrary arrest or detention; CAT, Article 13, which lays down the right of alleged victims of torture to file complaints). Individuals can bring alleged violations of the ICCPR to the attention of the Human Rights Committee for its consideration (for these individual “communications” to be successfully brought to the attention of the Human Rights Committee, the State concerned must have ratified the 1966 Optional Protocol to the ICCPR). At the national level, individuals can pursue their complaints about law enforcement by pressing criminal charges, starting civil proceedings, or even by doing both. Another option that is available in many countries is to bring the issue to the attention of the national ombudsman or of a national commission on human rights. The issue of complaints by individuals is examined in greater depth in Chapter 11.

Within the scope of this chapter, however, another feasible option deserves particular attention: the possibility to file a complaint with the responsible law enforcement authority and demand an investigation and compensation. The possibility to file complaints with the responsible law enforcement organization does not exist in every country in the world. Where it does, the way in which the proceedings are structured and conducted varies considerably. When put in place, such proceedings should be made public and encourage people to make use of them. Complaints about law enforcement practices must be investigated promptly, thoroughly and

impartially. In some countries this requirement has led to the establishment of civilian review boards that are charged with the investigation of such complaints. In other countries the initial investigation is conducted by officials of the law enforcement organization concerned. In no way does the right to file a complaint with a review board, or with the agency concerned, affect the individual's rights to take the same matter to court. The general aim of such complaints mechanisms, whatever their structure or attachment, is mediation and peaceful settlement of the dispute.

The commanding leadership of a law enforcement agency should not consider the possibility of such direct complaints as a burden. On the contrary, it presents a number of benefits, including those listed here:

- Complaints which the law enforcement agency receives directly present a useful internal evaluation tool. Received in an objective and impartial manner, they should lead to a learning exercise for the law enforcement agency, acting as a means of identifying shortcomings and of improving operational procedures, tactics, training, etc.;
- Furthermore, the number and nature of direct complaints also provide considerable insight into the community's perception of the law enforcement agency – regardless of whether or not, in the end, the majority of complaints are justified. A large number of complaints or of a specific type of complaints should alert the commanding leadership not merely to the issue itself (in terms of a learning exercise, as mentioned above); it should also feed into the evaluation of the relationship between the community and the law enforcement agency as part of the performance evaluation referred to in section 10.4.4. This may then provide a reason to pursue trust-building measures in order to improve that relationship;
- Finally, where a community realizes that the law enforcement agency accepts complaints against law enforcement officials, deals with them in an objective and impartial way, and gives complainants a sense of just and fair treatment, this will enhance the acceptance of the law enforcement agency by the community and ultimately facilitate the work of the law enforcement agency.

It nonetheless has to be borne in mind that complaints addressed directly to the law enforcement agency should be seen as a complementary tool and not as a replacement for external oversight (criminal and civil investigation, NHRC, ombudsman, parliamentary control, etc.). These matters will be addressed in greater depth in Chapter 11.

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## CHAPTER 11 OUTLINE

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- 11.2 Law enforcement agencies investigating human rights violations
  - 11.2.1 Criminal investigation
  - 11.2.2 Other human rights violations
- 11.3. External national oversight mechanisms
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## KEY LEGAL DOCUMENTS

### Treaty law

- International Convention on the Elimination of All Forms of Racial Discrimination (CERD, adopted in 1965, entered into force in 1969)
- International Covenant on Civil and Political Rights (ICCPR, adopted in 1966, entered into force in 1976) and its two Optional Protocols adopted respectively in 1966 (entered into force in 1976) and in 1989 (entered into force in 1991)
- International Covenant on Economic, Social and Cultural Rights (ICESCR, adopted in 1966, entered into force in 1976 and its Optional Protocol (OP/ICESCR, adopted in 2008, entered into force in 2013)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, adopted in 1979, entered into force in 1981)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, adopted in 1984, entered into force in 1987) and its Optional Protocol (OPCAT, adopted in 2002, entered into force in 2006)
- Convention on the Rights of the Child (CRC, adopted in 1989, entered into force in 1990) and its Optional Protocol on the involvement of children in armed conflict (OP/CRC-AC, adopted in 2000, entered into force in 2002)
- Rome Statute of the International Criminal Court (Rome Statute, adopted in 1998, entered into force in 2002)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, adopted in 1990, entered into force in 2003)
- International Convention for the Protection of All Persons from Enforced Disappearance (CPED, adopted in 2006, entered into force in 2010)

### Non-treaty law

- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration, adopted in 1985)
- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted in 2005)

# CHAPTER 11

## INVESTIGATING HUMAN RIGHTS VIOLATIONS

### 11.1 Introduction

As we approach the end of this Manual it is appropriate to give some thought to the issue of human rights violations. This chapter has clear connections with Chapters 1 and 2, which present the legal framework and should therefore be consulted if greater detail is required. Violations of human rights deserve wider consideration than if they are viewed merely from the point of view of law enforcement. They must be placed squarely in the context of both international and national law and the requirements thereof. Human rights law – both international and national – places a number of obligations on the State and its agents with regard to the individuals under its jurisdiction, namely the duty to respect, to protect and to ensure human rights as well as the duty not to discriminate (see Chapter 3, section 3.2). When an agent of the State or a person acting in an official capacity fails in these obligations in a way that is attributable to the State (see Chapter, 1, section 1.3.1), this act or omission becomes a human rights violation. This is particularly the case where the act or omission unlawfully restricts or denies a human right of the individual.

It has been emphasized throughout this Manual, and will become clearer in the course of this chapter, that human rights violations pose considerable threats to peace, security and stability in a country because they undermine government credibility and authority. As a visible component of State practice, law enforcement plays a crucial role in promoting and protecting rights. At the same time, law enforcement officials are also potential violators of individual rights and freedoms. Hence, where there is reason to believe that a law enforcement official has violated a person's human rights, it will be necessary to ensure that the matter is investigated properly and that there are adequate sanctions as well as remedial support for the victim in the form of compensation or other types of reparation.

In principle, there are two ways to address the issue of violations of human rights. From the victim's standpoint, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration) proposes two definitions for such violations (for further details, see Chapter 6, sections 6.2.2 and 6.2.3).

The first definition characterizes them as being acts and omissions that are *"in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power"* (Victims Declaration, Part A, Article 1). Central to such violations is the individual or collective harm and suffering

caused to human beings, “including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights” (Victims Declaration, Article 1; see also Principle 8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law). Apart from being characterized as a criminal offence, such acts (or omissions) become a violation of human rights when they can be imputed to a State (see Chapter 1, section 1.3.1).

The second definition concerns those “acts and omissions [imputable to the State] that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights” (Victims Declaration, Part B, Article 18). The expression “recognized norms” must be understood as referring to provisions that are contained in human rights treaties, that form part of international customary law, or that form part of principles of law as recognized by independent States.

For both types of violations, the investigation – depending on its nature (criminal, civil, public administrative) – may seek to hold the individual public servant accountable, e.g. the law enforcement official, and/or the State as a whole, given its responsibility to ensure compensation or other forms of reparation for unlawful acts of its agents.

Certainly, the situation of all victims of unlawful acts – regardless of their perpetrator – is a matter of concern to law enforcement officials; all victims are all entitled to be treated with compassion and respect, to have access to the mechanisms of justice and to be given prompt redress. However, where the act constitutes a human rights violation, i.e. the unlawful act in question has been “committed” by the State, through one of its public officials or another person acting in an official capacity, the situation deserves particular attention. It must be understood that violation of an individual’s human rights can seriously impair the relationship between the State and individuals under its jurisdiction. Law enforcement performance, in terms of the actual state of law and order, depends on the existence of good public relations. Where law enforcement officials resort to practices that run counter to individual rights and freedoms, the very relationship between the organization as a whole and the community is at stake. Trust and confidence are two prerequisites for fruitful communication and cooperation between the community and a law enforcement agency. When trust and confidence wane because of apparent unlawful or arbitrary behaviour by law enforcement officials, the quality of cooperation and communication will also decline. Special care must therefore be taken of the victims of such violations if isolated incidents are not to have a disastrous effect on the image and performance of the entire law enforcement agency.



Law enforcement officials must be held accountable for their individual acts, in particular those that are unlawful and/or arbitrary. A law enforcement official cannot successfully invoke superior orders when it was, or should have been, clear to the official that the order in question was manifestly unlawful and there was a reasonable opportunity to refuse to follow it (see, for instance, BPUFF No. 26). For serious breaches of international law, such as acts of genocide or torture, superior orders may never be invoked as an excuse (see, for instance, CAT, Article 2; ICC Statute, Article 33).<sup>25</sup>

Even in situations where lawful superior orders could successfully be invoked by the acting law enforcement official, he or she is not subsequently exempted from any personal responsibility for the contested act; the accountability for the wrongful act (or omission) is merely extended to include the superior official. While exceptional circumstances, such as situations of public emergency including civil unrest and armed conflict, the threat thereof, or natural disasters, may allow for certain (lawful) derogations of human rights, such situations may not be successfully invoked as a justification for unlawful or arbitrary law enforcement practices. In any case, superior officers can and must be held accountable if they were aware of the fact that officials under their command were resorting to unlawful and/or arbitrary practices in the performance of their duties and did not take all measures in their power to prevent, suppress or report such practices. It is necessary to establish and maintain effective monitoring and review procedures in order to guarantee the individual accountability of law enforcement officials.

Although the issue of State responsibility has been dealt with in Chapter 1 of this Manual, it is useful to repeat some of the main points in connection with the subject covered in this chapter. International law establishes and regulates relations between States and other subjects of international law. The most important sources of international law are customary law, treaty law and principles of law as recognized by independent States. For the purposes of the present chapter the consideration of international law will be limited to international human rights law (IHRL). IHRL creates legally binding obligations for States. These obligations include the requirement to adapt (or create) national legislation in accordance with the international norms, as well as to refrain from practices that are in contravention of those norms. This latter requirement as to the practices of States extends to all entities and persons acting on behalf of the State, including public officials such as law enforcement officials. Ultimate responsibility for the acts of individual officials lies with the State. This provision does not interfere with or replace the existing levels of individual and organizational accountability at the national level but creates additional accountability at the international level. At that level the States

<sup>25</sup> For an overview of similar norms, see the ICRC database on customary law, Rule 155, Defence of Superior Orders, [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule155](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule155) (last consulted on 30 September 2013).

themselves are accountable for the individual practices of their officials, as well as for the (legislative and other) actions of their governmental agencies, in particular where such practices or actions constitute a violation of human rights.

Law enforcement officials act in a public capacity under the direct authority of, and with special powers granted to them by, the State in which they operate. The practices of and decisions taken by law enforcement officials must therefore be seen and accepted as practices and decisions of the State, which is responsible and accountable for them. Law enforcement practices must be based on respect for and obedience to the laws of the State. Where law enforcement practices violate the rights and freedoms of individuals, the very foundation for the establishment and acceptance of State authority is undermined. Whenever and wherever such practices remain without (judicial) consequences for those responsible, it is not merely the credibility of the law enforcement institutions and the State with regard to international human rights obligations that is at stake, but also the very concept and quality of individual rights and freedoms.

Depending on the nature of the human rights violation, the competence, procedures and possible remedies for addressing human rights violations will differ. While some may appear more effective or important than others, it is the combination of a range of mechanisms established to hold the State and its agents accountable that provides effective remedies for human rights violations. Only when those mechanisms together form an effective system of checks and balances will the population have the necessary trust in the State and its institutions. The different mechanisms will be broadly outlined in the following sections.

For a law enforcement agency, the existence and effectiveness of such mechanisms should not be perceived as a threat. They should rather be seen as providing support for an institution in its endeavour to fulfil its mission in an effective, professional manner and in full respect of the law. Obviously, law enforcement agencies will not be happy if an oversight mechanism concludes that a law enforcement official's behaviour was unlawful or otherwise inappropriate or unprofessional, or if the quality of a law enforcement action is questioned – and the reaction of the general public will be the same. Nevertheless, it is far worse for the legitimacy and acceptance of a law enforcement agency if the population perceives it as systematically covering up unprofessional or even unlawful behaviour. Where law enforcement agencies accept full scrutiny of their actions and operations, their credibility and their acceptance by the population will be enhanced. They should also perceive the investigations by oversight mechanisms as an opportunity to detect areas in which they may be able to improve their way of working, their procedures, their training, their equipment, etc. Finally, the detection of clearly

unlawful behaviour should have a preventive effect for the whole institution and also allow the institution to take action against individuals who are harming both the effectiveness and the image of the law enforcement agency through their acts. It is therefore in the interest of a law enforcement agency for their own personnel and the general public to know and understand those mechanisms – encouraging the provision of openly accessible information on the available control mechanisms and how to access them. Many law enforcement agencies around the world have understood the advantages of this approach and provide this information for the general public, e.g. through posters and leaflets at police stations, relevant links on their websites, specific telephone lines, etc.

