

UNDERSTANDING POLICING

A resource for human rights activists

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Foreword

Police can be violators of human rights, but at the same time they play an essential role in the protection of human rights. Policing is thus at the heart of a broad spectrum of human rights discourses. Developments in the way in which police have been perceived and addressed by human rights organizations have reflected developments that have taken place within the broader human rights discourse: a focus on case-based concerns targeting State officials has been replaced by an increasing role for engagement with State officials in seeking to prevent human rights violations.

Strategies for preventing human rights violations can vary from the confrontational to the cooperative. Approaching the police as human rights protectors presents an opportunity for increased cooperation in a search for areas of mutual interest based on a common understanding that human rights and policing go hand in hand. Human rights do not impede policing; on the contrary, they provide the police with a space in which to operate and use their powers lawfully. Police should not be opponents of human rights advocates but can rather be counterparts, seeking to achieve similar goals.

This Resource Book builds on the assumption that an approach by human rights organizations that acknowledges the concerns and realities of the police and that understands police language, will be more effective than an approach that sets itself apart and criticises from the sidelines. Clearly this approach requires a police agency that is receptive to human rights concerns and human rights based reforms where necessary.

Amnesty International could play an important role in furthering discourses on security and supporting police reform programs in line with human rights principles. In order to achieve this, a more thorough understanding is needed of the security sector and its workings. This Resource Book hopes to contribute to such an understanding.

Eduard Nazarski
Director
Amnesty International, the Netherlands

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It goes without saying that a Resource Book like this one is never truly complete. The compiling of useful instruments and documents is an ongoing process. New studies are carried out and projects are continuously set up all over the world to improve policing. This Resource Book hopes to contribute to such initiatives. We would like to invite users of this resource to share their experiences with us and contact us if they know of new initiatives not yet described so that we can incorporate these either in a subsequent edition or separate publications or in a web-based version of the resource. You can contact us at amnesty@amnesty.nl.

Anneke Osse
Amsterdam
24 July, 2006

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An introduction to 'Understanding Policing'

Introduction

The police are one of the key State agencies targeted for criticism by Amnesty International (AI) and many other human rights organizations. In *Combating torture. A manual for action*, published in 2003, Amnesty International states, "The evidence strongly suggests that most of the victims [of torture] were people suspected or convicted of criminal offences. Most of the torturers were police officers who used armed threats and violence to subdue their victims."¹

Countless examples of police violating the basic rights of the people they are supposed to serve have been documented, ranging from torture and other forms of cruel, inhuman and degrading treatment, to preventing the exercise of legitimate rights to assemble and associate, jeopardizing equal access to justice, and failing to protect basic rights, especially for those vulnerable groups such as women and children. Police have neglected, ignored, and failed to respect basic rights to life, liberty and security in all regions of the world.

The opposite is true as well: police have positively contributed to peoples' full enjoyment of their rights. Police have prevented crimes from being committed, have ensured that people can safely demonstrate for their rights, have facilitated smooth political transitions, have investigated colleagues who have carried out crimes of all sorts, have 'blown the whistle' on their superiors, and have been supportive of political and legal reforms.

No doubt due to this fact that police are both human rights violators as well as protectors, the relationship between many human rights organizations (including Amnesty International) and the police has often been characterized by ambiguity. Human rights advocates frequently tend to feel somewhat uncomfortable with policing issues – and very often for the right reasons, as can be seen in the citation given above. Human rights advocates tend to focus on police misconduct, rather than on strengthening the police in order to prevent future violations. A study carried out by Amnesty International-Netherlands in which Amnesty International's recommendations on policing were reviewed concluded that many of these still "only address specific operational aspects of policing without referring to the larger issue of democratic accountability."² Doing so requires expertise about 'the police' as an institution, and 'policing' as a function: something to which this Resource Book hopes to contribute.

1) Amnesty International, 2003, *Combating torture. A manual for action*, p.27.

2) Amnesty International – Netherlands, 2004, *Amnesty International's recommendations on policing. A review and guide*, p. 7.

Aims of this Resource Book

Understanding Policing aims to clarify practical concepts as well as international and other standards that relate to policing. It thereby seeks to facilitate the assessment of police agencies in particular countries. Such assessments are fundamental to developing effective research and campaigning strategies that seek to influence policing as a means of improving respect for human rights and bringing conduct in line with internationally recognised human rights standards. They are also fundamental to deciding whether initiating engagement with police to achieve such aims is appropriate. The target for this resource is those working within the framework of Amnesty International's organization. However, it also addresses the broader human rights community.

Understanding Policing seeks to bring together both professional police and human rights paradigms and provides an introduction to literature from both these backgrounds. Policing and human rights are sometimes treated as if they are two separate fields. Literature, both academic and that related to police practice and the work of human rights organizations, tends to focus on either one of the fields, neglecting the inherent links. This Resource Book aims to bring together these different fields. Moreover, *Understanding Policing* aims to explain differences in language that often hamper communication between the human rights community and the police.

Understanding Policing seeks to define a common language and establish benchmarks for a human rights based assessment of police agencies, from these diverse sources. These benchmarks will not lead directly to the formulation of recommendations for policing but rather to a set of questions and considerations to be kept in mind when conducting research on police in a given country or when undertaking a contextual analysis to help identify why police institutions fail to uphold human rights standards. The basic assumption underlying this Resource Book is that in order to achieve effective intervention on the issue of police conduct, it is essential to have a thorough understanding of policing itself.

To treat the police as if they were the same everywhere, regardless of national contexts would be misguided and inappropriate. Countries differ in their resources as well as their cultures, and this affects policing. Instead of prescribing exactly what police should look like, this Resource Book aims to help understand the basic functions of policing in a society and with what minimal norms and principles it should comply. To some this book may appear to focus on contexts most common in industrialised countries where police agencies are well resourced and operate in cultural contexts that have adopted receptive attitudes towards human rights. More specifically, some have argued that this Resource Book focuses on the Anglo-Saxon context rather than taking a neutral perspective. However, we believe that the values discussed in this Resource Book apply universally – regardless of resources or cultural contexts. Police are bound by international human rights standards across the globe.

These standards have been adopted by the United Nations, representing global values and principles. While it is no doubt true that policing in countries lacking financial and other resources presents particular inherent challenges, and the implementation of certain standards will sometimes have to be carried out quite differently in these countries than in those not facing such problems, international norms apply globally and are to be used as indicators to assess human rights compliance by agencies worldwide.

Resources used

Understanding Policing builds on a range of work undertaken within Amnesty International to date. We do not intend to repeat what has already been published but will extensively refer to existing reports and materials available within the Amnesty International movement. This resource aims to bring together and build on existing research, action and engagement experiences and expertise throughout the movement to further enhance the organization's relevance and effectiveness in this field.

As this Resource Book is intended as a practical tool for human rights activists within the field, we have collected reports and references from other non-governmental organizations (NGOs) and others that we believe will be useful for further reading. Whenever possible we have indicated where useful resources are available on the Internet.

With regard to human rights standards, we focus on UN instruments and do not refer to regional standards – the only exception being standards adopted within the Council of Europe's jurisdiction since the Council of Europe, including its 'Police and Human Rights Program', has published a fair amount of interesting materials in this field. The 'European Code of Police Ethics' based on the 1979 'Declaration on the Police' will be referred to in particular. Note that most UN standards with direct relevance for policing, including the UN Code of Conduct for Law Enforcement Officials, the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment and the Basic Principles on the Use of Force and Firearms, are so-called 'soft law' in that they are non-binding declarations and principles.

It should be noted that *Understanding Policing* does not take a legalistic perspective, but explores the possibilities for human rights compliant policing in practice. This means that we will go beyond the international standards. We will look at how the standards can be implemented, assuming that best practice may be of interest for human rights advocates' analysis of police agencies all over the world. Note that as our focus is on policing compliant with human rights standards, we will not address police abuses as such. In addition, our focus is on 'policing in general'. Groups requiring specific attention, such as women, refugees and children, will not be dealt with separately.

How to use this resource

We understand that not everyone will read the entire Resource Book from beginning to end. We recommend however that readers take note of the 'Summary and Conclusions' (hereafter) and the 'Contextual analysis and assessment' (Appendix A) in particular. The 'Contextual analysis and assessment' contains a tool to assist readers when assessing the police in a target country.

We would like to stress the importance of reading the Chapters of Parts I and II of this Resource Book. Too often human rights strategies seeking to address problems that involve the police ignore the fact that the police are part of a broader security and justice system for which they cannot be held fully responsible. Similarly, sometimes human rights strategies do not fully understand the complexities of the interplay between State, public and police that requires the police to have some degree of autonomy (within boundaries) to decide on how to respond to law and order situations. Both these issues are addressed in these two Parts of this Resource Book.

Overview of Chapters

In drafting this Resource Book we have tried to follow a consistent format: whenever relevant we have started with an exploration of what the UN human rights standards say with regard to a particular topic. However, police actions are not, and cannot be, fully covered in rules and regulations. We therefore move on to explore what professional standards have developed to guide police actions in practice, as these can be used as benchmarks against which police can be assessed.

This Resource Book is divided into four parts. Part I introduces the issues and explores the relationship between policing and human rights. Chapter 1 presents an overview of 'Police and Human Rights'. We start by defining 'police' and discuss how police and human rights relate to each other as well as how human rights advocates tend to perceive policing and how this has influenced human rights advocacy targeting police.

Part II aims to describe the context in which the police operate. One of the core functions, if not the core function, of the State is the maintenance of order. We therefore start with an exploration of the concepts of 'order' and 'disorder' in Chapter 2, identifying the police as just one of several State agencies responsible for the maintenance of order within a broader security system whose effectiveness is dependent upon cooperation with and acceptance by civil society.

In Chapter 3 we will look more closely at the objectives police are given and the resources (personnel, financial) and philosophies employed to achieve them. We will discuss those philosophies currently in use, either by design or by default. We will focus particularly on community policing as this is a concept increasingly used by both police and human rights advocates despite the fact

that there is a significant degree of ambiguity over what exactly is meant by the term. We present a list with critical success factors to assist those assessing community policing projects in target countries. A brief evaluation of policing philosophies is presented.

In Chapter 4 we will look at how police relate to their political environment. A crucial and often defining element of police actions is that the police have relative autonomy in operational decisions.

After having explored the prime objectives of policing, Part III focuses on the powers police are given to carry out their objectives. Chapter 5 looks at the power to use force; Chapter 6 at the powers to arrest and detain; and Chapter 7 at the task of criminal investigation (with particular focus on the suspect interview). These are the areas where human rights are most frequently abused.

Finally, Part IV looks at how the police can be supported in upholding human rights principles. As police are given special powers that can have a serious impact on people's full enjoyment of their rights, it is of utmost importance that police are held to account for their use of these powers. Chapter 8 describes both internal and external accountability mechanisms and presents a table with which police accountability in a target country can be assessed.

Enhancing training and recruitment policies is often seen as a way of improving police practices. Chapter 9 takes a closer look at these human resources tools and how these can contribute to human rights awareness. It also warns against over-reliance on them. The Chapter describes how police tend to be recruited, selected and trained and makes suggestions for improvement. A list of questions has been formulated below that may be of help when assessing basic police training from a human rights perspective.

Finally, Chapter 10 looks at how human rights NGOs can influence police work and enhance compliance with human rights standards. Particular attention will be devoted to the issue of engagement; how can human rights advocates engage with the police, what problems might arise and how can these problems be solved?