## **11.2 Law enforcement agencies investigating human rights violations**

### **11.2.1 Criminal investigation**

Under national laws, responsibility for the prevention and detection of crime has been assigned to law enforcement agencies. This includes the responsibility for investigating crimes committed by public officials, thus also by law enforcement officials. Evidence of this responsibility can be found in national penal codes, which often contain provisions relating to punishable offences committed by a person acting in a public capacity, e.g. in connection with corruption or where bodily harm is subject to more severe penalties when committed by a public servant. The penalty that can be imposed for such offences takes account of the fact that the perpetrator acted in an official capacity and of the serious consequences that this can entail. Similarly, a duty to launch a criminal investigation into human rights violations (at the national level) is contained in several of the international hard and soft law documents relating to human rights – either explicitly or implicitly because it flows from the obligation to protect individuals from unlawful conduct, which includes criminalizing such conduct. Examples can be found in Article 12 of the CAT; Articles 11, 19(2), and 33 to 36 of the CRC; Article 2(d) read in conjunction with Article 4(a), (b) and (c) of the CERD; Article 2(b) read in conjunction with Article 6 of the CEDAW; Article 8 of the CCLEO; Article 22 of the BPUFF; Article 9 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; and Article 6 of the CPED.

All such investigations must be carried out promptly, thoroughly and impartially. These three specifications are of equally crucial importance to the outcome of the investigation as well as to its credibility. It must be understood that the criterion of “impartiality” will weigh particularly heavily for external observers of such an investigation. The act of one individual law enforcement official is capable of discrediting the law enforcement agency as a whole. It is hence not difficult to understand that any law enforcement investigation into the circumstances of an incident involving law enforcement officials will meet

with scepticism as to its independence and impartiality, although it is indeed the responsibility of law enforcement agencies to investigate such crimes.

In order to ensure that such investigations are conducted with the required objectivity and impartiality, some countries have established specific departments, units or agencies with the exclusive responsibility to investigate suspected crimes committed by law enforcement officials. In other countries, a deliberate decision has been made not to treat a crime committed by a law enforcement official differently from any other crime. Thus, the investigating competence will fall on the department in charge of investigating the type of crimes in question (homicide department, anti-corruption unit, etc.). In particularly sensitive cases (e.g. due to the substantial public attention involved) the investigation may be transferred to a geographically different unit or department.

In any case, it has to be recognized that it is not easy psychologically for law enforcement officials to investigate crimes that have allegedly been committed by their own colleagues. It is incumbent on the higher command level to establish an institutional culture in which unlawful acts by law enforcement officials are unacceptable and in which the duty to fully and effectively investigate such acts is acknowledged by all members of the institution (see also Chapter 3, section 3.4, on the subject of institutional ethics, as well as Chapter 10, sections 10.2.2 and 10.4.2, on the measures needed to prevent peer pressure and a misplaced sense of solidarity from prevailing within the institution, where “whistle-blowing” is considered to be “treason”).



## INTEGRATION IN PRACTICE

### **Doctrine and system of sanctions**

A code of conduct that establishes the commitment of the law enforcement agency and all its members to lawful, non-arbitrary behaviour that is compliant with and respectful of human rights can firmly anchor such values in the institutional culture. It should include provisions that call on each individual law enforcement official to oppose any violation of the law or the code of conduct and to report such acts. The constant confirmation of the code by the hierarchy whenever possible or necessary should foster the understanding that opposing, reporting or investigating unlawful acts does not constitute an act of “treason,” but is in the interest of the law enforcement agency as a whole and of all its members. Finally, in order to be effective, disrespect for the code of conduct must lead swiftly to appropriate disciplinary sanctions (in addition to any response through criminal or other proceedings if other laws, rules and regulations have been violated).

Furthermore, it is indispensable to install additional safeguards for such type of investigations so as to ensure that the investigation is conducted thoroughly

and with the required objectivity. This means that as soon as the investigation includes a law enforcement official as a potential suspect, additional mechanisms are needed in terms of reporting, supervision and control – by the senior command level, the prosecution, the government ministry, etc. In particular, the prosecution plays an important role in thoroughly assessing the objectivity and impartiality of the investigation. Victims should also have access to the prosecution and be able to request the proper investigation of a case and – where the investigation leads to that conclusion – its prosecution in court.

Of course, independent external oversight (see section 11.3) also assumes particular importance in such cases.

### **11.2.2 Other human rights violations**

Where an act or omission by a law enforcement official might constitute a violation of human rights but not a criminal offence (e.g. disregarding procedural safeguards in the course of law enforcement operations), legal provisions are needed to provide remedies for victims of such violations, including possibilities for redress and compensation (see Victims Declaration, Article 19). In view of the harmful effect of human rights violations by law enforcement officials on a society's trust and confidence in the integrity of its law enforcement agency as a whole, it is in the interest of the law enforcement agency to thoroughly investigate such alleged violations even if they do not constitute a criminal offence (see also Chapter 10, section 10.5).

## **11.3 External national oversight mechanisms**

### **11.3.1 Judicial control**

In view of the fact that human rights violations are acts or omissions that constitute a violation either of criminal laws operative within the territory of the State or of internationally recognized human rights norms, States are under an obligation to exert judicial control over such acts or omissions as well as to protect the victims. Effective judicial control over law enforcement agencies is fundamental to ensuring that these agencies and their members are accountable for their acts or omissions.

Where a human rights violation is also a violation of criminal laws, the implications for judicial control are prescribed in national law. In purpose and scope, however, criminal law is normally more concerned with the perpetrator than with the victims of crime. Aspects of compensation and redress for such victims quite often become the object of subsequent civil proceedings. With regard to internationally recognized human rights norms that have not yet been incorporated into national laws, courts and tribunals at the national level are nevertheless under an obligation to take those norms into consideration insofar as they form part of customary international law or belong to treaty law to which that State is party.

In any case, judicial control should cover all possible aspects: criminal proceedings to establish the accountability of the individual law enforcement official and – where relevant – of his or her superiors under criminal law; civil proceedings to obtain compensation or redress from the responsible law enforcement official; public administrative proceedings to obtain redress (e.g. rescinding an unlawful decision or receiving medical, psychological or social assistance) and/or financial compensation for damages, losses or injuries sustained in areas under State responsibility.

Effective access for victims to judicial control must be ensured, as must the possibility to challenge decisions taken by the prosecution not to investigate a case or to close the case after completion of the investigation without bringing anybody to trial.

The independence, impartiality and objectivity of the judiciary are indispensable and fundamental to the administration of justice in general and in relation to the investigation of human rights violations in particular. In contexts in which serious human rights violations are constant patterns of behaviour among public servants, including law enforcement officials, they are usually indicative of a climate of impunity, which in turn is often indicative of a weak judiciary. Where the intention is to address such patterns of behaviour effectively, the initiative must therefore include measures to strengthen the independence, impartiality and objectivity of the judiciary and the determination to combat any forms of corruption within the judiciary.

### **11.3.2 National human rights institutions**

Apart from criminal or civil legal proceedings, at the national level, there are other ways for individuals to attempt to obtain an effective remedy for their complaint. Sometimes provision for the establishment of a complaints mechanism at the national level is made in international human rights instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, Article 14(2)). Around the world, countries have created a broad range of institutions in charge of promoting and defending human rights at the national level.

National human rights institutions are part of the State apparatus but are not governed directly by the executive, legislative or judicial authorities. Being public entities, they receive funding from the State and are thus accountable for their administration, expenditure and effective fulfilment of their mandate. Nevertheless, they must be able to carry out their work in an independent, impartial and non-partisan manner.

An international soft law document, the Principles relating to the Status of National Institutions (Resolution 48/143 adopted by the General Assembly

of the United Nations) – known as the Paris Principles – provides guidance as to how such institutions should be set up and function in order to ensure that they can assume their responsibility effectively:

- The mandate of a national human rights institution should be as broad as possible and *“set forth in a constitutional or legislative text”*;
- The institution should be composed in such a way as to ensure a *“pluralist representation”* of the society;
- Its structure, the appointments of its members and its funding should be organized in such a way as to ensure that its work can be carried out in full independence;
- It should be mandated to take up any issue falling within its competence, regardless of who has presented the issue to it;
- It should be entitled to hear any person and consult any document deemed necessary;
- It should be authorized to *“hear and consider complaints and petitions concerning individual situations”* and/or to transmit them to any other competent authority *“within the limits prescribed by the law;”*
- It should also be entrusted with the power to propose *“amendments or reforms of [...] laws, regulations and administrative practices.”*

Such institutions have relatively limited powers compared, for instance, with the judiciary, as they have no authority to enforce their recommendations or to order any type of corrective action. Nevertheless, their effective functioning and the capacity to fulfil their mandate are essential to secure people’s trust and confidence in the State and its institutions. People must feel comfortable about presenting their cause to a national human rights institution, in full trust that the institution charged to promote and protect human rights is actually doing so in an impartial and effective manner. Furthermore, through their reports and recommendations these institutions become a valuable source of information and advice for law enforcement agencies striving to improve their professionalism, their efficiency and their compliance with human rights.

Two types of institutions which have been established in many countries around the world deserve closer consideration: the national ombudsperson and national human rights commissions.

### 11.3.2.1 National ombudsperson

The office of “ombudsperson” now exists in a large number of countries. The ombudsperson (who may be an individual or a group of persons) is generally appointed by the national parliament. The primary function of this institution is to protect the rights of individuals who believe themselves to have been the victims of unjust acts on the part of the public administration (in most instances this includes acts of law enforcement officials). Accordingly, the

ombudsperson will often act as an impartial mediator between an aggrieved individual and the government.

While the institution of ombudsperson is not exactly the same in any two countries, all follow similar procedures in the performance of their duties. The ombudsperson receives complaints from members of the public and will investigate those complaints provided that they fall within the competence of his or her office. In the course of the investigation the ombudsperson is generally granted access to the documents of all relevant public authorities. He or she will then issue a statement of recommendation based on the findings of this investigation. That statement is given to the person lodging the complaint, as well as to the office or authority against which the complaint is directed. In general, if the recommendation is not acted upon, the ombudsperson may submit a specific report to another State institution or organ having oversight over the office or authority against which the complaint is directed; this is in most cases the parliament. While any individual who believes that his or her rights have been violated may submit a complaint to the ombudsperson, many countries require the complainant to first exhaust all alternative legal remedies. There may also be time limits imposed on the filing of complaints, and while the ombudsperson's authority usually extends to all aspects of public administration, some are not empowered to consider complaints involving presidents, ministers or the judiciary.

Access to the ombudsperson also varies from one country to another. In many countries individuals may lodge a complaint directly with the ombudsperson's office. In other countries complaints may be submitted through an intermediary such as a member of parliament. Complaints made to the ombudsperson are generally confidential and the identity of the complainant is not disclosed without that person's consent. The ombudsperson is not always restricted to acting on complaints and may be able to commence an investigation on his or her own initiative. Self-initiated investigations often relate to issues which the ombudsperson deems to be of broad public concern or to issues which affect group rights and are therefore not likely to be the subject of an individual complaint. In many respects, the powers of the ombudsperson are quite similar to those of national human rights commissions (to be discussed below). Both may receive and investigate individual complaints. In principle, neither has the power to make binding decisions. There are nevertheless some differences in the functions of the two bodies, which explains why some countries establish and simultaneously maintain both types of institutions.

### **11.3.2.2 National human rights commissions**

In many countries, special commissions have been established to ensure that the laws and regulations concerning the protection of human rights (at the



national level) are effectively applied. Most commissions function independently of other organs of government, although they are usually required to report on a regular basis – through public reports, reports to parliament, etc.

The precise functions and powers of a particular commission will be defined in the legislative act or decree under which it is established. These laws will also serve to define the commission's jurisdiction by specifying the range of discriminatory or violative conduct that it is empowered to investigate. Some commissions concern themselves with alleged violations of any rights recognized in the constitution. Others may be able to consider cases of discrimination on a broad range of grounds including race, colour, religion, sex, national or ethnic origin, disability, social condition, sexual orientation, political convictions and ancestry. One of the most important functions vested in a national human rights commission is to receive and investigate complaints from individuals (and occasionally from groups) alleging human rights abuses committed in violation of existing national law. Such complaints may well include complaints against law enforcement agencies or individual officials.

In order to carry out its tasks properly, the commission will usually have the authority to obtain evidence relating to the matter under investigation. Even if only rarely used, that power is important to prevent lack of cooperation or even obstruction of the investigation by the person or the body against which the complaint has been lodged. While there are considerable differences in the procedures followed by various national human rights commissions in the investigation and resolution of complaints, many rely on conciliation and/or arbitration. If the process of conciliation fails to resolve the dispute, the commission may be able to resort to arbitration in which it will, after a hearing, issue a determination. The ability of a commission to initiate enquiries on its own behalf is an important measure of its overall strength and probable effectiveness.

### **11.3.3 Other types of oversight mechanisms**

States also often establish other types of oversight mechanisms with the duty to assess law enforcement actions or operations. These mechanisms may be, for instance, ad hoc commissions tasked to assess a specific situation or incident, e.g. a public assembly that ended violently and with a large number of casualties. They may also be permanent independent oversight bodies with general responsibility for controlling and evaluating the work of law enforcement agencies. Usually, both types of bodies will look not only at possible human rights violations, but also at operational issues and the overall functioning of the law enforcement agency (in general or in relation to the specific event or incident to be investigated). They are therefore able to make a broader contribution to improving the overall quality, professionalism and efficiency of law enforcement agencies. However, for such mechanisms to be more than mere window-dressing exercises, they need the same level of

operational independence and investigative powers as national human rights institutions. Moreover, a process needs to be set in place to ensure that their conclusions and recommendations are indeed followed by corrective measures. Finally, they should neither replace judicial control nor restrict the possibilities for victims to have alleged human rights violations fully investigated and – when those violations are confirmed – to obtain compensation and redress.

## **11.4 International accountability mechanisms**

### **11.4.1 Individual accountability: international criminal jurisdiction**

The International Criminal Court (ICC) and the rationale behind its creation have already been discussed in Chapter 1, section 1.3.3.2. With regard to human rights violations, it is an important institution at the international level with powers to establish individual criminal accountability for four types of crimes (enumerated in Article 5 of the Rome Statute) in which national authorities are either unable or unwilling to investigate and prosecute:

- The crime of genocide;
- Crimes against humanity;
- War crimes;
- The crime of aggression.

The most relevant within the framework of law enforcement are “*crimes against humanity*.” These are listed in Article 7 of the Rome Statute and include:

- murder;
- imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- torture;
- rape and other forms of sexual violence;
- enforced disappearance; and
- other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

The above-mentioned acts are deemed to be “*crimes against humanity*” if they are “*committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.*”

A more detailed explanation of the acts that constitute a crime under the Rome Statute is provided in “Elements of Crimes” (Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002), which was formally adopted at the Review Conference held in Kampala in 2010 (ICC publication RC/11).

The Office of the Prosecutor, attached to the ICC, is in charge of investigating acts or omissions that fall under the court’s jurisdiction.

Article 13 of the Rome Statute establishes that such crimes fall under the jurisdiction of the ICC if the underlying situation has been referred to the Prosecutor by a State Party or by the United Nations Security Council under Chapter VII of the Charter of the United Nations or if the Prosecutor has initiated an investigation on his or her own initiative in accordance with Article 15 of the Rome Statute. If a particular act or omission falls under the general jurisdiction of the ICC, the case is admissible unless it has already been effectively and genuinely investigated (and eventually prosecuted) by a State having jurisdiction over the case. Ongoing investigations or trials do not lead to the inadmissibility of the case if they are conducted in a way that demonstrates the State's unwillingness or inability to effectively and genuinely investigate (and eventually prosecute) the case (for further details, see Article 17 of the Rome Statute and Chapter 1, section 1.3.3.2).

In cases in which *"the Prosecutor concludes that there is reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation."* (Article 15(3)). Conversely, if the prosecutors decides not to initiate or not to pursue an investigation, the decision is subject to the control of the Pre-Trial Chamber (Article 53).

When conducting an investigation the Prosecutor shall take all *"appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court (Article 54(1)(b))."* This includes collecting and examining evidence, requesting the *"presence of and questioning persons being investigated, victims and witnesses"*, as well as ensuring the *"confidentiality of information, the protection of any person and the preservation of evidence"* (Article 54(3)). The Prosecutor may request the Pre-Trial Chamber to issue a warrant of arrest of a person reasonably suspected of having *"committed a crime within the jurisdiction of the Court"*, if this is necessary to *"ensure the person's appearance at trial"*, to prevent the obstruction or endangering of the investigation or the court proceedings, or to prevent the continued perpetration of a crime that falls under the jurisdiction of the Court (Article 58). The arrest itself will then be carried out by a State Party in line with the rules for international cooperation established in Part 9 of the Rome Statute.

The rights of a person being investigated are established in Article 55 and Article 59 of the Rome Statute and are presented here:

- Not to *"be compelled to incriminate himself or herself or to confess guilt"*;
- Not to *"be subjected to any form of coercion, duress or threat, to torture of any other form of cruel, inhuman or degrading treatment or punishment"*;
- Where necessary, to have free access to a *"competent interpreter"*;
- Not to *"be subjected to arbitrary arrest or detention"*;
- *"To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court"*;

- “To remain silent, without such silence being a consideration in the determination of guilt or innocence”;
- “To have legal assistance of [his or her own] choosing [...], and without payment [...] if the person does not have sufficient means to pay for it”;
- “To be questioned in the presence of counsel”;
- To be presented “promptly before the competent judicial authority” to determine the lawfulness of the arrest;
- To apply for interim release pending his or her surrender to the Court.

In both the investigation and the court proceedings, particular attention must be paid to the situation of victims:

- A Victims and Witness Unit shall provide “*protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses*” (Article 43(6); see also Article 68(4));
- The Prosecutor’s decision to investigate a case or not must take account of the interests of victims (Article 53(1)(c) and 53(2)(c));
- When conducting the investigation, the Prosecutor shall respect the “*interests and personal circumstances of victims and witnesses*” (Article 54(1)(b));
- The Court shall ensure that a trial is fair and expeditious and that it demonstrates full respect for the rights of the accused and due regard for the protection of victims and witnesses (Article 64(2));
- The Trial Chamber shall “[p]rovide for the protection of the accused, witnesses and victims” (Article 64(6)(e)). This may include deciding that, where necessary, certain proceedings are to be held in closed session (Article 64(7); see also Article 68);
- Victims’ personal views and concerns may be presented and considered at appropriate stages of the proceedings (Article 68(3));
- The Court’s decisions may include orders for reparations to be made to victims, “*including restitution, compensation and rehabilitation*” (Article 75); such reparations may also be paid out of the Trust Fund established by the Assembly of States Parties “*for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims*” (Article 79).

#### **11.4.2 State accountability for human rights violations**

There are various ways of holding States responsible at the international level for their decisions and practices (or the lack thereof) in relation to human rights (see Chapter 2, section 2.4.6). The exact procedures by which States can be held responsible for human rights violations can be found in all sources of international law, including decisions of international and regional courts, resolutions of the General Assembly of the United Nations and, of course, in specialized human rights instruments themselves. This section will examine two sets of procedures more closely, with specific reference to the investigation of human rights violations: the inter-State

complaints procedure and the procedure for individual communications concerning violations of human rights.

#### **11.4.2.1 Inter-State complaints**

As already discussed in Chapter 2, section 2.4.6, there are six specialized human rights instruments that contain a provision concerning inter-State complaints: the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), the Convention for the Protection of All Persons from Enforced Disappearance (CPED) and the Optional Protocol to the ICESCR (OP/ICESCR). The Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OP/CRC-CP) also contains such a mechanism but it has not yet entered into force. Under the ICCPR, the CAT, the ICRMW, the CPED and the OP/ICESCR (as well as OP/CRC-CP when it enters into force), a State can only submit such a complaint if it has declared its recognition of the competence of the Committee established within the respective convention to receive and consider claims by a State Party that another State Party is not fulfilling its obligations under that covenant or convention. The State against which the complaint is made must also have recognized the jurisdiction of the respective committee(s). Recognition of the competence of the Committee on the Elimination of Racial Discrimination to deal with inter-State complaints is mandatory for all States Parties. Each of these instruments sets out the procedures for the receipt and consideration of specific complaints and for their settlement. The general role of each of the aforementioned committees in the case of inter-State complaints is one of mediation and conciliation, the aim being to bring about an amicable settlement on the basis of respect for the obligations provided for in the instrument concerned.

#### **11.4.2.2 Individual complaints**

Six instruments (Optional Protocol I to the (OP/ICPPR I), the CERD, the CAT, the Optional Protocol to the (OP/ICRPD), the CPED and the OP/ICESCR) also contain provisions for individual complaints about alleged violations of rights by States Parties. The Optional Protocol to the CRC on a communications procedure (OP/CRC-CP) also contains a mechanism of this kind but has not yet entered into force. The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (Committee on Migrant Workers) will also be able to consider individual complaints or communications on violations as soon as 10 States Parties have accepted the procedure (see ICRMW, Article 77(2); so far, only three States have made this declaration).

The procedure (whereby individuals may complain of violations of treaty obligations committed by a State Party) is optional for States Parties, i.e. in

situations where a State Party has not accepted the competence of a committee to receive and consider individual communications, such communications are inadmissible. Individual communications submitted under these instruments are addressed to the committee concerned. Under the ICCPR only communications from individuals claiming to be the victims of a violation of the Covenant's provisions will be considered by the Human Rights Committee. For the CAT the provision is similar, although the communication, addressed to the committee against Torture, can also be sent on behalf of the individual claiming to be a victim of a violation of that Convention. The CPED contains a provision similar to the one contained in the CAT. The CERD allows only communications from individuals or groups of individuals claiming to be victims of violations of the CERD to be received for consideration by the Committee on the Elimination of Racial Discrimination. The Optional Protocol to the International Convention on the Rights of Persons with Disabilities (OP/ICRPD) contains a similar provision. Under the Optional Protocol to the (OP/ICESCR), complaints may be brought by or on behalf of individuals or groups of individuals claiming to be victims of violations of the ICESCR.

Under the CPED, "[a] request that a disappeared person should be sought and found may be submitted to the Committee, as a matter of urgency, by relatives of the disappeared person or their legal representatives, their counsel or any person authorized by them, as well as by any other person having a legitimate interest" (CPED, Article 30).

As to the admissibility of individual petitions, the six instruments establish specific criteria:

- the competence of the Committee needs to be recognized (OP/ICCPR I, Article 1; CAT, Article 22(1); CERD, Article 14(1); OP/ICRPD, Article 1; CPED, Article 31(1); OP/ICESCR, Article 1);
- exhaustion of domestic remedies (OP/ICCPR I, Articles 2 and 5(2)(a); CAT, Article 22(5)(b); CERD, Article 14(7); OP/ICRPD, Article 2(d); CPED, Article 31(2)(d)); OP/ICESCR, Article 3(1));
- no anonymous communication; the complaint is not abusive (OP/ICCPR I, Article 3; CAT, Article 22(2); CERD, Article 14(6); OP/ICRPD, Article 2(a) and (b); CPED, Article 31(2)(a) and (b)); OP/ICESCR, Article 3(2)(f) and (g));
- compatibility with provisions of the covenant/convention in terms of its applicability to the specific case in terms of time, place, subject and the personal entitlement to launch a complaint – *ratione temporis, loci, materiae, personae* (OP/ICCPR I, Article 3; CAT, Article 22(2); OP/ICRPD, Article 2(b); CPED, Article 31(2)(b)); OP/ICESCR, Article 3(2)(b) and (d));
- no current examination of the matter under another international procedure (OP/ICCPR I, Article 5(2)(a); CPED, Article 31(2)(c));
- no past or current examination of the matter under another international procedure (CAT, 22(5)(a); OP/ICRPD, Article 2(c)); OP/ICESCR, Article 3(2)(c));

- substantiation of the allegation of a concrete violation (*prima facie case*) (OP/ICCPR I, Article 2; CAT, Article 22(1); OP/ICPRD, Article 2(f); OP/ICESCR, Article 3(2)(e)).

The requirement that domestic remedies must have been exhausted before individual communications can become admissible to one of the treaty bodies concerned makes it necessary to consider the various remedies that exist at the national level. In fact, Article 2(3)(a) of the ICCPR makes it incumbent upon States Parties to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” There are a few exceptions to the requirement that domestic remedies be exhausted. The first derives from the use of the word “effective” in Article 2(3)(a) of the ICCPR. In situations where no remedy exists, or the existing remedies are insufficient to adequately remedy the complaint, the exhaustion of domestic remedies is not required. This is, for instance, the case when a person would normally be able to claim compensation for suffering but the national remedy does not provide for the award of financial compensation. The second exception to the exhaustion of domestic remedies is constituted by situations in which the application of the remedies is unreasonably prolonged.



## INTERNATIONAL JURISPRUDENCE

### Human Rights Committee

#### Case of communication Dev Bahadur Maharjan v. Nepal

UN Doc. CCPR/C/105/D/1863/2009, 2 August 2012

“7.6 With regard to the remedy under the Torture Compensation Act 1996, the Committee observes that according to article 5, paragraph 1 of the CRT claims for compensation must be made within 35 days from the event of torture or after a detainee’s release. It also notes that according to article 6, paragraph 2 of the CRT, an applicant may be fined if it is proved that he acted in bad faith. It further notes that the CRT provides for a maximum compensation of 100,000 Nepalese rupees (article 6, paragraph 1 of the CRT). Reiterating its previous jurisprudence, the Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the authorities against the alleged perpetrators. The Committee observes that, for purposes of admissibility, the author’s fear of re-arrest or reprisals after his release from detention has been sufficiently substantiated, including by documentary evidence of similar cases. The Committee therefore considers that because of the 35 day statutory limit from the event of torture or the date of release for bringing claims under the CRT, which is in itself flagrantly inconsistent with the gravity of the crime, this remedy was not available to the author.”

When a complaint is considered admissible, the committee in question will proceed to bring it to the attention of the State Party concerned. Within six months, the receiving State must submit to the relevant committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State (OP/ICCPR I, Article 4; CAT, Article 22(3); OP/ICRPD, Article 6(2); OP/ICESCR, Article 6(2); within a time limit of three months: CERD, Article 14(6); within a time limit set by the Committee: CPED, Article 31(4)). The subsequent considerations of the committee concerned will be based on the information made available to it by (“or on behalf of,” CAT, Article 22(1)) the petitioner and the State Party concerned (OP/ICCPR I, Article 5(1); CAT, Article 22(4); CERD, Article 14(7)(a)); OP/ICESCR, Article 8(1)). Following these considerations, which are made in closed meetings, the committee will forward its views to the State Party concerned and to the individual (OP/ICCPR I, Article 5(3) and 5(4); CAT, Article 22(6) and (7); CPED, Article 31(5); OP/ICRPD, Article 5; OP/ICESCR, Article 9(1); CERD, Article 14(7) (a) and (b), no indication that meetings of this Committee in this respect are closed meetings).

Pursuant to the CPED (Article 31(4)), the OP/ICESCR (Article 5) and the OP/ICRPD (Article 4), the committee may also ask States to give urgent consideration to the matter of taking interim measures to prevent irreparable damage to persons protected under the aforementioned treaties.