Throughout the Resource Book, terms that are considered relevant for a true understanding of human rights compliant policing are given in **bold** the first time these are used. These terms, which are sometimes ambiguous, are explained in the Glossary, Appendix E, of this Resource Book.

We hope this Resource Book will provide the reader with background information on policing issues within a human rights context. Moreover, we hope this resource inspires and motivates human rights advocates to commence working on, and in some situations with, the police.

Summary

“We can not emphasise too strongly that human rights are not an impediment to effective policing but, on the contrary, vital to its achievement.”¹

The area of policing and human rights presents a dynamic and constantly evolving field of study. The human rights discourse has in recent years broadened its attention to include not only the negative functions of the State and its agents as human rights violators but also the positive obligations of the State. This presents an opportunity for the police to be seen as human rights protectors. At the same time, the notion has developed that human rights are not only abused by State officials, including the police, but by non-State actors as well. Both police and human rights advocates are striving for societies characterised by security and safety, an insight that has opened up the possibility of police and NGOs working together rather than opposing each other. The idea of police and NGOs working together is fraught with difficulties. Police officers tend to have a different perspective from that of most human rights advocates. They sometimes use different language when speaking of the same issue and will reach different conclusions about cause and effect. Sometimes this is the obvious result of the different roles they have in society; sometimes they may be the result of stereotypic assumptions. This Resource Book aims to give background information on policing issues for human rights advocates intending to initiate work on policing.

Achieving the objectives of law and order

All countries have one or more police agencies. By and large in all these countries policing involves the maintenance of order and the prevention and detection of crime. However, police are not the only State agencies operating in this field, nor is the achievement of these objectives the sole responsibility of the police. It is rather the State’s ultimate responsibility to maintain order in the territory over which it has effective control. States are responsible for doing so under international law, on the basis that order and security are essential conditions for people to fully enjoy all their economic, social, cultural, civil and political rights. Moreover, States are responsible for the maintenance of order as it is vital for the State’s continuity: disorder can ultimately threaten to disrupt the very existence of the State itself. The right to security, as set out in the Universal Declaration on Human Rights (UDHR), refers to a State’s duty to provide security and maintain order. States must ensure that their officials uphold human rights standards (i.e. avoid abusing their powers in the course of their duties) and protect human rights (i.e. actively ensure physical and mental security and the free exercise of fundamental rights and freedoms for all people within the territory over which the State has effective jurisdiction).

1) Independent commission on policing for Northern Ireland, 1999, *A new beginning: policing in Northern Ireland. The report of the independent commission on policing for Northern Ireland* (para.4.4).

Order and disorder are not fully neutral concepts. A State and its subjects may disagree over what constitutes order and disorder. There are, however, fundamental principles laid down in international law which govern how States ensure order and deal with disorder, and with which police practice should be consistent. Most notably, order must be based on the rule of law. Establishing and maintaining the rule of law is the primary legitimate means a State has to ensure order. Adhering to the rule of law means the government is bound by law, that there is equality before the law, that there are predictable and effective judicial rulings, and that human rights are integral. In order to achieve this, States establish systems and institutions including comprehensive laws, well functioning courts and independent judges and law enforcement agencies. Those working within this security and justice domain, including the police, may sometimes perceive law (and human rights) as restricting their work, but the opposite is in fact true: law makes it possible for them to do their work.

The security sector includes agencies whose functions sometimes overlap with those of the police: notably military forces and the security intelligence agencies. It is important that the differences are well defined, with the police clearly separated from the military. The security sector also includes non-State actors, such as private security providers. The criminal justice system is responsible for criminal investigation, prosecution and adjudication, as well as the execution of sentences. It includes such institutions as the police, prosecution, judiciary, probation and prisons services.

The effectiveness of the security and justice systems as a whole, depends on the quality of the separate entities involved: the chain is as strong as its weakest link, and they all affect policing directly or indirectly. It is crucial to the effectiveness of the security system that the different agencies have clear guidelines and instructions on their respective objectives which also specify their distinct positions and lines of accountability as well as their points of interface (the police's functions and responsibilities usually being set out in a Police Act). Human rights advocates need to be aware of the role and responsibilities of different security and justice agencies within systems established for maintaining order, so as to target their research and campaigning activities effectively. In order to assess police operations and identify those responsible for human rights failings, it is essential to understand and assess the entire system in which the police operate and on which they depend, both as it is laid out in law, regulations and policies, as well as how it is implemented in practice. Police cannot, and should not, be held responsible for misconduct, institutional miscommunication, lack of coordination, policy gaps etc., that are at the responsibility of other 'partners' in the security and justice domain. On the other hand, police can and should be held accountable for their own role in these processes.

All sections of the security and justice sector operate under national authority and within national sovereignty. Most of them are State institutions (the obvious exceptions are private security providers, although they too are bound

by national law) reflecting national (or regional or local) realities, political culture, history, people, and economy. As such, political and cultural realities shape policing. If the State system has not adopted democratic values the police is not likely to defend such values. Police come from the society they police and will adopt and express similar attitudes; as an example if these attitudes are negative towards certain members of the public the police are likely to share these attitudes. Tackling such problems will present a major challenge that necessarily requires engagement from more than just the police.

Within the security and justice sector the police are seen as the primary agency responsible for ensuring security and maintaining order. The three main functions of policing are generally agreed to be:

- Prevention and detection of crime
- Maintenance of public order
- Provision of assistance to the public

Sometimes these functions are spread over a number of separate agencies (as for example in countries with separate Judicial or Investigative Police), while in others they are carried out by one centralised or decentralised police agency. Human rights oriented policing requires that the public have access to at least all these three policing functions (although police may carry out additional functions such as fire fighting, border control, protection of diplomats etc). For this, police need adequate resources, including finance and staff.

In carrying out these functions, police can adopt different methodologies as reflected in different policing philosophies. There are two broad underlying perspectives that underpin these philosophies. One perspective is that of police as an instrument of State control, the assumption being that if States control their territories properly, this will result in 'law and order' and will guarantee security for the people in its jurisdiction. This 'force perspective', or vertical perspective, is clearly seen in authoritarian policing styles employed by many police agencies. The other perspective is that of police as a service provider to communities in their own areas. This 'service', or horizontal, perspective is seen in 'community policing' and its derivatives: problem oriented and intelligence led policing (although the latter can also be seen in authoritarian policing). Crisis policing is somewhat distinct in that it reflects the State's incompetence in maintaining order rather than its competence in fulfilling its core obligation of maintaining order.

Community policing's core characteristic is that communities are involved both in identifying problems of crime and disorder and in solving them, based on the understanding that the police cannot do so alone. For most countries this means an entirely new way of perceiving the police's role as well as the responsibilities and capabilities of the police. It requires police to actively engage with their communities, to focus on crime prevention rather than detection, to study why the public call on the police and to aim to tackle underlying causes rather than symptoms. However, it also necessitates an organizational transformation, where the command structure and

decision-making functions are decentralised (after all, responsiveness to the communities cannot be developed from one central level), and cooperation with other community-safety providers is developed. These fundamental organizational implications are often the cause of problems in practical implementation of this philosophy. In Chapter 3 we have listed success factors that can be used for assessing community policing projects, the prime one being that, when seeking to involve the communities in the maintenance of order and prevention of crime, time is a necessary prerequisite to develop trust. Moreover, developing trust between police and communities requires the full and visible long-term support of both the police leadership as well as politicians. Community policing does not mean the communities taking over policing functions. On the contrary, it requires well-trained professional officers fully understanding their role and responsibility and able to gather and select information that should guide decision-making rather than vice versa.

Because of its emphasis on responsiveness to communities, community policing is often perceived to be the most 'human rights friendly' form of policing. In practice this is not always the case, primarily due to the fact that the concept is often used imprecisely and has somewhat lost its meaning. Practically any policing activity implying any contact with any member of the public has been swept under the umbrella of community policing. Despite this (or thanks to this), it has currently become the leading policing philosophy.

Instead of focusing on the rhetoric surrounding community policing, human rights advocates should focus on human rights principles such as responsiveness and accountability to the communities served as well as legality. Authoritarian policing, or even militarised policing, does not have to be the enemy of human rights friendly policing. In fact, in some countries militarised policing (as opposed to community policing) is probably a better safeguard against human rights violations involving corruption and nepotism (where police serve partisan or other interests rather than the public interest), exactly because this type of policing tends to ensure tighter controls on individual officers. It should be noted however that authoritarian policing does tend to be more violent in many countries.

Law sets the framework within which police carry out their functions and policing priorities are set by (local) security policies. Those representing the people formulate both. As such, police are always closely connected to politics and policing is a political activity in that it seeks to balance various interests in society on behalf of the State. Police are to serve the public interest, rather than some partisan, or other ethnic or religious group interest. Hence, to ensure impartiality and neutrality, and thus non-arbitrary lawful professional decision-making by the police, police leadership must be authorised to decide what resources to spend on what problems with a degree of autonomy – obviously limited by law as well as by established policy. This is known as operational independence. Operational independence of police leadership translates to the rank-and-file officers as discretion (or discretionary powers). While on duty, a police officer typically has great discretionary power and can

decide individually on which deviant behaviours to act on or not – obviously limited by such margins as laid down in national law and policy.

Though not all countries recognize these principles of operational independence, they are at the very heart of policing. The possession of police powers as well as a certain amount of discretion as to when to use them is vital to effective policing. Police work can never be fully captured in rules and regulations prescribing exactly when to do what. As police operate in a complex arena with many interests, they need to be able to balance these interests and make their own professional judgement, although clearly they should always be held to account for these. Police must earn their 'right to operational independence' through their service to the community, lawful and non-arbitrary conduct, and their effectiveness all leading to the public having confidence in the police. Public confidence is to a large extent dependant upon the police being accountable and transparent in what they do and how they do it. Public confidence is a precondition for operational independence – but the reverse is true as well: operational independence can add to people's confidence in the police. Unfortunately in many countries the reality is very different with police lacking the competence to make professional judgements in difficult situations and unwilling to account for their decisions and actions. Similarly in many countries political elites seek to use the police to secure their own interests and are unable or unwilling to exercise legitimate and effective, but restrained, control over the police.

Police powers

Police are entrusted with extensive powers that can have a far-reaching effect on people's lives and which if misused, can result in severe human rights violations. For this reason international standards have set limits on these powers. Human rights oriented policing means policing in compliance with these international standards. It means trying to avoid using force, but being able and willing to use force lawfully and proportionately when strictly necessary and to account for its use afterwards.

Police have many different means of using force at their disposal, varying across jurisdictions. The majority of police carry some instruments of restraint such as handcuffs, a truncheon and/or a firearm. Situations necessitating intentional use of lethal force are a rare occurrence in day-to-day policing; in fact, most police work does not require the use of force at all. When force is required, police should start by employing the least violent method, only gradually adding force when strictly necessary to achieve a lawful policing objective. Use of firearms should always be reported.

Any use of force should always be lawful. Within the legal framework, tactical considerations guide what type and how much force to use in a specific situation. Police must be trained regularly in the use of force as well as in de-escalation techniques (including communications skills) so as to minimise the risk of using force. This is especially important in situations involving large numbers of people.

The policing of public gatherings, such as demonstrations, marches and rallies – also known as public order management – is a particular policing situation. The rights to assemble peacefully and to associate are basic rights which police are obliged to facilitate. The crucial factor in policing demonstrations as well as other public events lies in the preparation. Police should gather intelligence about the participants and their objectives beforehand, and should – where possible – seek to engage with the organizers of the event to identify risks and causes of tensions before they escalate. Preparation should also include such tactical matters as what dress to wear, what communication equipment to bring along and whether deployment of additional police agencies (including specialised units such as dog handlers and mounted police) is appropriate.