All committees are required to present regular reports (of their activities (annually under the ICCPR, CAT, CERD, CPED and OP/ICESCR; every two years under the OP/ICRPD), to the State Parties and the General Assembly of the United Nations (CAT, CPED and OP/ICESCR) and to the General Assembly of the United Nations and the Economic and Social Council (ICCPR, OP/ICRPD and CERD).

The procedure described above relates to individual violations of human rights. It is of course possible that they expose a pattern of violations of specific rights or in a specific country or region. In the event of such violations, individuals can bring their communication to the attention of the Working Group on Communications of the Human Rights Council under Council Resolution 5/1 and in accordance with General Assembly Resolution 60/251 (see Chapter 2, section 2.4.4).

### **11.5 Selected references**

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(last consulted on 30 September 2013)



**Part V**

# **SITUATIONS OF ARMED CONFLICT**

## CHAPTER 12 OUTLINE

- 12.1 Introduction
- 12.2 The origins of international humanitarian law (IHL)
- 12.3 The main concepts and rules of international humanitarian law (IHL)
  - 12.3.1 Scope of application of and obligations under IHL
  - 12.3.2 Basic rules and principles of IHL
  - 12.3.3 Prohibited means and methods of warfare
  - 12.3.4 Deprivation of liberty in armed conflict
  - 12.3.5 Refugees and internally displaced people
  - 12.3.6 Women in situations of armed conflict
  - 12.3.7 Children in situations of armed conflict
- 12.4 Violations of international humanitarian law (IHL)
- 12.5 The role of law enforcement officials in armed conflict
  - 12.5.1 The status of law enforcement officials
  - 12.5.2 Conduct of hostilities
  - 12.5.3 Other issues
- 12.6 Selected references

## KEY LEGAL DOCUMENTS

### Treaty law

- Hague Convention respecting the Laws and Customs of War on Land and its Annex, Regulations concerning the Laws and Customs of War on Land (Hague Convention IV, adopted in 1907, entered into force in 1910)
- Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare (Geneva Protocol, adopted in 1925, entered into force in 1928)
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention, adopted in 1864 and significantly updated in 1949, entered into force in 1950)
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention, adopted in 1906 and significantly updated in 1949, entered into force in 1950)
- Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention, adopted in 1929 and significantly updated in 1949, entered into force in 1950)
- Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention adopted in 1949, entered into force in 1950)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I, adopted in 1977, entered into force in 1978)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II, adopted in 1977, entered into force in 1978)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Additional Protocol III, adopted in 2005, entered into force in 2007)
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention, adopted in 1972, entered into force in 1975)
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention, adopted in 1993, entered into force in 1997)
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Anti-Personnel Min Ban Convention, adopted in 1997, entered into force in 1999)
- Convention on Cluster Munitions (adopted in 2008, entered into force in 2010)
- Convention on the Rights of the Child (CRC, adopted in 1989, entered into force in 1990)
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP/CRC-AC, adopted in 2000, entered into force in 2002)
- Rome Statute of the International Criminal Court (Rome Statute adopted in 1998, entered into force in 2002)

# CHAPTER 12

## INTERNATIONAL HUMANITARIAN LAW AND ITS RELEVANCE FOR LAW ENFORCEMENT OFFICIALS

### 12.1 Introduction

Law enforcement takes place at all times – whether a country is at peace, in a situation of internal violence or in a state of war with another country. Thus, as a matter of principle, the rules and standards discussed in the previous chapters remain applicable to all law enforcement actions, regardless of the underlying situation in the country concerned.

While it is possible for certain rights to be derogated, that does not occur automatically as a result of unrest or armed conflict. Until the authorities decide to declare a state of emergency<sup>26</sup> and to derogate certain (derogable) rights, the applicable legal framework remains unchanged and daily law enforcement work continues as normal. However, situations of armed conflict – be they non-international or international – present a country with specific challenges that may affect law enforcement work. The most common occurrences are as follows:

- Law enforcement officials may become targets in the conduct of hostilities;
- Law enforcement officials may be ordered to participate in the conduct of hostilities – *de facto* or if they are formally integrated into the armed forces of a country;
- Law enforcement officials may have to deal with people involved in or affected by the armed conflict, e.g. members of an armed group fighting against the government, members of the armed forces of another country, prisoners of war, other persons deprived of their liberty for reasons relating to the situation of armed conflict, and victims affected by the armed conflict;
- Law enforcement officials may have to investigate possible violations of international humanitarian law (IHL) that constitute offences under domestic and/or international criminal law.

Law enforcement officials need to understand their specific role and obligations in each of the possible scenarios and must act in accordance with the legal framework applicable to the situation. This chapter gives an overview of the main principles and rules of IHL and their consequences for the role and obligations of law enforcement officials in situations of armed conflict. However, it is not exhaustive and does not present in depth the very complex issue of the scope of application of law enforcement and its interplay with IHL. For further studies, the “selected references” at the end of the chapter may be consulted.

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<sup>26</sup> For further details on states of emergency see Chapter 5, section 5.3.

## 12.2 The origins of international humanitarian law (IHL)

International humanitarian law (IHL) is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. Nearly all civilizations since ancient times, and especially since the Middle Ages, have had rules restricting the right of belligerents to inflict injury on their adversaries. Laws for the protection of certain categories of people during armed conflict can similarly be traced back through history in almost any country or civilization in the world. Those categories of people have included women, children and elderly people, disarmed combatants and prisoners of war. Attacks against certain objects – places of worship, for example – and treacherous means of combat, such as the use of poison, have long been prohibited. However, it was not until the nineteenth century – when wars were waged by large national armies employing new and more destructive weapons and leaving a horrific number of wounded soldiers lying helpless on the battlefield – that a “law of war” based on multilateral conventions was developed. It was not a mere coincidence that this development took place at a time when States were becoming increasingly interested in establishing common principles of respect for human beings.

The treaty-making process to codify the rules of warfare dates back to the 1860s. On two separate occasions, an international conference was convened to conclude a treaty – each treaty dealing with one specific aspect of the law of war.

One conference was held in Geneva in 1864 and was concerned with the fate of wounded soldiers on the battlefield. The origin of the initiative was a small book published by Henry Dunant, a Swiss citizen who had witnessed the battle of Solferino in 1859. At that time, the treatment of wounded soldiers on the battlefield left almost everything to be desired. Worst of all, apart from the fact that insufficient resources were made available to care for the thousands of casualties, warfare at the beginning of that century no longer showed any respect for the customary practice of sparing the enemy’s field hospitals and leaving the medical personnel and the wounded unharmed. Field hospitals were repeatedly shelled and doctors and stretcher-bearers on the battlefield were open to attack. The situation of thousands of injured combatants, who were left without appropriate treatment, was disastrous. It was amidst the horrifying conditions on the battlefield of Solferino that the idea of the Red Cross was born. Soon after, the first steps were taken to ensure the protection of victims of armed conflicts: private organizations were set up in various countries to assist the military medical services in a task that the latter were not equipped to perform; the neutral status (inviolability) of medical personnel and medical establishments and units was formally declared; and a neutral sign intended to protect those helping the victims of conflict was adopted, a red cross on a white background, the reverse of the Swiss flag. The 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field expressed with clarity the idea of a generally applicable

humanitarian principle, by requiring the High Contracting Parties to care equally for their own wounded and for those of the enemy.

The other conference was held in St Petersburg in 1868 and led to the prohibition of the use of explosive projectiles weighing less than 400 grams. It was the first treaty to regulate the means of warfare.

Those two international conferences marked the starting point of the codification of the law of war in modern times. They were followed by two peace conferences held in 1899 and 1907 in The Hague. The main purpose of those gatherings was to regulate the methods and means of warfare. Since then, the resultant bodies of law have been known as the Law of Geneva and the Law of The Hague. The latter covers the conduct of military operations, whereas the Law of Geneva covers the protection of war victims.

Over the years, the law of war has been constantly reworked so as to enlarge the scope of protection for the victims and adapt it to the reality of new conflicts. The laws contained in the four Geneva Conventions of 1949 protecting the wounded, the sick, the shipwrecked, prisoners of war and civilians and in their three Additional Protocols of 1977 and 2005 are tangible results of those efforts. Today the four Geneva Conventions are, with 195 ratifications, the most universally accepted treaties in existence.

Of particular relevance to military commanders are the rules governing the use of methods and means of combat contained in the Hague Conventions and in the first two Additional Protocols, as they set limits that are intended to avoid unnecessary suffering and indiscriminate attacks. They are complemented by conventions addressing the particular suffering caused by specific types of means and methods of warfare: the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (adopted in 1925), the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention, adopted in 1972), the Convention on Certain Conventional Weapons (adopted in 1980) and its various Additional Protocols (adopted in 1980, 1995, 1996 and 2003), the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention, adopted in 1993), the Convention on the Prohibition of Anti-Personnel Mines (Ottawa Convention, adopted in 1997) and the Convention on Cluster Munitions (adopted in 2008).

After the traumatic experience of the Second World War, recourse to armed conflict was actually outlawed by the international community (in 1945) in the Charter of the United Nations, making it illegal for States to wage international

wars other than in self-defence or for the maintenance of collective security under the authority/approval of the United Nations Security Council: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations” (UN Charter, Article 2(4)). However, armed conflicts continue to be fought and the laws to limit violence and alleviate suffering have unfortunately become more important than ever.

In addition to convention or treaty-based law, there are a number of customary law rules emanating from a “*general practice accepted as law*” (ICJ Statute, Article 38(1)(b)) that are filling the gap left by treaty law, enhancing – both in international and in non-international armed conflicts – the protection offered to victims. A study conducted by the ICRC in 2005 identified 161 rules of customary IHL, constituting the common core of humanitarian law binding on all parties to armed conflicts.

## **12.3 The main concepts and rules of international humanitarian law (IHL)**

### **12.3.1 Scope of application of and obligations under IHL**

In order to determine which rules and standards of IHL are applicable, a distinction has first to be made between an international armed conflict and a non-international armed conflict.

- An international armed conflict or war takes place when armed hostilities break out between two or more States involving the official armed forces of those States. There is no need for a declaration of war and the threshold of intensity by which the fighting may be defined as an “international armed conflict” is low; a single armed confrontation between the armed forces of two countries may suffice.
- In a non-international armed conflict at least one of the parties to the conflict is a non-State actor. Certain criteria must nonetheless be fulfilled before a confrontation between a non-State actor and the State authorities or between two non-State actors can be called a non-international armed conflict. The non-State actor(s) involved must have a military structure with a command hierarchy, allowing them to conduct organized and sustained military actions. The intensity of the armed confrontation needs to exceed isolated incidences of violence.

In both international and non-international armed conflicts, the applicable legal framework is IHL, which is the *lex specialis* to international human rights law (IHRL) in these specific situations. However, IHRL remains applicable in different ways:

- It may complement IHL where the latter is not specific enough or fails to address specific issues;



- It may serve to interpret certain norms of IHL, in particular where the latter refers to specific legal concepts emanating from IHRL;
- It remains applicable to all situations that are unrelated to the armed conflict. The arrest of an ordinary criminal (a thief, for example) remains subject to IHRL and to domestic law.

Situations which do not fulfil the criteria for classification as an armed conflict remain governed by IHRL only (and, of course, the relevant domestic legislation). If the internal situation in a country does not reach the threshold of a non-international armed conflict, such situations are sometimes referred to as disturbances, tensions or other situations of violence. It is, however, important to bear in mind that such situations do not automatically imply that the legal framework differs from that which applies in peacetime. What is relevant is whether such situations lead to a decision by the government to declare a state of emergency and to restrict certain human rights. The requirements for a declaration of this order and its consequences with regard to derogable human rights have already been discussed in Chapter 5, section 5.3, of this Manual. It is worth noting that such a state of emergency may also be declared in a situation of armed conflict (international or non-international) and thus lead to possible derogations of certain human rights.

As, to a large extent, IHL comprises treaties and conventions, it first imposes obligations on those States (and their organs, including the armed forces) that have ratified the relevant treaties. States that have not adhered to certain treaties are nevertheless bound by (part of) their content to the extent that it has become customary IHL.

With regard to a non-international armed conflict, the applicable IHL rules are binding on all parties to the conflict, including the non-State armed group. The most important of these rules<sup>27</sup> are:

- Article 3 common to the four Geneva Conventions, which was explicitly formulated for non-international armed conflicts;
- Protocol II additional to the Geneva Conventions of 1949, which applies as long as the armed actor controls part of a country's territory and is therefore able to ensure the respect of the relevant IHL rules in that territory. Article 1 of Additional Protocol II states the following:

*“Material field of application*

1. *This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take*

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<sup>27</sup> The relevant rules will be addressed in greater detail in the following subsections.

*place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*

2. *This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”*

- Protocol III additional to the Geneva Conventions, which relates to the adoption of a new protective emblem, the red crystal;
- Customary IHL.

However, the fact that non-State armed groups are bound by the IHL rules applicable to a non-international armed conflict has no effect on their legal status (Article 3 common to the four Geneva Conventions).

Furthermore, the non-State armed group can also agree to be bound by IHL treaties, which generally occurs when the group concerned is endeavouring to achieve recognition by the international community. However, even without such a declaration, non-State armed groups are bound by common Article 3 and Additional Protocol II if the conditions for their application are fulfilled.