Use of force is typically at the police's discretion. Deciding how much force is proportionate is not easy, and may in fact require an independent assessment. Situations in which serious injury and or death have been caused should always be reported to and be reviewed by independent authorities (e.g. an independent police complaints body or judicial authorities). To enable supervisors to ensure that any tendency to excessive or unnecessary use of force, by so-called at risk officers, is detected and checked, detailed records on the use of force by individual police officers should include such incidents as violent resistance to arrest, injuries in police-public contacts and the use of firearms.

Human rights oriented policing also means carrying out arrests and detentions where necessary. This should always be in accordance with human rights principles, the most important of which are non-arbitrariness, the presumption of innocence, 'fair trial' and the absolute prohibition of torture and other cruel, inhuman or degrading treatment. The period just following arrest and detention is when a detainee is most at risk from police abuse. It is for this reason that oversight by independent committees that regularly visit places of detention is considered an important preventive measure. It should be clear that arrest and detention are only lawful when these are carried out within the framework of law; police actions causing additional harm (such as the use of shackles), or that lead to additional punishment (such as forcing a person to eat food that is against his or her religion) are prohibited as the person is still presumed to be innocent and as such may only be subject to those restrictions necessary to the ongoing investigation.

In some cases detention is carried out for administrative (e.g. public order) and or preventive reasons. This is known as 'administrative detention'. In recent years there have been concerns about an increase in legislation that facilitates administrative and preventive detention as a means of addressing terrorism. This is often accompanied by *incommunicado* detention and leads to human rights violations.

Police that do not stop or prevent criminal behaviour are neglecting the rights of others, most notably the victims. The detection of crime is a core police

function. Human rights principles relating to criminal investigation include the presumption of innocence, prohibition of torture and other cruel, inhuman or degrading treatment, the right not to testify against oneself, and the right to privacy. Criminal investigation – seeking the truth about a particular crime – may involve a whole range of investigative methods for information-gathering purposes including house searches, wire-tapping and other forms of surveillance. These can be a serious intrusion into people's private life. In general, police should follow the principle of 'subsidiarity', meaning they should try to employ the least intrusive methods possible in the circumstances. There should be a scale of safeguards becoming stricter as intrusiveness increases. Forensics may provide useful and objective information about a crime, making other investigative methods unnecessary. Forensic information is often to be found at the scene of crime, making police skills in handling scenes of crime essential. Decisions about what investigative methods to use are first and foremost bound by law, with some methods deemed unlawful. Within the legal framework, tactical decisions are then made about what method to use when. However, police must also know how to use a certain method professionally and lawfully. Both social and technical skills are important 'investigative instruments'. This is especially the case for suspect interviews despite the fact that there are persistent but erroneous myths, within the police about the possession of a 'gut instinct' for carrying out suspect interviews or how to identify someone who is lying. Research has failed to uphold this assumption. Suspect interview requires a professional and intelligent use of information gleaned from a criminal investigation, rendering the use of any undue pressure on the suspect unnecessary. Any intention to use the suspect interview for anything other than seeking information on the crime i.e. for the purpose of punishing a suspect or creating fear, is both unprofessional and more importantly unlawful and as such should be prevented. When aiming to prevent human rights violations and enhance professionalism in the area of criminal investigation, laws and procedures that adhere to international human rights standards, together with adequate training, as well as constant monitoring and evaluation of practical experiences, are fundamental.

Enhancing police professionalism

Police misconduct, from minor offences to gross human rights violations, should never go unpunished and measures should be taken to prevent their recurrence. Police should be held to account for their actions, but should equally receive adequate 'preparation' (including guidelines, training and equipment) to enable them to carry out their actions professionally and in line with human rights standards. In the absence of such 'preparation', those responsible for failing to prepare police adequately (such as police trainers, managers and policy makers) could also be held to account. Establishing effective accountability mechanisms, both for individual police officers as for the police institution, is crucial.

Accountability, a concept commonly referred to by human rights advocates, is a complex matter involving many players. The fact that the concept cannot be translated in many languages means that care should be taken when

addressing it. Calling for the implementation of systems of accountability seen in other jurisdictions will not always prove useful and can even be counterproductive in a given country. In order to promote relevant improvements to accountability, human rights advocates need to understand the structure and functioning of the oversight and accountability system in the target country. Any assessment of the accountability structures in the target country requires an initial assessment of what mechanisms are used and secondly how effective they are before recommendations can be made that are relevant to solving problems and preventing their recurrence.

Effective accountability should always be a balance of power and influence between the various players involved. Just as it is unacceptable to vest all powers and discretion entirely with the police, relying entirely on their professional judgment, it is just as unacceptable to vest all powers to control the police within one other single institution or agency, regardless of whether it is the political elite, the Executive or the community or anyone else for that matter. This would simply replace the locus of trust: how can one be sure that the executive organs, or political institutions, parliament, community forums etc, are more reliable (i.e. acting in the public rather than partisan, private or own community interest) than the police? It is exactly for this reason that a system is needed where oversight and control are spread amongst communities and their representatives, executive authorities and legal institutions (including the law) as well as the police itself.

Accountability mechanisms should incorporate instruments that ensure compliance with policies, regulations and laws relating to policing. For this purpose, these policies, regulations and laws should be as clear and unambiguous as possible. Instruments of accountability can also include complaints procedures and disciplinary and criminal procedures in cases of alleged misconduct. Accountability should encompass both *a priori* and *a posteriori* elements of policing; meaning it should include an assessment of the guidance given to police before an operation as well as how police are monitored and assessed afterwards. All this needs to be supported, in theory and in practice, by police management. Effective chains of command and leadership dedicated to establishing an ethos of respect for human rights are an essential prerequisite for upholding human rights standards. For external accountability mechanisms to be effective at all, internal commitment, most notably from police leadership, is an essential precondition.

Human rights compliant policing starts with the selection of the right people to become police officers and the exclusion of those that fail to uphold human rights values and attitudes. Some characteristics – most notably high moral standards and values – need to be inherent in individuals; others however, – most notably practical skills and knowledge – can (fairly easily) be taught. Recruitment, selection and training are equally important when seeking to establish a police agency that respects and protects human rights.

Recruiting a representative section of society and from these selecting those with high moral standards and values is a fundamental challenge for police organizations. Representation should be at all levels within the police agency. In order to achieve representation, targets should be set and maintained for the recruitment of ethnic groups, minorities and women, and causes for low recruitment of minorities and women should be evaluated. Indeed, recruitment policies and selection criteria, as well as police culture and symbols, should be assessed continuously on their potential discriminatory effect in order to encourage members of diverse communities to apply.

The training of new police recruits should comply with human rights principles – both in theory as well as in practice. Assessment of training programs from a human rights perspective should ensure the following:

- All police officers should receive basic police training.
- Basic training should be long enough for cadets to absorb knowledge, skills and attitudes.
- Training should tally with what is expected from future police officers. If public responsiveness is considered important it doesn't make sense to isolate cadets entirely from local communities on compounds, and expose them only to police officials.
- Training in laws and procedures should ensure that officers can relate these to day-to-day police work once they have completed training.
- A range of topics should be included in police training. These should include such issues as gender and cultural awareness, non-discrimination, and the role of the police in society.
- Police training should continue after basic training. Police officers should be regularly re-assessed on their policing skills, especially in the use of force.

The importance and potential impact of using recruitment procedures targeting all sectors in society, defining selection criteria reflecting respect for human rights principles and offering training that addresses human rights oriented skills, theory and attitudes, should not be underestimated. However, it should not be overestimated either. Both international donors interested in police assistance and human rights advocates tend to overvalue the importance as well as the effectiveness of recruitment, selection and especially training. At the same time there is a tendency to ignore institutional causes for human rights violations. Challenging and dealing with these institutional problems is far more difficult and requires long-term commitment, whereas training can seem like a quick-fix solution that is easily implemented. For training to be truly effective, it has to be reinforced in practice. When training cadets in the lawful use of police powers, the prerequisite must be the existence of operational procedures that are in line with human rights standards. This however is not a training issue. In situations in which police are violating human rights one should question whether training is the most effective starting point for change. And if so, one should consider starting with training police leadership, rather than rank and file officers. Answering this question accurately obviously requires a careful analysis of the respective situation.

When seeking to enhance police professionalism NGOs can play a distinct role. Exactly because they are not involved in State orderings, and often understand the community's concerns and worries, NGOs can be important partners for police seeking to improve their responsiveness and overall human rights compliance. We have mentioned before that the relationship between human rights NGOs and the police has for long been characterized by antagonism rather than trust. However, when police are open to human rights based reform, human rights NGOs and police can seek to formulate a common agenda through 'engagement'. Engagement between police and NGOs has often been characterised by involvement of NGOs in police training programs.

Engagement has created new dilemmas for NGOs, most notably the dilemma of how to work together while keeping enough distance to allow for criticism. Based on experiences within Amnesty International, the following lessons have been drawn:

- Any engagement activity should always be based on information: a proper contextual analysis should always be the starting point on the basis of which a strategy and a project plan defining objectives and activities can be developed. This assessment should include an analysis of what other NGOs are doing in this field.
- Establishing a relationship that is friendly but critical requires time.
- Transparency towards membership, as well as other NGOs, is essential in preventing resistance and opposition.
- Commitment from top police leadership should be clear so as to institutionalise contacts. In many countries this can only be achieved when there is clear commitment from the Ministry of Interior and/or Justice.
- Understanding policing is a precondition.

Work on policing issues should always be based on a solid analysis, involving a contextual analysis as well as a self-analysis, leading to the formulation of the main concerns based on which an intervention strategy can be developed. Undertaking such an analysis – one that goes further than a direct focus on the human rights violations – may not always be easy for human rights advocates who are eager to intervene. Indeed, the starting point for most human rights advocates will lie in things that go wrong rather than right. This Resource Book suggests that having decided to initiate work on policing issues – which in most situations will be based on human rights concerns – it is vital to 'take a step back' and start with an analysis focusing on what the police are required to do (as set out in national legislation and other standards and regulations governing the police), in what judicial and societal context they operate, and what their internal organization looks like. Based on this analysis, as well as a realistic estimate of one's own resources, human rights advocates can develop a strategy for research, campaigning and possible engagement.

This Resource Book aims to help in making these assessments, by providing human rights activists with a tool for carrying out an analysis and general background information on the police institution and policing.

Conclusions

Policing and human rights are two related subjects. In countries where human rights violations occur police are almost invariably involved in one way or another. Human rights violations involving police include the abuse of police powers (unlawful use of force, illegal arrest and detention) on the one hand and a lack of due diligence in carrying out police functions on the other. Police can be corrupted, unmotivated, uninterested, untrained etc. all leading to a police agency that is unable and/or unwilling to achieve its lawful objectives with due diligence. Yet even in countries where police receive extensive training, where advanced recruitment and selection methods have been developed and where there are abundant resources, human rights violations still occur as is documented in many of Amnesty International's country reports. Why is this and how can human rights advocates develop effective and relevant strategies for intervention and engagement with police?

To start with the first question; how do human rights violations occur and how do they persist? The answer will differ from country to country because of the different realities. It is for this reason that any attempt to intervene in relation to police conduct should always be based on a contextual analysis and assessment. Too often international consultants and trainers, usually employed by international donors, simply aim to export the system they know from 'back home' when addressing problems with policing. It should always be clearly understood that police are part of the State system in all its aspects. The country's history, culture, economy etc, are reflected in its legislation and policies, and in its operational practice as well as in the language used. Human rights compliant policing requires a human rights compliant environment in which to operate. Seeking to intervene in policing, while ignoring this simple fact, will rarely if ever be effective. With this in mind we would like to make four specific observations about human rights interventions that seek to improve policing and how these can be made more effective.

First: Too often the police are analysed in isolation as if it is possible to improve the human rights situation by changing just this one aspect of the security and justice system while leaving the other aspects untouched. Even though this point is often recognised in theory, it is hardly ever acted on in practical recommendations. Indeed, both consultants and international donors tend to focus on just one aspect of the security and justice system instead of targeting the system in its totality, thus ignoring how the different institutions interrelate. In practice, addressing problems in policing in isolation is rarely sufficient to improve policing as a whole. Any human rights strategy that seeks to be effective should always start with an assessment of the broader security and justice system as such and subsequently analyse the police's role in it. This should always include an analysis of both the legal and policy framework upon

which the police and the other security and justice agencies operate and how clearly they define and limit the various objectives and operational boundaries of these agencies. It should also include an assessment of their administrative, and/or political, authorities. Any kind of police reform requires commitment from police authorities; if not active commitment then at least permission to move on.

Secondly: Human rights interventions in relation to policing often focus on police operations in which human rights violations most commonly occur. Police reform programs often focus on implementing new philosophies and/or methodologies, usually involving some form of 'community based policing', and/or include the deployment of new equipment and weaponry, and very often the dissemination of new practices through training.¹ However, paradoxically, focusing on police operations tends to ignore the institutional causes of human rights violations and their persistence. This usually leads to interventions focusing on rank and file officers and how they carry out policing while failing to address the police leadership and police authorities. As a result such reform programs and related interventions tend to have little effect on respect for human rights in daily practice.

Thirdly: Interventions that do seek to deal with the institutional context of policing tend to underline the importance of accountability. Human rights advocates and international donors tend to emphasize the importance of improving accountability without explaining what it is exactly. Accountability is easily misunderstood and is difficult (if not impossible) to translate in many languages. Human rights advocates tend to underline the importance of external accountability and oversight bodies, sometimes at the expense of understanding that the effectiveness of such external mechanisms is dependent upon the internal commitment of the police, most notably police leadership. External accountability must always be accompanied by internal commitment to accountability, reflected in internal accountability mechanisms. For police these internal mechanisms – those that affect their promotion and demotion opportunities, their salaries and other benefits – may have more impact, as they may more directly affect their (working) lives. Human rights violations can often persist because there is no effective internal correction mechanism and a police culture characterized by a 'wall of silence' that prevents human rights abuses from being acknowledged and investigated. At the same time however, focusing only on internal systems while ignoring external mechanisms runs the risk of further reinforcing internal norms (rather than challenging these), including those that disrespect human rights.

1) Note that in recent times police reform programs have increasingly focused on how States can better defend themselves against 'terrorism', facilitating the adoption of legislation broadening police powers and functions – and sometimes thereby undermining the original objectives of the reform programs to improve police-community relations.

The answer is that there needs to be a balanced system of accountability involving both external and internal parties taking responsibility for effective and human rights oriented policing. Ignoring this risks rendering systems of accountability ineffective. External accountability mechanisms are not the answer per se and can themselves become the instrument of particular interests, thereby necessitating oversight of their operations, leading to a spiral of accountability structures. Human rights advocates need to acknowledge

the important role that internal accountability mechanisms can play and take steps to assess these. There has been a traditional reluctance amongst human rights advocates including Amnesty International to address these internal mechanisms. However, failing to address them risks developing strategies to tackle accountability that ignore some of the root causes of problems.

Fourthly: Human rights interventions almost invariably include training. Police are trained in new operational methodologies, in legal issues, in human rights, in dealing with minorities etc. Over and over again recommendations are formulated stressing the importance of improving training, apparently in the belief that training can solve all ills. It can't, for more than one reason. First of all, and most importantly, because many human rights problems do not stem from inadequate training but rather from the absence of adequate standards and procedures on which to base the training. This is the responsibility not of the training institutes but of those responsible for developing regulations and policies and translating these into standard operational procedures – in most countries the Ministry of Interior and/or Justice. Another reason why training alone can never be effective is that training tends to target the rank-and-file officers rather than the police leadership. Training rarely starts with police leadership, which is odd given that it is the leadership that is responsible for ensuring that training is put into practice. The ability of police leadership to shape an ethos of respect for human rights, and its effect on the overall police culture, should never be underestimated. Recruitment, selection and training are undoubtedly very important tools, but the extent to which police retain the information and values they have learnt during training in carrying out their duties is to a great extent shaped by the process of socialization which that person undergoes following training. What new recruits see and experience while doing their job shapes their thinking and behaviour. Training that is not embedded in a broader framework; that receives no follow-up in practice; and receives no visible support by police management, is bound to be ineffective.

So why is it that training is so often referred to as the solution to improving respect for human rights? The cynical answer is that it is probably because addressing training does not require a shake up of fundamental policing policies, doesn't touch upon daily realities, is not politically risky (both for donors as well as recipients) and doesn't cost too much, while it does convey an image of commitment to human rights (which is why so often the numbers of police undergoing training is highlighted).

Addressing policing and seeking to influence police behaviour requires a thorough understanding of the police and the context in which it operates. To understand the police and all the complexities involved, an understanding of policing concepts and relevant standards can help to reach a richer analysis in target countries and develop an effective and comprehensive research, campaigning and/or engagement strategy. Such analysis may very well result in the conclusion that in order to change police behaviour, legislative changes, or changes to the prosecution services, or other elements affecting the police, may in fact be more fruitful.



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Part I. Introduction



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Mindful 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 society as a whole

General Assembly Resolution 34/169 adopting the UN Code of Conduct for Law Enforcement Officials, 17 Dec. 1979

1. Human Rights and the Police

1.1. Introduction

Human rights advocates as well as academics often argue that 'good policing' means policing in line with international human rights standards. Although this is no doubt true, it must be understood that international human rights standards offer only limited guidance for day-to-day police work. In fact, good police work can never be fully captured in rules and regulations, however numerous and detailed they might be. The necessary discretion required by police to carry out their functions presents problems for those human rights advocates preferring to have clear norms against which police behaviour can be measured. Many police find the reasoning of human rights advocates to be naïve at best, and theoretical to say the least, reflecting a lack of understanding of their reality and placing an unrealistic burden on police work. Human rights advocates on the other hand say that police use this as an excuse to sidestep criticism.

Police and human rights are two domains that reflect differing perspectives on rights and security. Though the relations between the two fields may seem obvious, differences in fundamental frames of reference between the two may lead to major miscommunications. In this Chapter we will take a closer look at how the two domains relate to one another. We start by exploring the police as a professional group and policing as an activity. Though police are often referred to as law enforcers, we prefer to use the term police, since policing encompasses more than mere law enforcement tasks. In Section 1.3. we look at the specific field of policing and human rights and explore developments that have taken place in this domain over the past decades. These developments have influenced those working in both fields, and in Section 1.4. we look at how the developments have impacted on the relationship between representatives of both groups. We close with a brief summary.

1.2. 'Police' or 'law enforcer'?

The commentary to article 1 of the UN Code of Conduct for Law Enforcement Officials (UN Code of Conduct) provides the following definition of law enforcement officials: "The term 'Law enforcement officials' includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest and detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services."

The UN definition implies that all officials, whether called Security Forces, Gendarmerie or Military Police, having the power to arrest and detain, are to be

considered as law enforcement officials, and thus should uphold the norms set out in the UN Code of Conduct. This principle is also reflected in the 'Guidelines for the effective implementation of the code of conduct for law enforcement officials'.¹

It is notable that the definition in the UN Code of Conduct does not explicitly refer to the powers police have to use force against members of the public (in times of peace). The power to use force is very often seen as a defining police characteristic: the police may legally use force to maintain order, whereas other members of the public may in most circumstances only use force in self-defence. This is often referred to as the police having a 'monopoly on the use of force' in times of peace. It is exactly this monopoly on the use of force that gives the police its particular, and sensitive, position within the State system, thereby necessitating adequate control mechanisms to prevent abuse.

The specific power of police to use force is reflected in the European Code of Police Ethics which (referring to police as 'traditional police', trusting – perhaps rightly so – that everyone understands what that is) states that the "hard-core characteristic (...) entrusted to all existing public police bodies in Europe [is] the power to use force to maintain law and order in civil society."² Unlike the UN Code of Conduct, specific types of police formed for purposes other than maintaining law and order in civil society – such as military police, police involved in prison systems and secret security services as well as private security companies – are explicitly excluded from the European Code.³

In literature the terms 'police' and 'law enforcement official' (LEO, plural LEOs) are used interchangeably. In international human rights standards the latter term is most commonly used, thereby probably leading to its use by the majority of human rights advocates. Police themselves however tend to prefer the term 'police' as policing is not the same as law enforcement. Although police are always law enforcement officials, most countries also have non-police agencies whose officials enforce the law, for example border guards or customs officials. Even more important is the fact that the police function is often so much broader than mere law enforcement. It is generally accepted that the **functions of police** encompass:⁴

- Prevention and detection of crime
- Maintenance of public order
- Provision of assistance to the public

The term **policing** is used with many different meanings in mind; most notably it is referred to as the process of 'ensuring compliance with the law' in all its aspects. It should be apparent that ensuring such compliance can never be achieved by the police alone. Policing may indeed encompass more agencies and entities than just the police and is sometimes even taken as a social process involving civil society at large rather than a professional duty carried out by a State agency. However, such an interpretation of the concept of 'policing' may create unnecessary confusion, underlined by the fact that

1) Resolution 1989/61 adopted by the Economic and Social Council, 24 May 1989 and endorsed by the General Assembly in its Resolution 44/162 of 16 December 1989.

2) The European Code of Police Ethics. Commentary to the definition of the scope of the Code.

3) Ibid.

4) See for example: Rover, C. de, 1998, *To serve or to protect*; Crawshaw, R., e.a., 1998, *Human rights and policing. Standards for good behaviour and a strategy for change*; European Code of Police Ethics.

the term is not always easy to translate in other languages. We will therefore use a simple definition and define policing as 'what the police do to ensure compliance with the law'.

The history of 'police' as a concept

The concept of 'police' has a long history. Its characteristic feature is that the concept has been narrowed down more and more. 'Police', 'politics' and 'policy' are clearly related words. The words derive from Latin 'politia', meaning 'civil administration' or 'the State', stemming from the Greek 'polis' (city) and 'politikè' (that which belongs to the city state, to civil society).⁵ Originally the word 'police' encompassed the entire responsibility of the State, including religious functions (where these were still the responsibility of the State). Later the concept was used only for secular functions of the State and again later only for certain aspects of these State functions.⁶ Only in the 19th Century is the concept restricted to those functions of the State that encompass protection against threat. Police agencies (as opposed to the police function) as we know today, are relatively new. In fact the first civil, public police, was the Metropolitan Police of London, formed by Sir Robert Peel in 1829. Other countries followed, with most developed democracies having police for some 100-150 years. In many formerly colonized countries the police were 'implanted' by colonial rule, primarily serving the interests of the colonial power at the expense of the local people.