### **12.3.2 Basic rules and principles of IHL<sup>28</sup>**

The principal objective of the four Geneva Conventions and their two Additional Protocols of 1977 is to protect victims of armed conflict. The First Geneva Convention covers the protection of wounded and sick members of armed forces in the field. The Second Geneva Convention covers the protection of wounded, sick and shipwrecked members of the armed forces at sea. The Third Geneva Convention covers the protection of prisoners of war. The Fourth Geneva Convention covers the protection of civilian persons in time of war. Additional Protocol I extends the protection provided for in the four Geneva Conventions to victims of international armed conflicts, while Additional Protocol II extends the protection afforded by common Article 3 to victims of high-intensity non-international armed conflicts.

The provisions of the Geneva Conventions and their Additional Protocols relate to two main fields: the conduct of hostilities and the protection of persons in the power of the enemy (see sections 12.3.2.1 and 12.3.2.2).

Many of these rules can be considered customary rules of IHL and apply in both international and non-international armed conflicts.<sup>29</sup>

<sup>28</sup> For further details see <http://www.icrc.org/eng/war-and-law/index.jsp> (last consulted on 30 September 2013).

<sup>29</sup> For further details, see the list of customary rules of IHL in Henckaerts, Jean-Marie, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict," *International Review of the Red Cross*, Volume 87, No. 857, March 2005, pp. 175-212.

### 12.3.2.1 Conduct of hostilities

One of the fundamental principles of humanitarian law is that the right of belligerents to choose means and methods of warfare is limited. Three principles govern the limits to the conduct of hostilities: the principle of distinction, the principle of proportionality and the principle of precaution.

#### Principle of distinction

The principle of distinction is the central principle running throughout the law relating to the conduct of hostilities. All parties to a conflict must distinguish between legitimate military objectives on the one hand and civilians and civilian objects on the other. Military operations may be directed only against military objectives.

This principle thus ensures that civilians and civilian objects are protected against direct attacks. Wilfully attacking them – thus causing death or serious injury to body or health – is a war crime.

Although members of the armed forces who have laid down their arms or been placed *hors de combat* by sickness, wounds, detention or any other cause are not technically covered by the principle of distinction, they may not be made the object of attack. The same applies to the medical and religious personnel of the armed forces.

#### Principle of proportionality

This second key principle applicable to the conduct of hostilities – and distinct from the principle of proportionality under IHRL (see Chapter 3, section 3.3) – requires belligerents not to conduct an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the actual and direct military advantage anticipated.

More generally, indiscriminate attacks are also prohibited and may constitute war crimes.

#### Principle of precaution

While it is accepted that civilian casualties may be sustained as an incidental consequence of attacking a military objective, both sides are required to take precautions in the conduct of military operations to spare the civilian population, civilians and civilian objects. Most notably, belligerents must take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Furthermore, all sides must take precautions to limit the effects of attacks. Every effort should therefore be made to avoid locating military objectives within or near densely populated areas and to remove civilians and civilian objects under their control from the vicinity of military objectives.

Finally, due regard must be paid to the protection and preservation of the natural environment as well as to cultural property and dangerous installations.

### **12.3.2.2 Protection of persons in the power of the enemy**

The rules pertaining to the protection of persons in the power of the enemy include the following aspects:

- Soldiers who surrender or who are *hors de combat* are entitled to respect for their lives and for their moral and physical integrity. It is prohibited to kill or injure them.
- The wounded and sick must be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transport vehicles and equipment. The emblem of the red cross, red crescent or red crystal is the sign of this protection and must be respected.
- Captured combatants are entitled to respect for their lives, dignity, personal rights and convictions. They must be protected against all acts of violence and reprisals. They must have the right to correspond with their families and to receive relief.
- Civilians under the authority of a party to the conflict or an occupying power of which they are not nationals are entitled to respect for their lives, dignity, personal rights and convictions.
- Civilians or members of the armed forces who find themselves in the power of an adverse party to a conflict have the right to humane treatment and to protection of their dignity and integrity (Article 3 common to the four Geneva Conventions; Additional Protocol I, Article 11). Article 91 of Additional Protocol I states that “[a] party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” It must be noted that this provision applies only to situations of international armed conflict.
- Everyone must be entitled to benefit from fundamental judicial guarantees. No one may be sentenced without previous judgment pronounced by a regularly constituted court. No one may be held responsible for an act that he or she has not committed. No one may be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.

### **12.3.3 Prohibited means and methods of warfare**

In addition to the general prohibitions of means and methods of warfare which are indiscriminate or which cause superfluous or unnecessary suffering,

through a series of international treaties IHL has outlawed specific types of weapons, in particular biological and chemical weapons, blinding laser weapons, anti-personnel landmines and cluster munitions.

### WEAPONS PROHIBITED OR OTHERWISE REGULATED BY IHL TREATIES

Weapon	Treaty
Explosive projectiles weighing less than 400 grams	Declaration of Saint Petersburg (1868)
Bullets that expand or flatten in the human body	Hague Declaration (1899)
Poison and poisoned weapons	Hague Regulations (1907)
Chemical weapons	Geneva Protocol (1925) Chemical Weapons Convention (1993)
Biological weapons	Geneva Protocol (1925) Biological Weapons Convention (1972)
Weapons that injure by fragments which, in the human body, escape detection by X-rays	Protocol I (1980) to the Convention on Certain Conventional Weapons
Incendiary weapons	Protocol III (1980) to the Convention on Certain Conventional Weapons
Blinding laser weapons	Protocol IV (1995) to the Convention on Certain Conventional Weapons
Mines, booby traps and "other devices"	Protocol II, as amended (1996), to the Convention on Certain Conventional Weapons
Anti-personnel mines	Anti-Personnel Mine Ban Convention (1999)
Explosive remnants of war	Protocol V (2003) to the Convention on Certain Conventional Weapons

Several methods of warfare, such as perfidy (Additional Protocol I, Article 37) or denial of quarter (Additional Protocol I, Article 40), are prohibited. Starvation of civilians as a method of warfare is also prohibited. Therefore, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works may not be attacked, destroyed, removed or rendered useless (Additional Protocol I, Article 54;

Additional Protocol II, Article 14). *“Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are also prohibited”* (Additional Protocol I, Article 51(2); Additional Protocol II, Article 13(2)).

### **12.3.4 Deprivation of liberty in armed conflict**

#### **12.3.4.1 Background information**

The fundamental human rights of persons deprived of their liberty apply both in peacetime and in situations of armed conflict as most of them are non-derogable (see ICCPR, Article 4(2); for further details see Chapter 5, section 5.3.3). However, numerous examples lead to the conclusion that, in practice, the protection of the rights and freedoms of persons deprived of their liberty all too often falls short of the standards set by IHRL. Experience has shown that persons deprived of their liberty will inevitably be in a more vulnerable position whenever and wherever unrest grows and peace, security and stability in a country are under threat. This is particularly true for persons who have been deprived of their liberty in connection with an armed conflict and who are considered enemies of the State. They face greater risk of ill-treatment, torture or even enforced disappearance and extrajudicial killing. It is for that reason that IHL contains specific norms which seek to protect those persons. The rules of humanitarian law that relate to deprivation of liberty are therefore examined below.

#### **12.3.4.2 Non-international armed conflicts**

The fundamental legal provision protecting people affected by a non-international armed conflict is Article 3 common to the four Geneva Conventions, which is set out in the following box.

### **ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS**

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

Article 3 common to the four Geneva Conventions is today one of the most important rules providing absolute, non-derogable protection of the fundamental rights of human beings and is considered part of customary law.



## INTERNATIONAL JURISPRUDENCE

### International Court of Justice

#### Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), ICJ Reports 1986, Merits, Judgment, 27 June 1986

“Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules, which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 call ‘elementary considerations of humanity.’ (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22 [...]).”

It thus reaffirms to a large extent the applicability – even in times of armed conflict – of the fundamental human rights related to arrest and detention that are outlined in Chapter 8 of this Manual – including for persons who are arrested or detained in connection with the armed conflict. It is one of the areas where IHL and IHRL overlap and complement each other. The deprivation of liberty of persons taking part in the armed conflict is governed by IHL – as a *lex specialis* – as well as by applicable and relevant norms of IHRL and domestic law. Deprivation of liberty can take the form of administrative detention for the purpose of security in accordance with IHL. Persons taking part on the side of the non-State actor in the conduct of hostilities may also be charged for

criminal offences (murder, destruction of property, treason, etc.) in accordance with the domestic penal code. In both cases the fundamental rights and judicial guarantees outlined in Chapter 8, sections 8.2 and 8.5.5.3 respectively, must be respected. Conditions of detention must comply with international standards and show respect for the dignity of the person detained.

The particular relevance of Article 3 common to the four Geneva Conventions is that it also imposes obligations on the non-State actor taking part in the conflict. While a non-State actor is not legally entitled to arrest and detain somebody – since these are powers exclusively granted to State authorities – this actor may well actually deprive persons (e.g. members of the armed forces of the enemy State) of their liberty as a result of the conduct of hostilities. In such cases, Article 3 common to the Geneva Conventions requires the non-State actor to treat these persons humanely and prohibits torture and extrajudicial killings. Furthermore, common Article 3 clearly prohibits the taking of hostages.

Additional Protocol II to the Geneva Conventions establishes further detailed obligations for all parties to the conflict if, in the course of a non-international armed conflict, *“dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”* (Article 1(1)). The obligations are as follows:

- Principles providing fundamental guarantees for humane treatment similar to those in common Article 3 are reiterated (Article 4);
- Minimum provisions are laid down for the treatment of people who are interned or detained for reasons related to the armed conflict (Article 5(1) (a) to (e)), including:
  - care for the wounded and sick;
  - provision of food, water, health and hygiene facilities, and protection;
  - entitlement to receive individual or collective relief;
  - entitlement to practise religion and receive spiritual assistance;
  - working conditions and safeguards similar to those afforded to the civilian population.
- Those responsible for the internment or detention must also, within the limits of their capabilities, respect the following provisions relating to such persons (Article 5(2)(a) to (e)):
  - separate accommodation for men and women (except in the case of families) and the supervision of women by women;
  - the right to receive and send letters and cards;
  - places of internment and detention may not be located close to the combat zone;
  - entitlement to medical examinations;
  - their physical or mental health and integrity may not be endangered by any unjustified act or omission.



- The protection afforded by Article 4 and by Article 5(1)(a), (c) and (d) and 5(2)(b) is extended to people deprived of their liberty for reasons related to the armed conflict in question, who are not covered by the first paragraph of Article 5 (Article 5(3)).
- Article 6 sheds light on the issue of prosecution and punishment of criminal offences related to the armed conflict. In particular, it sets forth the minimum guarantees for independence and impartiality of court proceedings:
  - prompt information about criminal charges;
  - the principle of individual penal responsibility;
  - non-retroactivity of criminal law;
  - the presumption of innocence;
  - the right to be present at one’s own trial;
  - no compulsion to testify or to confess guilt.

In situations of non-international armed conflict, the above-mentioned principles of humanitarian law are complemented by applicable international human rights rules and principles – unless the latter have been lawfully derogated from. For further details on the derogation of human rights in a state of emergency see Chapter 5.

#### **12.3.4.3 International armed conflicts**

The Geneva Conventions and Additional Protocol I are applicable in cases of declared war or of any other armed conflict arising between two or more of the States party to the Geneva Conventions and Additional Protocol I from the beginning of such a situation, even if one of them does not recognize the state of war. These treaties also cover armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination (Article 2 common to the four Geneva Conventions).

In cases not covered by the Geneva Conventions, the Additional Protocols or other international treaties, or in the event of denunciation of these treaties, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience (Additional Protocol I, Article 1; First Geneva Convention, Article 63; Second Geneva Convention, Article 62; Third Geneva Convention, Article 142; Fourth Geneva Convention, Article 158).

With regard to detention or, more widely, to deprivation of liberty in situations of international armed conflict, the first important distinction to be made is between prisoners of wars (i.e. combatants who have fallen into the power of the enemy) and civilian internees. According to Article 43(2) of Additional Protocol I, “[m]embers of the armed forces of a Party to a conflict

*(other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities."*

A definition of "armed forces" is given in Article 43(1) of Additional Protocol I:

*"The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."*

By default, those not qualifying as combatants are civilians who do not have a right to participate in hostilities but who, conversely, do have a right to be protected against dangers arising from military operations, *"unless and for such time as they take a direct part in hostilities"* (Additional Protocol I, Article 51(3)).

*"Any combatant [...] who falls into the power of an adverse Party shall be a prisoner of war"* (Additional Protocol I, Article 44(1)). Article 4 of the Third Geneva Convention, which deals specifically with the treatment of prisoners of war during captivity, gives a more detailed definition of who is entitled to prisoner-of-war (POW) status. The basic premise for the treatment of POWs is that they must be treated humanely at all times and that they must be *"protected, particularly against acts of violence or intimidation and against insults and public curiosity"* (Third Geneva Convention, Article 13). Article 11 of Additional Protocol I states that *"[t]he physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty [...] shall not be endangered by any unjustified act or omission."*

In this case, deprivation of liberty is directly related to the conflict in question. POWs cannot be prosecuted for taking a direct part in hostilities. Their internment is not a form of punishment but is only intended to prevent their further participation in the conflict. They must be released and repatriated without delay after the end of hostilities. The detaining power may prosecute them for possible war crimes but not for acts of violence that are lawful under IHL.

Similar to the deprivation of liberty of POWs, the internment of civilians is a measure that can be taken for imperative reasons of security; it is therefore not used as a form of punishment. The required conditions of internment are virtually the same as those applying to prisoners of war and, by and large, the rules of internment applicable to civilians follow almost word for word those applicable to prisoners of war (see Articles 79 to 135 of the Fourth Geneva Convention).

Article 75 of Additional Protocol I sets out fundamental guarantees for the treatment of persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Geneva Conventions and Additional Protocol I. The full text of Article 75 is cited in the following box.

## **PROTOCOL I ADDITIONAL TO THE GENEVA CONVENTIONS, ARTICLE 75**

- “1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
  - (a) violence to the life, health, or physical or mental well-being of persons, in particular:
    - (i) murder;
    - (ii) torture of all kinds, whether physical or mental;
    - (iii) corporal punishment; and
    - (iv) mutilation;
  - (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
  - (c) the taking of hostages;
  - (d) collective punishments; and
  - (e) threats to commit any of the foregoing acts.
3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he [or she] understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
  - (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him [or her] and shall afford the accused before and during his trial all necessary rights and means of defence;
  - (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

- (c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he [or she] was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
  - (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
  - (e) anyone charged with an offence shall have the right to be tried in his [or her] presence;
  - (f) no one shall be compelled to testify against himself [or herself] or to confess guilt;
  - (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him [or her] and to obtain the attendance and examination of witnesses on him [or her] behalf under the same conditions as witnesses against him [or her];
  - (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
  - (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
  - (j) a convicted person shall be advised on conviction of his [or her] judicial and other remedies and of the time-limits within which they may be exercised.
5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.
6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.
7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
- (a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
  - (b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.
8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1."

### 12.3.5 Refugees and internally displaced people

The situation of refugees and internally displaced people (IDPs) as well as the relating responsibilities and obligations of law enforcement officials in view of their duty to protect have already been extensively addressed in Chapter 6, section 6.5. However, certain aspects that apply specifically in situations of armed conflict may appropriately be added at this juncture.

#### 12.3.5.1 International armed conflict

For the protection of refugees and internally displaced persons, the first observation to be made is that as long as they are not combatants, they must be considered as civilians and are protected against attacks unless and for such time as they directly participate in hostilities.

Another important aspect is that in the course of armed conflict, families easily become separated from each other and not knowing the whereabouts of a loved one is generally a source of great anxiety and suffering. Re-establishing family links is crucial to put an end to this anxiety. Article 26 of the Fourth Geneva Convention is of particular relevance in this regard. It stipulates that “[e]ach party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.” In this connection reference is made to Article 33 of Additional Protocol I, which addresses the issue of “missing persons” and the obligation for parties to the conflict to search for them and facilitate such searches. Article 74 of the same instrument addresses the issue of reuniting dispersed families.

The Fourth Geneva Convention prohibits “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, [...] regardless of their motive” (Article 49). It furthermore states, in the same Article, that the “Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” Article 85(4)(a) of Additional Protocol I stipulates that the aforesaid acts, “when committed wilfully and in violation of the Conventions or the Protocol,” shall be regarded as grave breaches.

Finally, in Article 44 of the Fourth Geneva Convention and Article 73 of Additional Protocol I, refugees and stateless persons are recognized as protected persons requiring special treatment; they shall not be considered as enemies merely because they are aliens and shall benefit from the same protection as any other civilian.

### 12.3.5.2 Non-international armed conflict

Most displacements in recent decades have been caused by non-international armed conflicts. In such situations, protection for the civilian population is afforded by Article 3 common to the four Geneva Conventions and by Additional Protocol II (applicable in situations of high-intensity non-international armed conflict). Common Article 3 states that persons taking no active part in the hostilities must be treated humanely by the parties to the conflict in all circumstances and without any adverse distinction. Additional Protocol II provides further measures for the protection for the civilian population, which may include refugees and IDPs. Rules for the general protection of the civilian population against the dangers arising from military operations are set out in Articles 13 to 16 of Additional Protocol II. Article 17 stipulates that the forced movement of civilians is prohibited *“unless the security of the civilians involved or imperative military reasons so demand.”* Paragraph 2 of that Article states, moreover, that *“[c]ivilians shall not be compelled to leave their own territory for reasons connected with the conflict.”*

Where circumstances have forced people to leave their territory, they should have the right to return to the place of their habitual residence. Such a return must take place under acceptable conditions of security and with guarantees of fundamental respect for their human dignity. It is not uncommon for IDPs to have lost all identification documents. The provision of such papers is crucial if IDPs are truly to enjoy their right to legal personality through, for instance, the registration of births, deaths and marriages.

### 12.3.6 Women in situations of armed conflict

#### 12.3.6.1 Background information

Women are often in greater danger than men during situations of both non-international and international armed conflict. It is for this reason that special measures for the protection of women are justified. IHL contains specific provisions designed to protect women from violence during armed conflict. In addition, general provisions of human rights treaties can also be construed as prohibiting violence against women during situations of armed conflict. Importantly, women are entitled to the general protection of humanitarian law (for both combatants and civilians) on a non-discriminatory basis.

Each of the four Geneva Conventions and their Additional Protocols contain provisions prohibiting any adverse – i.e. unfavourable – distinction based on gender (First Geneva Convention, Article 12; Second Geneva Convention, Article 12; Third Geneva Convention, Articles 14 and 16; Fourth Geneva Convention, Article 27(2); Additional Protocol I, Articles 9(1) and 75(1); Additional Protocol II, Article 2(1)). Parties to the various Geneva Conventions and Additional Protocols retain the right to extend additional protection to women. The provision on non-discrimination is, in most instruments,

supplemented by another provision stipulating that “*women shall be treated with all consideration due to their sex*” (First Geneva Convention, Article 12; Second Geneva Convention, Article 12; see also the Third Geneva Convention, Article 14). Women are also entitled to certain gender-specific forms of protection under IHL, which concern mainly female prisoners of war and female civilians, including when they are detained or interned for security reasons.

### **12.3.6.2 Protection of women combatants and prisoners of war**

There are no laws prohibiting women from taking (official) part in the conduct of hostilities in situations of armed conflict. If women choose to become combatants within the meaning of the Geneva Conventions and their Additional Protocols, they become legitimate targets and can be attacked to the same extent as men. As male combatants, female combatants are protected against means and methods of warfare that involve the imposition of superfluous injury or unnecessary suffering.

Although IHL is identical for men and women combatants in terms of the conduct of hostilities, female combatants have specific protection when they fall into the power of the enemy and thus become prisoners of war. For instance, detaining authorities shall provide separate dormitories for women and men (Article 25) and separate sanitary conveniences (Article 29). The principle of providing differentiated treatment for women also resulted in provisions relating to the separate confinement of women from men and the immediate supervision of women by women (Article 97).

### **12.3.6.3 Protection of civilian women during armed conflict**

Women who are not combatants are civilians and are thus protected – in both non-international and international armed conflict – against attacks unless and for such time as they directly participate in hostilities.

In non-international armed conflict, Article 3 common to the four Geneva Conventions applies to all persons covered by this article, including women. Additional Protocol II – in addition to the protection applicable to all persons – stipulates specific protection for women. Article 5(2)(a) of Additional Protocol II provides that women detained for reasons related to the armed conflict “*shall be held in quarters separated from those of men and shall be under the immediate supervision of women*”; an exception is made when men and women of the same family are accommodated together. Article 6(4) provides that the death penalty “*shall not be carried out on pregnant women or mothers of young children.*”

The protection of civilians in situations of international armed conflict is addressed by the Fourth Geneva Convention, which contains a number of specific provisions for the protection of women in general (Article 27), as well

as for pregnant women and women internees (Articles 38(5), 76, 85, 98, 124 and 132). Additional Protocol I reiterates the requirement for separate accommodation for men and women whose liberty has been restricted and further requires female supervision of women whose liberty has been restricted for reasons related to the armed conflict (Additional Protocol I, Article 75(5)).

Sexual and other forms of assault directed specifically against women civilians during armed conflict may be part of a deliberate strategy to repress or punish the civilian population or it may be the result of a failure by command officials to discipline their troops. IHL specifically forbids any attack on the honour of women, including rape, enforced prostitution and any form of indecent assault (Fourth Geneva Convention, Article 27; Additional Protocol I, Articles 76; Additional Protocol II, Article 4(2)(e)).

#### **12.3.6.4 A note on rape as a method of warfare**

Rape and abuse of women has been reported in almost every modern situation of armed conflict – both international and non-international. There can be no doubt that rape, enforced prostitution and any other form of indecent assault against women are prohibited under IHL. Nevertheless, as – for instance – the armed conflicts in Rwanda and in the territory of the former Yugoslavia so graphically demonstrated, the use of rape as a method of warfare is still prevalent. All too often in these situations, women and girls are raped in an organized and systematic manner – a clear indication that sexual abuse is part of a wider pattern of warfare used to deprive opponents of their human dignity, to undermine and punish enemies and to reward troops.

However, in this regard it is important to note that it is not only women who are affected by rape and other forms of sexual violence in general and in particular as a method of warfare. Such assaults also take place against boys and men with similar purposes as those mentioned above and with equally serious consequences for all victims and their families.

The international tribunals set up by the United Nations Security Council to deal with the aftermath of the Yugoslavia and Rwanda conflicts have been unequivocal in condemning such atrocities as war crimes and/or crimes against humanity. The perpetrators are hence individually responsible under international criminal law – as are their superiors who failed to take action to prevent such abuse. Rape is not an accident of war. Its widespread use in times of conflict reflects the special terror that it holds for the victims, the sense of power that it gives to the perpetrator and the contempt for the victim that is expressed by it. Such atrocities will continue to occur as long as there is an absence of political will to prevent them and as long as impunity can be guaranteed for offenders.



### 12.3.7 Children in situations of armed conflict

Situations of armed conflict undoubtedly have a particularly devastating effect on children. The separation of families, the orphaning of children, the recruitment of children into armed forces or armed groups and the death or injury of child civilians are but a few gruesome examples of likely consequences of war for children. It is difficult to gauge the effects of war on the future psychological and physical development of children who have been exposed to armed conflict situations. Recent history provides a sufficient number of vivid examples of the terrible effects of war on children. Children will always require special protection and treatment in situations of armed conflict. States Parties must therefore take all feasible measures to ensure that children who are affected by an armed conflict are protected and cared for.

Situations of non-international armed conflict are governed by Article 3 common to the four Geneva Conventions, and – where the criteria of applicability of its Article 1 are fulfilled – also by Additional Protocol II. Article 4 of the latter provides fundamental guarantees for the humane treatment of persons not or no longer taking part in hostilities. Article 4(3)(a) to (e) states the special measures which are applicable or relevant to children concerning:

- education;
- the reunion of temporarily separated families;
- the minimum age (15 years) for participation in hostilities or recruitment into the armed forces;
- the protection of captured child combatants under the age of 15;
- the temporary displacement of children for reasons related to the armed conflict.

Similar provisions with regard to international armed conflict (to which the four Geneva Conventions and their Additional Protocol I apply) can be found in Articles 77 and 78 of Additional Protocol I. According to Article 24 of the Fourth Geneva Convention, States party to the conflict must *“take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances.”* If arrested, detained or interned for reasons related to the armed conflict, children must be *“held in quarters separate from the quarters of adults, except where families are accommodated as family units”* (Additional Protocol I, Article 77(4)). Unless there are imperative reasons for doing so, no Party to the conflict may *“arrange for the evacuation of children, other than its own nationals, to a foreign country”* (Additional Protocol, Article 78(1)). When an evacuation does occur, all necessary steps must be taken to facilitate the return of the children to their families and their country (Additional Protocol I, Article 78).

Article 38 of the Convention on the Rights of the Child (CRC) urges States Parties to “ensure respect for rules of international humanitarian law” which are applicable to them in situations of armed conflict and relevant to the child. It furthermore enjoins States Parties to “take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.” States Parties may not recruit people under the age of 15 into their armed forces. In recruiting young people between the ages of fifteen and eighteen, they are to “give priority to those who are oldest.”

The Optional Protocol to the CRC (OP/CRC-AC) on the involvement of children in armed conflict stipulates that its State Parties “shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities” (Article 1) and that they are “not compulsorily recruited into their armed forces” (Article 2). Armed groups that are distinct from the regular armed forces of a State “should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years” (Article 4(1)). States are obliged to take “all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices” (Article 4(2)), to demobilize children within their jurisdiction who have been recruited or used in hostilities, and to provide “all appropriate assistance for their physical and psychological recovery and their social reintegration” (Article 6(3)).

Finally, it should be noted that the conscription or enlistment of children under the age of 15 years into armed forces or armed groups as well as the use of children to participate actively in hostilities is a war crime in both international and non-international armed conflicts (Rome Statute, Article 8(2)(b)(xxvi) and (e)(vii)).

## **12.4 Violations of international humanitarian law (IHL)**

Despite its general, worldwide acceptance, IHL is violated all too often. Some of the most serious violations of these rules in international armed conflicts, which are referred to as “grave breaches,” are listed in the Geneva Conventions and in Additional Protocol I. Wilful killing or torture of a person protected under IHL and making the civilian population the object of attack are just two examples of these types of violations of IHL. Those same acts are also prohibited and criminalized non-international armed conflicts. Other international instruments and customary law also contain provisions regarding other serious violations, such as the forceful conscription of children under 15 years of age and the use of certain prohibited weapons. All those violations are so serious that they entail individual criminal responsibility for those who commit them, or order others to do so, and are thus considered “war crimes.”