Police are a State institution, operating under national authority and within national sovereignty. For many they are the most visible representatives of the State. They can operate in a centralised or decentralised system, organised at a federal, state or provincial level, divided into a judicial or a uniformed agency. Indeed, there are as many different police agencies as there are countries. Police are always *contingent* upon the State and its inhabitants: they will always reflect the nation (or region or locality) in its political culture, history, people, and economy. This simple notion can have enormous consequences. Political realities shape policing: if the State system has not adopted democratic values the police are not likely to defend such values. Police themselves invariably come from the society they police and will adopt and express similar attitudes (which must not be confused with police always being responsive to a community's needs). If societal attitudes are hostile to certain members of the public the police are likely to share these attitudes. If the country is confronted with high levels of corruption, alcohol abuse, physical violence etc, it is to be expected that these problems will be reflected within the police agencies and that therefore tackling them will present a major challenge and may very well require an entry point other than the police. Indeed: "It must be realized that the professional police standards (rule of law, accountability, transparency of decision-making etc) are to a large extent universal. However, the police function within cultural limits and constraints as well as economic realities."⁷ General statements about the police, as given

5) The word first appeared c.1530 in the English language, as a synonym for 'policy', that is civil administration. Up to the mid-19th century, 'police' in English meant both 'civil administration' and, borrowed from French, 'administration of public order'. Online Etymological Dictionary, at www.etymonline.com.

6) See for example; Cachet, A., 1990, *Politie en sociale controle*.

7) Das, Dilip K., 1997, "Challenges of policing democracies: a world perspective." p. 628.

in this Resource Book, should always be set against the reality of the target country – obviously without lowering the standards against which the police are assessed.

Different perspectives on the role of the State and its officials

Broadly speaking there are two perspectives on the role of the State vis-à-vis its dependants.⁸ One (Napoleonic) is based on the assumption of the State as strong and authoritarian in its ability to provide security for the people in its territory; the State is thought to best represent and defend the public interest. State officials are to neutrally and professionally carry out State missives irrespective of who the State agent is. From this perspective it is hard to “think of security outside the box of the all-powerful nation-state.”⁹ The most notable representation of this perspective is France, but the other continental countries of Europe tend to share this perspective. The other (Anglo-Saxon) perspective is critical (even suspicious) of public management of security problems. The role of the State in providing security is considered equal to that of other non-State actors. State officials are to engage with their communities, and should be representative of them, as a means of ensuring that they work in the community’s interest. This perspective is seen in the United Kingdom and the USA, as well as in many other countries that have been influenced by them.

The perspective in use is strongly based on a particular country’s historical context and is reflected in the judicial systems in use (inquisitorial or rather accusatorial, see Chapter 2).

How people perceive the role of the State strongly influences how they perceive the role of the police. In the one system police are primarily seen as the strong arm of the State, whereas in the second tradition police are primarily seen as service-providers to the communities. Both perspectives are legitimate – in theory they are equally able to be consistent with human rights principles or to violate them. However, the human rights domain is heavily influenced by the Anglo-Saxon context with its preference for a service-oriented decentralized police, that is responsive to and representative of the people they serve. It is true that this may indeed be very helpful when seeking to establish human rights compliant policing – though it is certainly not a precondition. The more formal State, operating at a certain distance to the people also has the potential to comply with human rights principles. Moreover, those introducing concepts and methodologies from one system to the other may encounter difficulties.

It is important to be aware of the distinction between perspectives on the role of the state, as well as to reflect on one’s own position in this regard. Most major international human rights organizations are based in Anglo-Saxon contexts and seem to have adopted its outlook on the State accordingly. This Resource Book strives to take a neutral position on this issue, while adhering to

8) Ferret, J., 2004, “The State, policing and old continental Europe: managing the local/national tension.”

9) Ibid. p.50.

international human rights standards. Wherever relevant we will reflect on the different systems and the consequences for policing.

As has been shown above, policing encompasses more than mere law enforcement. This Resource Book will therefore use the word 'police' rather than 'law enforcer'. The term 'law enforcement official' will only be used when referring to the UN Code of Conduct. This Resource Book will not address additional police functions such as those relating to immigration, asylum and refugee policies and practices, border control, correction and detention (other than police detention) and policing in war situations and refugee camps.

1.3. Police and human rights

Human rights standards were initially developed as a means of placing controls on the powerful State and its apparatus of power, and protecting the individual against State abuse of power. The International Covenant on Civil and Political Rights (ICCPR), and other treaties within the human rights framework, all reflect this principle. Those international human rights standards relating to police focus for that reason on police powers. International law sets standards as to how police powers are to be used legitimately. These international human rights standards tend to be perceived by police officers as limiting their room to act. This is not totally coincidental, as indeed this is exactly what human rights advocates tend to stress.

Policing tends to be associated with the negative functions of the State – police can use their powers to legitimately restrict people's rights and liberties. For a large part the legitimacy of police use of their powers can only be assessed after the event as police have (and require) a degree of **discretion** as to when and how to act or not to act. Obviously this requires a functioning system of **accountability**. Indeed, issues of accountability are a major concern for human rights advocates, and enhancing accountability is often referred to as an important solution for human rights problems.

This having been said, the attention of the human rights community has gradually shifted to encompass the positive obligations of the State and hence to the police in its other roles: as human rights protectors and as one of the key players in the overall maintenance of stability (what police call order), supporting the creation of a situation in which people can enjoy all rights (including civil, political economic, social and cultural rights). Indeed, the police for long have been under the human rights spotlight uni-dimensionally and yet negatively, whereas in more recent times other dimensions have been added including those that acknowledge a more positive role for police, opening up the possibility for reflecting on areas of mutual interests for both human rights advocates and police officials.

For decades human rights were considered from the perspective of a powerful, abusive, State *against* the weak individual: the public needing protection

against the State which was *actively* violating their rights. Consistent with this perspective, human rights were mainly regarded as something taking place in the public sphere. However, in recent years the emphasis has shifted to highlight the fact that human rights are not restricted to acts or omissions of State officials against the public, but equally encompass inter-public acts as well (acts of non-state actors against members of the public, and of members of the public against one another) and to highlight the role of the State in protecting those in the private sphere. As the Committee on the Elimination of Discrimination Against Women (CEDAW) stated in 1992 “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”¹⁰ The police are the primary institution responsible for the maintenance of public order and the **rule of law**. They are also one of the key State agencies responsible for the prevention and investigation of criminal acts including those that can be qualified as human rights abuses or violations. As such, police are to carry out their functions with due diligence. We will return to the issue of **due diligence** in Chapter 2.

At the same time however, the notion of the powerful State has gradually been eroded: citizens have claimed increased rights and States are not as powerful in reality. Police often seek to highlight this point. According to their reasoning, the imbalance of power has shifted from the State to sections of society such as members of organized crime networks as well as terrorist groups who are aware of their rights and seek to ‘abuse’ the system to their benefit (such as delaying trials, filing complaints, appealing to higher courts etc). From this viewpoint, human rights are seen as an impediment to effective policing. Moreover, police feel that such sections of society are given more freedom to act than police themselves are. The perception is that a ‘Catch 22’ situation has evolved in which the human rights system, developed to protect the ‘weak’ individual, is actually weakening the State, resulting in a perceived dichotomy with security on the one side and human rights on the other.

There are other relevant relationships between policing and human rights. Often overlooked but worth studying is the resolution adopting the UN Code of Conduct, which states: “*Every law enforcement agency should be representative of, and responsive and accountable to, the community as a whole.*”¹¹ This implies that police ought to engage with those they are to serve – members of the public – so as to establish their objectives in a joint process together with those in whose interests they are to act. This is the only way to prevent police becoming technocratic maintainers of public order, or worse. Indeed a preoccupation with ‘professional policing’ among police reformers tends to ignore the importance of police work being ‘value-driven’, one of these values being empathy with and responsiveness to those the police are serving. Professionalism, although essential, is not sufficient to ensure human rights compliant policing. At the same time responsive policing is no guarantee of human rights compliant policing either. Public tolerance of police violence tends to increase in situations of high crime, to the extent that police violence can be praised by sections of the public as being ‘tough on crime’ (as currently

10) CEDAW, General Comment No.19, para 9.

11) General Assembly Resolution 34/169 adopting the UN Code of Conduct, 17 Dec. 1979.

12) As is also stated in the 'Guidelines for the effective implementation of the UN Code of Conduct for law enforcement officials': *"All law enforcement officials shall be adequately remunerated and shall be provided with appropriate working conditions"*.

13) Article 11(2) of the European Convention and Article 16(3) of the American Convention reflect similar principles.

seen in many countries including Brazil, South Africa and Colombia). This presents police leadership and their political masters with complex issues that must be solved in joint cooperation with civil society.

Police are to ensure that other people can enjoy their rights. However, the rights of police officers themselves are often neglected, both by human rights advocates as well as by the police. Police leaders sometimes tell police they are not entitled to civilian's rights because they are not civilians. This is clearly not true. Police are entitled to the same rights as everyone else, as provided for in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and ICCPR, including leisure time, fair pay, fair working hours, safe working conditions, equal promotion opportunities.¹² The only exception is given in Article 22(2) of the ICCPR that States can restrict the rights of those working within the armed forces or the police to freedom of assembly including the right to form and join trade unions (in fact, this is the only explicit mention of police in the entire body of international human rights treaties).¹³

Unfortunately in many countries the reality for police is extremely hard. Police often work excessively long hours, are underpaid, carry out dangerous work with little if any protection, are ill-prepared (both in terms of training and equipment) to perform tasks, have little social status and receive criticism from all sides. Indeed, many working in the field of police and human rights ask how the police can be expected to protect human rights when their own rights are not protected. Any effort undertaken to improve police respect for human rights should include making a fair analysis of their own situation. Where necessary, it could include advocating protection of police rights. This may be a difficult issue for human rights advocates, yet it is a logical consequence of their work. Moreover, any effort to improve police professionalism should address police management and elicit their full and visible commitment.

Police officers have rights too!

The European Platform for Police and Human Rights, in which both police and NGOs (including Amnesty International) participate, and that works under the auspices of the Council of Europe, has published a leaflet called 'Police officers have rights too!' The leaflet discusses the following rights:

- **Rights on duty:**
The right to life
- **Rights in the workplace:**
The right to privacy
The right to freedom of expression and association
The right to freedom of discrimination
- **Rights to proper working conditions**
- **Rights in disciplinary or criminal proceedings**

1.4. Police and human rights advocacy

As we have seen in the previous Section 'Police and Human Rights' is a dynamic field that has seen major developments during the past decades. This has affected the work of human rights advocacy, and continues to do so.¹⁴ Those working in the field of human rights advocacy who wish to address police need to consider these developments and challenges to their work which include:

- Human rights advocates have tended to ignore the police's responsibility in actively *protecting* people's rights through preventing crime (including violent crime) and maintaining public order. They have mainly been concerned with the negative aspects of policing, thereby making it difficult to engage with police. The resulting distance between police and human rights advocates has limited the development of a common language and understanding. Acknowledging the positive obligations on the State, and the police, may in fact present the possibility of a 'shared agenda' or 'common ground' for police and human rights advocates.
- Human rights advocates have tended to stress the police's role in relation to civil and political rights while ignoring its role in the maintenance of stability and order to ensure the realisation of people's enjoyment of their economic, social and cultural rights.¹⁵
- This has resulted in the paradoxical situation that human rights advocates have tended to pay little attention to general crime that may have been a more serious threat to people's full enjoyment of their rights, than police behaviour was. People's sense of insecurity has become a major issue in the media in the last decade. Crime is a serious threat to the lives of people all over the world. Fear of crime, even when subjective, threatens people's sense of security and safety. Human rights organizations have tended to underestimate how crime affects people's lives – and sometimes misunderstand people's perception that human rights can render criminal institutions less effective. The effect of this has been that in some countries victims groups are opposing human rights groups rather than seeking co-operation¹⁶ and that 'security' and 'human rights' are sometimes perceived to be opposites rather than two sides of the same coin.¹⁷ Indeed, in some countries governments and police have been successful in convincing the public that tough policing (often meaning more police powers with lesser safeguards for their lawful use) is necessary to provide a feeling of security.¹⁸
- Linked to this is the fact that traditionally human rights advocates – including those working within Amnesty International – have focused on State violence against political opponents. However, "the new victims of police abuse are common criminals – both perpetrators and victims of crime – in contrast to the past when the

14) Neild, R., 2002, "The new face of impunity."