Effective mechanisms are therefore indispensable to ensure and enhance compliance with and to prevent violations of IHL. Of such mechanisms, *“the prevention and, if necessary, repression of serious violations are particularly important. Under IHL, the perpetrators bear individual responsibility for the violations they commit, and [...] must be prosecuted and punished.”*<sup>30</sup> Furthermore, violations may also result from omission, i.e. a failure to act. In situations of armed conflict, armed forces or groups are usually placed under a command responsible for the conduct of subordinates. The hierarchical superiors should therefore also be held individually responsible if they fail to take proper measures to prevent their subordinates from committing serious violations of IHL.

*“The responsibility for prosecuting serious violations of international humanitarian law falls primarily on States. This is particularly clear in the case of ‘grave breaches,’ where the requirement goes so far as to oblige States to search for and punish all those who have themselves committed or issued orders to others to commit a grave breach, regardless of the nationality of the perpetrator or where the crime was committed”*<sup>31</sup> (see First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146; Additional Protocol I, Article 85(1)).

*“A necessary first step toward fulfilling the obligation to prosecute and punish serious violations is to enact national legislation penalizing the conduct prohibited under international humanitarian law [and] to grant domestic courts jurisdiction over [these] crimes.”*<sup>32</sup> The International Committee of the Red Cross has developed a kit that provides advice for countries on how to comply with their obligations to ensure the respect of IHL by the forces under their control and in their territory and to prosecute violations of IHL (see footnote 30).

More recently, the responsibility of States to prosecute violations of IHL has been reinforced by the establishment of international criminal tribunals (see also Chapter 1, section 1.3.3):

- International Criminal Tribunal for Rwanda;
- International Criminal Tribunal for Former Yugoslavia;
- “Mixed” tribunals (half-international and half-domestic) for, in particular, Cambodia, East Timor, Sierra Leone and, most recently, Lebanon;
- International Criminal Court.

Today, the International Criminal Court (ICC) has jurisdiction over the most serious violations of IHL, i.e. war crimes, in particular when committed as part

30 ICRC, *National Enforcement of International Humanitarian Law, Information kit*, ICRC, Geneva, 2004, [http://www.icrc.org/eng/assets/files/other/kit\\_national\\_enforcement.pdf](http://www.icrc.org/eng/assets/files/other/kit_national_enforcement.pdf) (last consulted on 30 September 2013).

31 ICRC, *The role of States in prosecuting violations of international humanitarian law*, Interview with Cristina Pellandini, 26 October 2010, <http://www.icrc.org/eng/resources/documents/interview/interview/2010/penal-repression-interview-2010-10-26.htm> (last consulted on 30 September 2013).

32 *Ibid.*

of a plan or policy or as part of a large-scale commission of such crimes. War crimes under jurisdiction of the Court are defined in Article 8 of the Rome Statute. They include grave breaches of the Geneva Conventions of 12 August 1949, as well as other serious violations of the laws and customs applicable in international and non-international armed conflicts. For further information on the ICC, see Chapter 1, section 1.3.3 and Chapter 11, section 11.4.1.

## **12.5 The role of law enforcement officials in armed conflict**

### **12.5.1 The status of law enforcement officials**

Law enforcement officials are, under normal circumstances, not part of the armed forces of a country and are therefore civilians from the point of view of IHL. They are thus protected under IHL, i.e. they are not legitimate military targets and should be protected against attacks in the same way as any other civilian. Deliberately killing a law enforcement official in the course of an armed conflict may thus constitute a war crime.

This remains valid, however, only as long as law enforcement officials are not integrated into the armed forces, such integration not being unlawful from the perspective of IHL. On the contrary, Article 43 of Protocol I additional to the Geneva Conventions provides explicitly for the possibility of the formal integration of armed law enforcement agencies into the armed forces of a country and stipulates that “[w]henever a Party to a conflict incorporates [... an] armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict” (Article 43(3)).

Even if they are not formally integrated into the military armed forces of their country, law enforcement agencies as a whole or individual law enforcement officers may be directly implicated in the conduct of hostilities. Law enforcement officials directly participate in hostilities when the following three criteria are all met:

- They carry out specific acts which are likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, may inflict death, injury or destruction on persons or objects protected against direct attack (threshold of harm);
- There is a direct causal link between the act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part (direct causation);
- The act is specifically designed to attain the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).

The criteria established in order to determine when a civilian starts to be directly involved in the hostilities have been identified by the ICRC in its Interpretative Guidance on Direct Participation in Hostilities under International

Humanitarian Law.<sup>33</sup> It would be beyond the scope of this Manual to present the criteria in detail. The essential matter to be borne in mind is the fundamental difference between law enforcement and the conduct of hostilities. Law enforcement aims typically at enforcing domestic legislation, including bringing perpetrators of crimes to justice, maintaining or restoring public security, law and order, and protecting and assisting people in need. The purpose is to save and to protect life and, for that reason, to ensure that force and firearms are used only as a last resort when other available means remain ineffective or hold no promise of achieving the intended result. The legal framework regulating the use of force for law enforcement purposes is established primarily in human rights law. The assumption underlying the conduct of hostilities, however, is that the use of force is inherent in warfare given that the ultimate aim of military operations is to prevail over the enemy's armed forces. The use of force and firearms against legitimate targets is thus presumed to be lawful. The principles and rules governing the conduct of hostilities (i.e. distinction, proportionality and precautions in attack, as discussed above) are established in IHL. In practice, it is not always easy to distinguish between direct participation in hostilities and law enforcement activities, particularly in non-international armed conflicts.<sup>34</sup>

When law enforcement officials conduct activities that extend beyond the bounds of law enforcement because they participate directly in hostilities or because they are integrated into the armed forces, this will have consequences for the targeting of law enforcement officials. In both cases, law enforcement officials become a lawful target of attack – in both international and non-international armed conflict. For instance, the deliberate killing of a police officer in a non-international armed conflict will usually be considered murder or homicide under domestic law. However, it is not a violation of IHL if the police officer was either integrated into the armed forces or directly participating in hostilities. Law enforcement officials directly participating in hostilities thus cease to be protected against attack under international law; the State authorities and the law enforcement officials themselves need to be aware of this.

Finally, in the course of an international armed conflict, law enforcement officials will be afforded POW status if they were formally integrated into the armed forces and subsequently captured by the other side. If captured, law enforcement officials may be deprived of their liberty until the cessation of active hostilities.

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33 ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009.

34 On the complex issue of the interplay between the conduct of hostilities and law enforcement paradigms, see ICRC Report, *The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, Report prepared by Dr Gloria Gaggioli (ICRC, Geneva, November 2013). See also the ICRC Report on *International Humanitarian Law and the challenges of contemporary armed conflicts*, 31IC/11/5.1.2, ICRC, Geneva, October 2011, in particular pp. 18-19.

### 12.5.2 Conduct of hostilities

The previous section has shown that, from the perspective of international law it may be lawful for law enforcement officials to take part in the conduct of hostilities if they are formally integrated into armed forces.<sup>35</sup> However, there is a high price to be paid for taking up this option. The considerable challenge of complying with two distinct legal frameworks – IHL and IHRL – has already been addressed to a certain extent in Chapter 5 with regard to the use of military armed forces in law enforcement.

Law enforcement officials suddenly tasked with operating within the framework of the conduct of hostilities face challenges that are equally demanding. They are required to switch from thinking in terms of “serve and protect” or “maintain peace and order” to the objective of “kill or neutralize the enemy.” The use of force, and particularly of lethal force, becomes lawful when directed at legitimate targets and there is no longer any need to demonstrate that it was the last resort. These fundamental changes have implications for all areas shaping the conduct of operations: operational procedures, education, training and equipment and even the system of sanctions. The higher levels of command are required to ensure that law enforcement officials are enabled to participate in the conduct of hostilities in full compliance with the legal framework applicable, i.e. IHL.

This challenging task calls for a broad range of measures, as presented in the following box.



## INTEGRATION IN PRACTICE

### Doctrine and education

If asked to participate in the conduct of hostilities, law enforcement officials may find themselves in a situation of extreme violence, where their reactions nonetheless still need to be controlled. The commanding officers need to give clear orders so as to ensure full respect for international humanitarian law (IHL). The message that “even war has limits” needs to be clear and the underlying rules need to be included in all educational activities.

### Training and equipment

The equipment and training in its use needs to be adapted to the new situation. Some types of equipment that may be used lawfully in law enforcement operations suddenly become unlawful in the context of hostilities. For instance, riot control agents – commonly known as “tear gas” – and expanding bullets may be used lawfully in law enforcement operations, but their use is prohibited in the conduct of hostilities. This needs some explanation:

<sup>35</sup> The existence of national laws providing for this possibility is not uncommon. They would naturally have to be respected. A discussion of these laws is, however, beyond the scope of this Manual.

- In law enforcement, tear gas is intended to limit the use of other more dangerous weapons, particularly firearms. Tear gas weapons should therefore be designed and used so as to cause the least possible harm. In the conduct of hostilities, the 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, the 1993 Chemical Weapons Convention and customary IHL prohibit the use of *any* toxic chemical, including tear gas, as a weapon. The intention in prohibiting the use of tear gas as a “method of warfare” is to prevent the risk of hostilities escalating to the use of chemical warfare agents. In fact, most past cases in which chemical warfare agents were used in armed conflict began with the use of tear gas.
- Live ammunition may be used in law enforcement operations only under extreme circumstances in order to protect life (BPUFF No. 9). The use of expanding bullets can be explained by the need to minimize the risk of harm to uninvolved bystanders (expanding bullets are likely to stay in the targeted body and are less harmful in case of ricochets). Furthermore, police ammunition typically has much less velocity and deposits far less energy than military rifle ammunition. In situations of armed conflict, where high velocity ammunition carrying large amounts of energy is used, expanding bullets are considered to cause unnecessary suffering.

Contemporary military equipment is highly sophisticated and requires a great deal of training to ensure that it is used in full respect of the principles of distinction and proportionality. Law enforcement officials must be adequately trained in order to avoid unnecessary or excessive damage to protected persons and objects.

### **System of sanctions**

Law enforcement officials need to be held accountable for any failure to meet their obligations under IHL. In particular, they need to be aware that they may be charged with war crimes if they commit serious violations of IHL.

In situations of long-lasting non-international armed conflicts, State authorities sometimes give their military armed forces and/or their law enforcement agency mixed mandates and have to resort to a system of pre-established standard operational procedures for both ordinary law enforcement work and the conduct of hostilities. However, this is a complex undertaking in relation to the use of force and such procedures should make a clear distinction between the conduct of hostilities and law enforcement. The lines between the two, particularly where the use of force and firearms is concerned, cannot be blurred and the forces tasked with a mixed mandate must be enabled to operate in full compliance with the legal framework applicable to the operation in question, be it a law enforcement operation or the conduct of hostilities.

Training in the use of firearms presents another particular challenge. The general aim of all training is to equip trainees to respond appropriately in a given situation. When it comes to the use of firearms, such situations will

usually require instantaneous, almost instinctive reactions. A soldier's training will tend to promote rapid recourse to firearms against legitimate targets, while a law enforcement official should be trained to avoid the use of firearms except when absolutely necessary. Therefore, where armed forces or law enforcement officials are involved in both military *and* law enforcement operations, the training provided must include exercises addressing the need to distinguish very clearly between situations in which force is used against legitimate targets under the conduct of hostilities paradigm and situations in which force is used in the context of law enforcement operations (e.g. dealing with civilian unrest). The trainee must be equipped to make the correct choice in a fraction of a second and training therefore needs to be specifically designed for that purpose and be allocated the necessary time and resources.

Authorities should be aware of the complex measures and precautions to be taken when deploying their law enforcement officials in the conduct of hostilities. If they do not have the means to do so adequately, they should, as far as possible, refrain from changing the mandate and mission of their law enforcement personnel.

It nonetheless needs to be acknowledged that the internal situation in some countries is particularly complex and that, in terms of established procedures as well as the appropriate equipment and training, the authorities will have to take account of the specific challenges of a quickly changing environment. Checkpoints are particularly problematic. For instance, whether a driver breaking through a checkpoint can be considered a legitimate military target because the driver is believed to be a member of an armed group fighting the government (which would imply that it is legitimate under IHL to use of lethal force) or whether the driver might just be an "ordinary criminal" trying to escape from a police control (which would not necessarily justify the use of lethal force) is a difficult question placing a high burden of responsibility on those manning the checkpoint. This dilemma can only be solved by introducing a broad range of precautions covering operational proceedings for the setting-up of checkpoints, as well as by providing training and adequate equipment for those whose task is to man the checkpoint.

It is worth noting that the decision regarding the legal framework applicable is left neither to the discretion of the higher authorities nor to that of the commanding officer. They cannot choose to switch freely from one legal framework to the other as it suits them. The application will depend on objective criteria as to whether the overall situation qualifies as an armed conflict or not and whether the action taken is directed against a legitimate target and can therefore be considered as part of the conduct of hostilities or as a normal law enforcement activity.



All too often, authorities deliberately fail to provide their forces with adequate information about their mandate and consequently the legal framework applicable. For political reasons, authorities may deny the fact that their country is in a situation of non-international armed conflict, while at the same time deploying military means to neutralize and kill their adversaries. This is a dangerous undertaking as the members of their security forces may end up violating the applicable legal framework and being held accountable for such violations (at least at the international level).

Finally, the authorities also need to take all possible precautionary measures when law enforcement officials return to their normal law enforcement duties after having participated in the conduct of hostilities. The process of mentally readjusting from a conduct of hostilities paradigm in which it is presumed lawful to use force against legitimate targets back to a law enforcement paradigm in which the use of force should be avoided as far as possible is probably at least as difficult as the initial mental switch when starting to participate in the conduct of hostilities. The commanding officers need to take all necessary precautions to prevent law enforcement officials from continuing to deploy the same techniques and tactics that they used when fighting the enemy.