15) For several decades, AI focused on civil and political rights, but has broadened its mission to include economic, social and cultural rights. See, 2005, *Human rights for human dignity*.

16) Cavallaro, J.L., 2003, *Crime, public order and human rights*.

17) Ibid. See also: Varenik, R., 2003/04, *Exploring roads to police reform: six recommendations*.

18) Cavallaro, J.L., 2003, *Crime, public order and human rights*.

people whom human rights organizations defended were victims of state repression. It is clear that the idea of defending the new 'guilty victims' is increasingly discomfoting to [human rights organizations]. (...) They face denunciation by politicians for coddling criminals and must contend with the argument that tough-on-crime policies entail a necessary trade-off in the abrogation of some rights. In transitional societies, where rights are fragile in both public consciousness and political discourse, this hard-line appeal threatens a loss of public support for hard-won rights values."¹⁹

Human rights advocates who approach the police to establish some kind of engagement sometimes encounter a lack of understanding on the side of police. Rather than assuming that this reflects a lack of commitment, it should be understood that in some situations this misunderstanding by police officers – of human rights in general and how it relates to police work – is real and is often made worse by the fact that human rights semantics have been abused by (former) authorities. For example, police officers sometimes believe that arresting someone is a violation of human rights, making it difficult for them to understand how the two (policing and human rights) can go together. Human rights advocates should make it very clear what human rights are and what negative restrictions and positive obligations these place on police work. Human rights compliance first of all requires there to be a lawful basis for police action, that the action itself should conform to the law, and that the law should conform human rights standards. Moreover, human rights compliance requires the police to investigate and prevent incidents in which the rights and freedoms of people are curtailed.

1.5. Summary

Policing encompasses more than mere law enforcement. This Resource Book will therefore use the word 'police' rather than 'law enforcer'. Policing encompasses prevention and detection of crime, the maintenance of public order and provision of assistance to the public. These three functions together are believed to ensure security for those living in the State's territory. In order to ensure security, police can legitimately restrict peoples' rights, referred to as the negative function of the State; however police also have a positive obligation to help create an environment in which people feel and are free and secure. Police themselves are also entitled to this positive obligation of the State; they themselves are entitled to the same rights as anyone else, including economic, social and cultural rights.

Police officers tend to have a different perspective from that of most human rights advocates. They sometimes use different language when speaking of the same issue and will reach different conclusions about cause and effect. Sometimes this is the obvious result of the different roles they have in society; sometimes they may be the result of stereotypic assumptions.

19) Neild, R., 2002, "The new face of impunity."



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Part II. Achieving the Objectives of Law and Order

Achieving the Objectives of Law and Order: Introduction

To many the most important police function, and the one they associate most with policing, is the maintenance of public order. Indeed, all other police functions derive from this.

The police are not the only agency responsible for the maintenance of order, nor are they the only agency operating in this field. There is a conglomerate of partners involved, all with distinct roles and responsibilities and distinct powers. In many cases it would be inappropriate, but also ineffective, to approach only one agency with concerns about the lack of law and order. It is therefore essential to understand what other players are involved in the maintenance of order and how the police relate to (and depend on) these.

It is also essential to understand how the police relate to the State and its citizens. Are police the coercive arm of the State or are they an instrument to render service to the community? This debate is often reflected in the use of the different concepts of police as a 'force' or a 'service' respectively. The perspective taken strongly affects how police approach the public as well as how the public approaches the police. Human rights advocates tend to perceive the police as a 'force' and strive for the police to become a 'service'; a police that is responsive and directly accountable towards the community. Indeed 'from a force to a service' is a slogan that is often used in relation to human rights work with the police.

Obviously, when prioritising service to the State, police risk becoming an instrument of force of the powerful elite. However, when prioritising service to communities, police risk serving the needs of some at the cost of others. It is for this reason that police need some freedom to make their own choices based on their professionalism (obviously bound by law and established policy). Indeed, in seeking to achieve policing compliant with human rights, the question should not be whether they are a force or a service, but rather how these two aspects of policing are balanced. Police are the strong arm of the State, operating in the public interest. Put the other way around: The police are a service that may lawfully use force in order to achieve their lawful objectives. How force and service are balanced in practice is closely related to the role police have in society. Ignoring either side will inevitably result in less effective policing. As such it is not appropriate to talk about 'police forces' or 'police services'. We suggest rather using the neutral concept of a 'police agency'.

Part II of this Resource Book explores some of these issues. It looks at what the police are required to do and in what context. Chapter 2 looks at the concepts of 'order' and its opposite 'disorder'. Chapter 3 looks at how the police can give form to their responsibility to maintain order; by adopting

different methodologies to achieve their goals. Chapter 4 looks at the interplay between the State, its citizens and the police and explores the necessity, but also the risks, of operational independence. We believe that this background information about what the police should do and the context in which they operate, is crucial for those wishing to make an adequate assessment of police in a given country and to develop an effective intervention strategy.



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Everyone has the right to life, liberty and security of person

Article 3, Universal Declaration on Human Rights

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realised

Article 28, Universal Declaration on Human Rights

2. State Responsibility for Law and Order

2.1. Introduction

Some level of tranquillity in society is a necessary precondition for ensuring that people prosper. Indeed, the link between security and the full enjoyment of both civil and political, as well as economic, social and cultural rights is increasingly acknowledged, as reflected in the fact that international development initiatives are being linked to issues of security.¹ For people to be able to live together peacefully, norms of behaviour within and between groups emerge, which are sustained naturally through socialization and informal discipline, or they may be externally imposed through formal regulations. Ultimately, the State is responsible for ensuring a minimum level of order and the police are one of several State entities tasked with giving effect to this obligation. The resolution adopting the UN Code of Conduct for Law Enforcement Officials refers to “*defence of public order*” as “*the nature of the functions of law enforcement.*”² An important precondition for adequately evaluating police practice is a full understanding of the background against which police operate – including all aspects of the broader security and criminal justice systems.

We start in Section 2.2 of this Chapter by exploring the concept of ‘order’ and how it relates to the ‘rule of law’. It is the State’s ultimate responsibility to maintain order, which we discuss in Section 2.3. Section 2.4. looks at how States realise their responsibility to maintain order in practice through the establishment of security systems involving agencies that sit alongside a criminal justice system. It addresses how these various entities – including non-State actors – interrelate, developing the institutional context in which police operate. Order can be defined as the absence of disorder; Section 2.5. looks at disorder in different manifestations. Disorder may require States to establish a state of emergency, derogating from human rights standards, and frequently impacting on police activities, an issue discussed in Section 2.6. We close with a brief summary.

1) This is clearly endorsed by many funders of police reform and police assistance programs. See for example Stone, C. and J. Miller, M. Thornton and J. Trone, 2005, *Supporting security, justice and development: lessons for a new era*. The paper draws together lessons from experiences of UK funded policing and justice programs in seven countries.

2) General Assembly Resolution 34/169 adopting the UN Code of Conduct, 17 Dec. 1979.

3) The Concise Oxford Dictionary, 1990.

2.2. Order

2.2.1. The right to security and the duty to maintain order

The ‘right to security’, ‘secure’ meaning ‘untroubled by danger or fear; safe, protected’; ‘security’ meaning ‘a secure feeling’³ is a basic right guaranteed in Article 3 of the Universal Declaration on Human Rights (UDHR). It is a difficult right to guarantee, as there are so many factors involved in providing security. The individual may require different factors to ensure his or her security from those required by the collective (certainly considering that achieving security may involve subjective feelings rather than objective criteria). High levels of

4) Rights to liberty of movement, freedom of thought, opinion, assembly and association respectively.

5) ICHRP, 1999, *Taking duties seriously: Individual duties in international human rights law- A commentary*.

6) The Concise Oxford Dictionary, 1990.

7) In this view laws tend to criminalise those acts that are of most concern to the (middle-class) electorate, typically acts such as theft, pick pocketing, street violence, house-breaking etc. Criminal acts that tend to be committed by the 'well to do', such as fiscal offences, tend to receive far less public attention and are not considered a threat to order according to this line of argument. Many authors make this point. See for example Chevigny, P., 1995, *Edge of the knife, police violence in the Americas*; Smith, B.W., 2004, "Structural and organizational predictors of homicide by police."

8) AI, 2003, *Shattered Lives*.

9) See www.humansecurity-report.info for the 2005 Human Security Report.

crime, whether real or perceived, may result in people feeling unsafe and insecure and may facilitate the acceptance of a tougher anti-crime regime potentially jeopardizing the rights of others.

The right to security is strongly connected to the 'entitlement to order', as stated in Article 28 of the UDHR, implying that order is necessary for people to realise their rights and freedoms and fulfil their aspirations. Article 28 is taken further in the preambles of both the ICCPR and the ICESCR: "(...) *the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.*" One of these conditions is an environment that is safe and secure, where there is 'order'. The importance of order can also be derived from Article 29(2) UDHR and Articles 12, 18, 19, 21 and 22⁴ of the ICCPR which state that certain rights may be limited to meet the just requirements of 'public safety, (public) order, health or morals' or in the interest of 'national security' or for respect of the rights or reputations of others (though some may never be limited). Order must be maintained as it is in everyone's interest; and everyone is to contribute as everyone 'has duties to the community' (as stated in Article 29(1) UDHR).⁵

We will define **order** as 'a state of peaceful harmony under a constituted authority'.⁶ Order is not a fully neutral concept however. Some will argue that order means the absence of those that disobey laws. Yet others may argue that the maintenance of order aims at preserving the inequitable distribution of resources.⁷ Order tends to be defined by those in power as the absence of any threat to their own power. It is for this reason that political leaders sometimes seek to curtail peoples' right to associate and assemble in order to prevent the emergence of any opposition that may question their position. The repression of dissidents is then justified as 'a necessary measure for the maintenance of order.'

Security is a shared responsibility

Order is related to the concept of 'community safety'. In fact one could say that order is a concept that State agencies would use, whereas community safety is the concept used 'on the ground'.⁸ This 'local perspective', as opposed to the national perspective, is all the more relevant as it has become clear in recent years that States are not always successful in their ability to ensure peace and order. Indeed, a State's capacity to intervene in conflicts of all sorts and influence non-State actors is limited and is sometimes biased in favour of specific interests. Moreover, ensuring community safety requires cooperation amongst all the relevant entities involved, as well as civil society. The UN has responded to this challenge with the concept of 'human security'.⁹ This emphasises the notion that States are required to protect peoples' rights but should also support their empowerment so as to enhance their potential for self-protection. It is worth noting that the human security concept relates to all human rights including economic, social and cultural rights and again

acknowledges the “indivisibility of security, economic development and human freedom.”¹⁰

Human rights advocates may feel somewhat uncomfortable with the order concept. Order may have a connotation of conservatism and maintenance of the *status quo*. However, order as intended in Article 28 of the UDHR, does not mean the adherence to rules regardless of the content of those rules. Indeed, in a gang-ruled community order can be maintained through fear. It follows from the ‘right to security’ that order is to be seen as including non-arbitrariness and predictability of what rules and norms will apply.¹¹ This means the State ought to be guided by principles of the rule of law and human rights so as to increase the likelihood that harmony is indeed peacefully acquired and maintained. ‘Order’ as such is a hollow concept. For order to be in line with human rights principles it must be based on the rule of law and lead to ‘the ideal of free human beings enjoying all their rights’.

Measuring crime as an indicator of order and security

In order to give effect to their responsibility for the maintenance of order in their territory, States require some insight into levels of ‘order’ within the country. Some may argue that to achieve this, it is sufficient to measure the volume of crime and use this as an indicator of how secure society is. However, doing so ignores the fact that people’s sense of security is affected by more factors than crime alone. Indeed, in order to develop an effective security policy some insight into both objective crime rates as well as people’s sense of security is required. In many countries in all regions of the world governments are confronted with populations experiencing a sense of insecurity, often as a result of (real) high levels of crime but also stemming from fear of terrorist attacks, sensationalist media coverage etc. Indeed, fear of crime is largely driven by perceptions rather than realities. Managing perceptions and expectations of the public should be part of an effective security strategy – without forgetting real levels of crime of course. High levels of fear of crime may in itself constitute a failure of the State’s responsibility to provide security. Do note that not all crimes make people feel equally as insecure. Crimes involving violence in particular disrupt people’s sense of security.

To be able to make accurate statements about levels of crime and security requires the monitoring of crime, both qualitatively and quantitatively. Measuring crime objectively is extremely difficult. Measuring State effectiveness in dealing with crime is equally difficult, if not impossible. To get a minimally reliable figure of real crime rates, a combination of public surveys, victim studies, offenders studies and statistics of crime reports should be used. It is important to use a combination, since any of these sources used alone can be unreliable and therefore insufficient. For example, not everyone reports crimes and police tend to mis-record certain crimes, making this statistic an unreliable source for identifying the number of crimes in a particular area and in a given time period.¹² Note that in some countries crime statistics become unreliable because of police tactics to suppress crime through

10) Secretary-Generals’ High-Level Panel on Threats, Challenges and Changes, 2004, *A more secure world: our shared responsibility*.

11) Kleinfeld Belton, R., 2005, *Competing definitions of the rule of law*.

12) Reference to the registration of crimes in international human rights standards (as well as in the work of AI) has thus far been largely restricted to the context of violence against women and discrimination, rather than focusing on the importance of registration in ensuring the monitoring of ‘overall security’ as such.

non-registration. This is due to various factors including the way police performance is evaluated. Sometimes the government does not want the police to register all crimes as any increase in crime figures can be used by opposition groups to criticise the government. Non-registration of their complaints by the police is indeed a major and very common grievance of citizens in many countries.

By combining various sources, the inaccuracies can be minimised. The Vera Institute of Justice has published a useful tool that provides guidance on how to measure various aspects of 'safety and justice' and identifies valid performance indicators.¹³

2.2.2. Rule of law: a precondition for order

The preamble to the UDHR states: *"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."* The UN have defined **rule of law** as follows: "Rule of law (...) refers to the principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and legal transparency."¹⁴

The rule of law, as an essential element of lasting peace, is an essential element of Amnesty International's mission which states: "Amnesty International urges all governments to observe the rule of law." The rule of law terminology is strongly connected to democracy and human rights; in fact it is stated in many UN documents that the three should always go together as they are so strongly linked. However there is some debate over what is meant by the rule of law.¹⁵ Procedural formalists would argue that 'rule of law' simply refers to the existence of laws and a system ensuring compliance with these laws regardless of the law-making process and the content of those laws. Under such a viewpoint apartheid laws would not be contradictory to rule of law principles for example.

Another interpretation of rule of law focuses on the institutions necessary for upholding rule of law, including comprehensive laws, well functioning courts and independent judges and law enforcement machinery. Yet, rule of law can also be about achieving certain goals, for which these institutions are necessary, yet insufficient. These goals are¹⁶:

1. A government bound by law
2. Equality before the law
3. Law and order
4. Predictable and effective rulings
5. Respect for human rights

13) Vera Institute of Justice, 2003, Measuring progress toward safety and justice: A global guide to the design of performance indicators across the justice sector.

14) Report of the Secretary-General, 2004. *The rule of law and transitional justice in conflict and post-conflict societies.*

15) Kleinfeld Belton, Rachel (2005), *Competing definitions of the rule of law.*

16) Ibid.

It is this latter normative interpretation of the rule of law – meaning the establishment of institutions seeking to achieve all five goals – that is advocated by human rights organizations, including Amnesty International. Clearly, human rights must be an integral element (whereas for ‘procedural formalists’ the first four points would suffice). This position also implies that ‘mere’ advocacy for the establishment of rule of law institutions does not suffice.

One of the objectives of the rule of law is to establish order, order that subsequently must be based on the rule of law. Establishing and maintaining the rule of law is one of the means a State has to ensure order. It goes without saying that the existence of the rule of law is fundamental to human rights based policing as it defines and limits both police functions and powers, provides guidelines governing professional conduct, and places the police within the broader security system.¹⁷ Adherence to the rule of law obviously requires a well-functioning system of laws protecting people’s rights, be they civil, cultural, economic, political or social rights. Police may sometimes say “laws limit their work” while the opposite in fact is true: law makes it possible for them to do their work.

2.3. State responsibility

The maintenance of order is one of the core objectives of the State as it is necessary for the continuity of the State itself: “No service of government is more fundamental than protecting people’s bodies and possessions. Indeed, the relationship between personal security and government is tautological: if people are not provided with protection at some minimum level, government is not considered to exist.”¹⁸ Indeed, any relatively stable government, whether democratic or authoritarian, will develop some security and justice arrangements, including the establishment of law enforcement agencies, and carry the responsibility for upholding the rule of law and the maintenance of order.

The maintenance of order is also a legal requirement on States. Under international law States are ultimately responsible for maintaining and ensuring peace and security within their territories so that their citizens can fully enjoy their human rights. This follows from the preamble of the UDHR which states: “Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms”. This is reiterated in the preambles of the ICESCR and the ICCPR: “*the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.*” Amnesty International strives to ensure that States uphold their responsibilities in the field of human rights under international law. In various reports, most notably *Shattered lives* and *Making rights a reality*, the organization has formulated language on State responsibility.¹⁹ Indeed, the right to security translates to the State’s duty to maintain order and provide security.

17) Report of the Secretary-General, 2002, *Strengthening the rule of law*.

18) Bayley, D. and C. Shearing, 2001, *The new structure of policing. Description, conceptualization and research agenda*, p.30.

19) AI, 2003, *Shattered lives*, especially its section on the duty of the State to protect its citizens (p. 79-81); AI, 2004, *Making rights a reality*, especially Chapter 2; AI, 2002, *Rights at risk*, on security legislation and law enforcement measures.

International law puts both negative and positive obligations on States: States should not abuse their powers and should protect people's freedoms respectively. In *Making rights a reality*, reference is made by Amnesty International to the (draft) articles on the Responsibility of States for Wrongful Acts.²⁰ According to these an internationally wrongful act refers to an act or omission that is attributable to a State and constitutes a breach of an international obligation of the State. States bear legal responsibility for respecting and implementing human rights standards within their territories and in territories where they have effective control and jurisdiction. This includes the obligation to prevent people's rights being violated or abused by State officials or others and to promote the full enjoyment of human rights. If private citizens threaten to abuse those rights, certainly the right to life and security of the person, a State is, under international law, obliged to prevent such from happening. If the abuse has taken place a State is, under international law, obliged to investigate and prosecute in accordance with international human rights standards.²¹ This principle is the basis of the legal concept of **due diligence**.²² States are responsible and must take positive measures for upholding people's rights and can be held accountable when failing to do so. For our purposes here it follows from the foregoing that States are responsible for guaranteeing security by establishing and maintaining order and creating a system to ensure this. States must ensure State representatives uphold human rights standards, i.e. avoid abusing their powers in the course of their duties, and must protect human rights standards, i.e. actively ensure basic security for all people within the territory over which the State has effective jurisdiction.

'The State' is an abstract concept. It is represented by 'organs' "whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State, whose conduct shall be considered an act of that State under international law. An organ includes any person or entity which has that status in accordance with the internal law of the State."²³

It is clear that police agencies, as well as individual police officers, fall within the above definition of an organ representative of the State and therefore assume State responsibility. Through their objectives of maintaining public order, and preventing and detecting crime, the police are one of the key State organs responsible for the protection of human rights. With reference to due diligence, this means that when the police know, or should have known, of human rights abuses and fail to act to prevent them from happening, they bear responsibility under international law. However, the relationship between policing and the due diligence responsibility of the State is often more complex. How actively should police investigate certain crimes? And at what cost – what could go ignored? Are all crimes appropriate for police involvement? It is a responsibility of the State to employ optimal efforts to try to prevent human rights abuses of any kind. State agencies other than the police may in fact be more effective and better equipped than the police.

20) UN General Assembly resolution 56/ 83 adopted on 28 January 2002. The Articles are annexed to the resolution "without prejudice to the question of their future adoption or other appropriate action."

21) Ibid.

22) AI, 2004, *Making rights a reality*, p. 7; AI, 2003, *Shattered lives*, p.81.

23) See note 20. Article 4.

Although States are responsible for the maintenance of order, it is clear that they are not always effective in protecting the security of their people or providing an effective security system, as is documented in many of Amnesty International's reports. The resulting security gap in many countries is filled by armed groups or vigilantes threatening to replace State institutions as the significant security providers, often in fact contributing to increasing insecurity and signalling or causing a situation of disorder. In some countries private security forces step into the security domain, with mixed results.²⁴

Amnesty International takes the position that the State need not monopolise the security sector, and that there is room for non-state 'orderings', including community-generated security initiatives (which may also be outside the formal legal process). However, the organization is also clear that the State is ultimately responsible if any of these 'orderings', including the private security sector, or vigilante groups, violate human rights.²⁵ The paradox is evident; if the State is not effective in providing security for all its people, other players emerge, yet on condition that the State can (and will) regulate effectiveness and equity and preferably can (and will) step in whenever necessary – which was exactly the problem in the first place.²⁶ The issue of private security providers is discussed further in Section 2.4.

Note that in some countries, mostly but not limited to Africa, the idea of the State maintaining security is alien to indigenous culture and traditions. In these countries traditional justice systems sometimes support local communities in the maintenance of order and the resolution of conflicts. Very often traditional justice encompasses some kind of a court function where individuals (either elected or leaders through inheritance) solve conflicts and problems that may threaten the peaceful harmony of the community. This may concern marital disputes, thefts, violence etc. For some countries the establishment of a formal judicial system in line with international human rights standards that is accessible to all is simply a bridge too far. In those countries, where official agencies may be located hundreds of miles away, requiring days of travel to register a criminal act, the traditional system can fill the gap and prevent impunity. However, it should be noted that traditional systems are in many situations discriminatory against women, children and juveniles.²⁷

24) Goldsmith, A., 2003, "Policing weak states: citizen safety and state responsibility."