### **12.5.3 Other issues**

Law enforcement officials may also have to deal with persons deprived of their liberty in connection with a situation of armed conflict. In that case they must know and understand the difference between prisoners of war, persons detained because of criminal offences (regardless of whether these offences were related to a situation of armed conflict or not) and persons detained administratively without criminal charges – and treat these persons in full respect of their rights in accordance with their status (for the rules applicable in each case see Chapter 8 and Chapter 12, section 12.3.4).

If called to investigate possible violations of IHL, law enforcement officials must be familiar with the applicable rules and be able to identify possible violations.

Law enforcement officials must be fully aware of their obligations with regard to the rights and vulnerabilities of specific groups affected by the situation of armed conflict, including the provision of protection and assistance. For instance, when dealing with children recruited into armed forces or armed groups, they should not treat them as if they were enemies or criminals. Children who have been recruited to take part in hostilities are themselves victims and should be treated as such. For further discussion of the needs and rights of specific groups, see Chapter 6.

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# **ANNEXES AND INDEX**



## ANNEX 1 BIBLIOGRAPHY

This Annex is a compilation of all selected references cited in the individual chapters in this Manual. The hyperlinks were all last consulted on the editorial closing date, 30 September 2013.

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## ANNEX 2

# KEY LEGAL DOCUMENTS

This Annex is a compilation of all key legal documents listed in the individual chapters in this Manual. The documents presented under treaty law and under non-treaty law, as in the chapters, have been subdivided into “universal” and “regional” legal acts. In each section, they are arranged in alphabetical order, with the exception of the four Geneva Conventions, which are listed in chronological order. All Protocols are listed immediately after the conventions to which they apply.

### **Treaty law: universal**

- Charter of the United Nations (UN Charter, adopted in 1945, entered into force in 1945)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, adopted in 1984, entered into force in 1987)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Optional Protocol (OPCAT, adopted in 2002, entered into force in 2006)
- Convention on Cluster Munitions (adopted in 2008, entered into force in 2010)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, adopted 1979, entered into force in 1981)
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention, adopted in 1972, entered into force in 1975)
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention, adopted in 1993, entered into force in 1997)
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Anti-Personnel Mine Ban Convention, adopted in 1997, entered into force in 1999)
- Convention on the Rights of the Child (CRC, adopted in 1989, entered into force in 1990)
- Convention on the Rights of the Child: Optional Protocol on the involvement of children in armed conflict (OP/CRC-AC, adopted in 2000, entered into force in 2002)
- Convention on the Rights of the Child: Optional Protocol on a communications procedure (OP/CRC-CP, not yet in force)
- Convention relating to the Status of Refugees (CRSR, adopted in 1951, entered into force in 1954)
- Convention relating to the Status of Refugees: Protocol (adopted in 1966, entered into force in 1967)

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention, adopted in 1864 and significantly updated in 1949, entered into force in 1950)
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention, adopted in 1906 and significantly updated in 1949, entered into force in 1950)
- Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention, adopted in 1929 and significantly updated in 1949, entered into force in 1950)
- Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention, adopted in 1949, entered into force in 1950)
- Geneva Conventions: Protocol Additional to the Geneva Conventions of August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I, adopted in 1977, entered into force in 1978)
- Geneva Conventions: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II, adopted in 1977, entered into force in 1978)
- Geneva Conventions: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Additional Protocol III, adopted in 2005, entered into force in 2007)
- Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare (adopted in 1925, entered into force in 1928)
  
- Hague Convention for the Pacific Settlement of International Disputes (Hague Convention I, adopted in 1899, entered into force in 1900)
- Hague Convention respecting the Laws and Customs of War on Land and its Annex, Regulations concerning the Laws and Customs of War on Land (Hague Convention IV, adopted in 1907, entered into force in 1910)
  
- International Convention for the Protection of All Persons from Enforced Disappearance (CPEd, adopted in 2006, entered into force in 2010)
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD, adopted in 1965, entered into force in 1969)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, adopted in 1990, entered into force in 2003)
- International Covenant on Civil and Political Rights (ICCPR, adopted in 1966, entered into force in 1976)
- International Covenant on Civil and Political Rights: Optional Protocol I (OP/ICCPR I, adopted in 1966, entered into force in 1976)

- International Covenant on Civil and Political Rights: Optional Protocol II (OP/ICCPR II, adopted in 1989, entered into force in 1991)
- International Covenant on Economic, Social and Cultural Rights (ICESCR, adopted in 1966, entered into force in 1976)
- International Covenant on Economic Social and Cultural Rights: Optional Protocol (OP/ICESCR, adopted in 2008, entered into force in 2013)
  
- Principles relating to the Status of National Institutions (Paris Principles, adopted in 1993)
  
- Rome Statute of the International Criminal Court (Rome Statute, adopted in 1998, entered into force in 2002)
  
- Statute of the International Court of Justice – Annex to the UN Charter (ICJ Statute, adopted in 1945, entered into force in 1945)
  
- United Nations Convention against Corruption (UNCAC, adopted in 2003, entered into force in 2005)
- United Nations Convention against Transnational Organized Crime: Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted in 2000, entered into force in 2004)
- United Nations Convention against Transnational Organized Crime: Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (adopted in 2000, entered into force in 2003)
  
- Vienna Convention on Diplomatic Relations (adopted in 1961, entered into force in 1964)
- Vienna Convention on the Law of Treaties (Vienna Convention, adopted in 1969, entered into force in 1980)

### **Treaty law: regional**

- African Charter on Human and Peoples' Rights (ACHPR, adopted in 1981, entered into force in 1986)
- African Charter on the Rights and Welfare of the Child (adopted in 1990, entered into force in 1999)
- American Convention on Human Rights (ACHR, adopted in 1969, entered into force in 1978)
- Arab Charter on Human Rights (ArabCHR, adopted in 1994; last version adopted in 2004, entered into force in 2008)
  
- Charter of Fundamental Rights of the European Union (adopted in 2000, legally binding since 2009)
- Charter of the Association of Southeast Asian Nations (ASEAN Charter, adopted in 2007, entered into force in 2008)

- Charter of the Organization of American States (OAS Charter, adopted in 1948, entered into force in 1951)
- Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention, adopted in 1969, entered into force in 1974)
- European Convention on Human Rights (ECHR, adopted in 1950, entered into force in 1953)
- European Social Charter (ESC, adopted in 1961, revised in 1996; the revised version entered into force in 1999)
- Inter-American Convention to Prevent and Punish Torture (adopted in 1985, entered into force in 1987)
- Montevideo Convention on the Rights and Duties of States (Montevideo Convention, adopted in 1933, entered into force in 1934)
- Pact of the League of Arab States (established in 1952)
- Treaty of Lisbon (adopted in 2007, entered into force in 2009)

### **Non-treaty law: universal**

- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted in 2005)
- Basic Principles on the Role of Lawyers (adopted in 1990)
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF, adopted in 1990)
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles, adopted in 1988)
- Code of Conduct for Law Enforcement Officials (CCLEO, adopted in 1979)
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration, adopted in 1985)
- Declaration of Minimum Humanitarian Standards (Turku Declaration, adopted in 1990)
- Declaration on Territorial Asylum (adopted in 1967)
- Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles, adopted by the International Law Commission in 2001)
- Guiding Principles on Internal Displacement (adopted in 1998)
- International Code of Conduct for Public Officials (adopted in 1997)

- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (adopted in 1989)
- Principles relating to the Status of National Institutions (Paris Principles, adopted in 1993)
- Standard Minimum Rules for the Treatment of Prisoners (SMR, adopted in 1955)
- United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines, adopted in 1990)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNRPJ, adopted in 1990)
- United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules, adopted in 2010)
- United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules, adopted in 1990)
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, adopted in 1985)
- Universal Declaration of Human Rights (UDHR, adopted in 1948)

### **Non-treaty law: regional**

- American Declaration of the Rights and Duties of Man (adopted in 1948)
- Bangkok Principles on the Status and Treatment of Refugees (Bangkok Principles, adopted in 1966)
- Cartagena Declaration on Refugees (Cartagena Declaration, adopted in 1984)
- Principles Covering Treatment of Refugees (Asian-African Refugee Principles, adopted by the Asian-African Legal Consultative Committee (AALCO) in 1966)





## ANNEX 3 INTERNATIONAL JURISPRUDENCE, BY CHAPTER

In this Annex the examples of international jurisprudence referred to in the Manual are arranged in the order in which they appear in each chapter.

Chapter	Topic	Case	Country	Page
4	Presumption of innocence	Sobhraj v. Nepal Human Rights Committee Communication No. 1870/2009, UN Doc. CCPR/C/99/D/1870/2009, 27 July 2010	Nepal	151
4	Obligation of non-discrimination	Timishev v. Russia European Court of Human Rights Applications Nos. 55762/00 and 55974/00, 13 December 2005	Russia	156
4	Fair trial/infiltration	Teixeira de Castro v. Portugal European Court of Human Rights, 44/1997/828/1034, Judgment of 9 June 1998	Portugal	163
4	Absolute prohibition of torture	Gaefgen v. Germany European Court of Human Rights Application No. 22978/05, 3 June 2010	Germany	164
4	Death in custody	Sathasivam and Saraswathi v. Sri Lanka Human Rights Committee Communication No. 1436/2005, U.N. Doc. CCPR/ C/93/D/1436/2005, 8 July 2008	Sri Lanka	169
5	Maintenance of public order and use of firearms	Evrin Öktem v. Turkey European Court of Human Rights Application No. 9207/03, Information Note on the Court's case-law No. 113, November 2008	Turkey	186
5	Military armed forces in law enforcement	Caracazo v. Venezuela Inter-American Court of Human Rights Series C, No. 95, Judgment of 29 August 2002	Venezuela	193
6	Victims of torture: right to redress	Gaefgen v. Germany European Court of Human Rights Application No. 22978/05, 3 June 2010	Germany	204
6	Victims of abuse of power	Manneh v. The Gambia ECOWAS Community Court of Justice AHRLR 171, Judgment of 5 June 2008	Gambia	208
6	Non-refoulement	Hirsi Jamaa and others v. Italy European Court of Human Rights Application No. 27765/09, 23 February 2012	Italy	234

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7	Use of firearms: command responsibility	McCann and Others v. United Kingdom European Court of Human Rights Application No. 18984/91, 27 September 1995	United Kingdom	259
7	Use of force in detention	Neira Algeria <i>et al.</i> v. Peru Inter-American Court of Human Rights Series C, No. 20, 19 January 1995	Peru	264
8	Legality of arrest: reasonable grounds	Shimovolos v. Russia European Court of Human Rights Application No. 30194/09, 21 June 2011	Russia	270
8	Arbitrary arrest	Marques de Morais v. Angola Human Rights Committee CCPR/C/83/D/1128/2002, 18 April 2005	Angola	275
8	Rights of the arrested person and arrest procedures	Caldas v. Uruguay Human Rights Committee Communication No. 43/1979, UN Doc. Supp. No. 40 (A/38/40) at 192, 21 July 1983	Uruguay	277
8	Pre-trial detention	Nerattini v. Greece European Court of Human Rights Application No. 43529/07, 18 December 2008	Greece	284
8	Conditions of detention and treatment of persons deprived of liberty	Aleke Banda, Orton and Vera Chirwa v. Malawi African Commission on Human and Peoples' Rights Communications Nos 64/92, 68/92 and 78/92, 22 March 1995	Malawi	286
9	Search and seizure: proportionality	Buck v. Germany European Court of Human Rights Application No. 41604/98) Judgment of 28 April 2005	Germany	306
9	Body-cavity searches: humane treatment	Jalloh v. Germany European Court of Human Rights Application No. 54810/00, Judgment of 11 July 2006	Germany	310
9	DNA samples and related data: presumption of innocence	S. and Marper v. the United Kingdom European Court of Human Rights Applications Nos. 30562/04 and 30566/04) Judgment of 4 December 2008	United Kingdom	312

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9	Search of premises: procedures	Dobrev v. Bulgaria European Court of Human Rights Application No. 55389/00 Judgment of 10 August 2006	Bulgaria	313
9	Surveillance techniques	Bykov v. Russia European Court of Human Rights Application No. 4378/02) Judgment of 10 March 2009	Russia	314
9	Surveillance techniques	Escher <i>et al.</i> v. Brazil Inter-American Court of Human Rights Judgment of 6 July 2009	Brazil	315
9	Privileged communication between client and lawyer	Smirnov v. Russia European Court of Human Rights Application No. 71362/01 Judgment of 7 June 2007	Russia	317
9	Searches in detention	Van der Ven v. The Netherlands European Court of Human Rights Application No. 50901/99 Judgment of 4 February 2003	Netherlands	319
9	Body-cavity searches: necessity	Ms X v. Argentina Inter-American Commission on Human Rights Report No. 38/96, Case 10.506, 15 October 1996	Argentina	320
11	Exhaustion of domestic remedies	Dev Bahadur Maharjan v. Nepal Human Rights Committee Communication No. 1863/2009, UN Doc. CCPR/C/105/D/1863/2009, 2 August 2012	Nepal	365
12	International humanitarian law, Article 3 common to the four Geneva Conventions of 1949	Nicaragua v. United States International Court of Justice TICJ Reports 1986, Merits, Judgment of 27 June 1986	United States	381



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## **MISSION**

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.



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