25) AI – Netherlands, 2004, *Amnesty International's recommendations on policing. A review and guide*, p.17.

26) See note 24.

27) Penal Reform International, January, 2001, *Access to justice in sub-Saharan Africa; the role of traditional and informal justice systems*.

28) General Assembly Resolution 34/169 adopting the UN Code of Conduct, 17 Dec. 1979

2.4. Security and justice systems

2.4.1. Introduction

All States develop various institutions and entities with the aim of maintaining order and ensuring security. These form their security and justice systems. For most of these, if not all, legislation defines their objectives, structures and powers. Laws, rules and regulations, national and local policies and operational codes are used to direct what these agencies do and how they do it. As is recognized in the resolution with which the UN Code of Conduct was adopted, effective law enforcement depends on a "well-conceived, popularly accepted and humane system of laws."²⁸ Non-State actors operating in the security

domain, such as private companies, are in most jurisdictions bound by law just like any other citizen.

Police are just one of a number of State institutions responsible for the maintenance of order. They have a limited responsibility when it comes to restoring public order as they are only equipped and trained to do so to a limited extent.

The security and justice systems of a country are partly overlapping and mutually reinforcing. Effectively maintaining order will help to prevent crime and an effective criminal justice system will support the maintenance of order. In this Section we will look at those players in the security and justice field with whom police cooperate and on whom they depend.

2.4.2. The security system

The security sector includes all agencies involved in the lawful maintenance of security. It includes the police, 'Special Forces', army, military police, security intelligence agencies and private security agencies. Note that there are also 'auxiliary services' such as social workers, schools, housing co-operatives etc. that all play a role in the maintenance of order. In fact: "Everyone plays a role in these processes – parents, siblings, peers, friends, acquaintances, colleagues and a host of authority figures."²⁹ Of course there are also those that are unlawfully involved in the maintenance of public order such as vigilantes and paramilitary groups.

Having so many different players in the security field, sometimes with similar institutional objectives, creates particular dynamics. As the security sector is often based on some level of secrecy, cooperation amongst agencies is not always easy. Indeed, in some situations competition between agencies is not uncommon.

It follows that the different objectives and operational boundaries of various players in the security field should be clearly defined and limited. In the next Sections we will look more closely at those entities involved in providing security and the maintenance of order whose activities may strongly affect police work.

2.4.2.a. The military

In principle the division between the tasks of the police and the military is simple; police deal with domestic, public, security while the army deals with external threats. Police are to engage with the communities they serve, being responsive and accountable to them.³⁰ The military on the other hand are trained and tasked to deal with an enemy threatening the State. Responsiveness to the community is not a relevant value for the military and accountability lines are typically internal within the hierarchy with only the highest commander being publicly accountable. This division in tasks explains most of the differences between military and civilian officers, including:

29) Bayley & Shearing, 2001, *The new structure of policing. Description, conceptualization and research agenda*, p.2.

30) See note 28.

- Soldiers do not have discretionary powers: they “take orders from above rather than responding to the appeals of individual citizens”³¹
- Soldiers tend to operate in groups whereas police tend to work alone or in pairs
- Soldiers’ means of conflict resolution are very different: “their use of force is much less restrained.”³² The military are trained to use force to kill, whereas the police are only to shoot to kill as a last resort
- “Secrecy is a more ingrained mindset”³³ within the military

In many countries the military receive (far) greater prestige and resources than the police do (sometimes even *de facto* over-ruling the police) sometimes leaving the police under-equipped and under-resourced. This can have particularly negative consequences in countries in transition where crime tends to rise while the old security system (typically of a military type) is dismantled and the new one (typically of a civilian type) has not yet adequately established itself. An example can be seen in Nigeria: “In Nigeria, as in other transitional states, the military left the scene with their bullet-proof vests, high-performance vehicles, life insurance and higher motivation. The police that succeeded them lacked resources and the government was not in a haste to equip them fully. It did not take long for the consequence to be noticed on the streets in terms of increased crime.”³⁴

Even though the military’s primary task is to deal with ‘external’ threats, they are sometimes called upon to restore public order when (internal) disturbances are violent and ongoing. The Sudanese Police Forces Act 1999 (Article 8) for example, provides that when a state of emergency is declared the President may reintegrate the Police Forces into the People’s Armed Forces at which time they will operate under the laws and regulations of those armed forces. In situations of disorder or internal disturbance, as well as in emergency situations where firm and fast action is needed, military tactics, including their strict command and minimal discretion, may be perceived as more effective than police tactics. Indeed, police units trained for riot control typically have more military features than other police departments do. The opposite is also true. Military peacekeeping units performing policing functions in post-conflict situations sometimes adopt civilian police tactics including establishing community relations and driving around unarmed and without helmets.

31) Bayley, D., 2001, *Democratizing the police abroad: What to do and how to do it*, p.38/39.

32) Ibid.

33) Ibid.

34) Cavallaro, J.L., 2003, *Crime, public order and human rights*, p.22.

35) Goldsmith, A., 2003, “Policing weak states: citizen safety and state responsibility.”

36) AI, 2003, *Republic of Congo: A past that haunts the future*.

Indeed, in some countries, typically in many central and South American countries, the distinction between the police and the army is not so clear. Civil policing and military duties are blurred where soldiers perform police functions regardless of the circumstances, as a normal part of their duties and States sometimes decide to deploy (part of) the civil police with the military. Moreover, in some countries police are required to perform military duties when ordered to do so simply because the regimes trust the police more than the military.³⁵ Police are sometimes even ordered to perform military duties outside the State’s territory. For example some time between 1997 and 2002, the Angolan government sent their paramilitary Rapid Intervention Police to Congo Brazzaville to fight as military combatants.³⁶

Clearly delineating the separation between internal security and national defense is a priority for achieving democratic policing and respect for citizens' rights. Not only should there be clear separation of duties but when military do perform police functions and vice versa there should be clear criteria for when and how and for how long. In particular it should be clear under what legal and operational procedures the military are performing police functions and using police powers, with special emphasis on those procedures guiding the use of force as well as the means of force available.

Paramilitary

Many countries operate paramilitary police forces, often for political rather than public interests.³⁷ Amnesty International has documented many examples of paramilitary forces responsible for excessive use of force. In many situations these paramilitary forces are not trained as police but do carry out police functions and have police powers. The term 'paramilitary' is ambiguous. In some country contexts it is used to refer to non-State armed groups (whether operating with or without the tacit approval of the State), while in others they are an official part of the State security apparatus. Those carrying out research into security systems should be aware of the complexities of the command structures of any 'paramilitary' groups as well as related complexities surrounding issues of accountability.

Militarization of police

In most countries police are civilian in nature and origin, attached to the Ministry of the Interior or Justice rather than Defence.³⁸ Some countries, including France, Turkey and Chile, have dual systems where 'Gendarmerie' agencies, originating from the military (sometimes still within the hierarchy of the Ministry of Defence but under (local) civilian authorities) operate next to the civilian police. In many countries the police have strong military features: they wear combat uniforms, patrol in groups, have a military type ranking system (Police General rather than Commissioner) and live in separate compounds.

Militarization of police may show itself in many aspects including:

- The hierarchical system in use
- The culture
- Training aspects (in a militarized system typically much time is spent on marching)
- Living quarters of police officers (in a militarized system police typically live in separate compounds, isolated from the communities they serve)
- Personnel policies (in a militarized system officers tend to be transferred without being consulted)
- Operational tactics being used

In theory and in practice it is undoubtedly considered best practice for the police to be as non-militarized as possible, since more militarized police tend to

37) See for example: AI, 2002, *Policing to protect human rights*.

38) Art. 13 the European Code of Police Ethics requires the police to be placed under civilian authorities, with the commentary adding that "A police organization under civilian responsibility is likely to best cultivate police professionalism suitable for civil society."

be less responsive to community needs (as a consequence of culture as well as methods) and will experience difficulties in establishing relationships with the public.³⁹ It is for this reason that even in times of disorder it is recommended that basic law enforcement responsibilities be kept in the hands of civil law enforcement agencies for as long as possible.⁴⁰ This having been said, some authors argue that some 'functional blurring' may be appropriate in fragile environments since "militarization can make police more violent, but its associated hierarchical structures and discipline may also offer a potential tool for controlling brutality and ensuring a degree of public safety."⁴¹

39) See for example O'Rawe, M. & L. Moore, 1997, *Human rights on duty*; Bayley, D., 2001, *Democratizing the police abroad: What to do and how to do it*, p.39; Rover, C. de, 1998, *To serve and to protect*; Crawshaw, R., e.a., 1998, *Human rights and policing. Standards for good behaviour and a strategy for change*.

40) Rover, C. de, 1998, *To serve and to protect*.

41) Global Facilitation Network for Security Sector Reform, 2005, *Compendium of good practices on security sector reform*.

42) The text, and the IACHR quotes, in this box are taken from *Civil Society Organizations and the Inter-American System for the Protection of Human Rights Face Citizen Security Challenges in the Americas*. Document prepared for the hearing on Citizen Security and Human Rights At the Inter-American Commission on Human Rights, presented on October 14, 2005, issued by a conglomeration of human rights NGOs.

43) Despite secrecy being their core business, Security Agencies have opened up slightly recently. E.g. the US National Security Agency and the UK based MI5 both have websites explaining their mission and objectives.

The Inter American Commission on Human Rights (IACHR)

"The lack of clear delineation between police and the army is a serious problem in many countries within the jurisdiction of the IACHR. The Commission has addressed the issue repeatedly, stating that, "a state must not permit the Armed Forces to influence the actions of police institutions." It has also affirmed that, "given that the Armed Forces lack proper training for controlling internal security, it is the responsibility of an effective and rights-respecting civilian police force to combat insecurity, crime, and violence internally." In addition to noting the differences in military and police training in its 1998 Annual Report, the IACHR recommended that, "the Armed Forces not be deployed for the purposes of law enforcement. Due to their specialty, complexity and degree of interaction with civilians, the investigation of common crimes and arrests, amongst other tasks, require a duly trained police corps particularly respectful of the Law."

(...) According to the IACHR, when states authorize military interventions in internal security matters, they confuse the concepts of public security and national security. Neither the abuse of "states of exception" nor the extraordinary increase in crime can justify the intrusion of the military in matters related to internal security. Another worrying aspect of militarization is the continued use of military jurisdiction for misconduct, even when soldiers are engaged in policing functions. For their part, police forces continue to be deeply militarized in their organizational structures and educational systems, and in their control and disciplinary mechanisms."⁴²

2.4.2.b. Internal Security Agencies

As a general rule of thumb the police are restricted to crime prevention and detection the maintenance of public order. Their intelligence gathering, carried out under a Criminal Procedure Code, is restricted to criminal intelligence. Police should not actively gather political intelligence. Gathering political intelligence about State security rather than crime is the prime responsibility of Security Agencies whose function it is to prevent (foreign) threats against the State. As Security Agencies tend to operate under secrecy, their accountability lines are quite different from the police. Generally, Security Agencies report to a secret parliamentary commission and/or are (internally) accountable to the Minister of the Interior.⁴³

The exact distinction between police and internal security agencies is not always clear. In some countries Security Agencies are separated entirely from the police, necessitating some kind of coordinating mechanism for exchanging relevant information. In others, such as Malaysia and Ireland, both are performed within the same agency (though not necessarily by the same officers). In still others, police have 'security officers' accountable to both the police and the Security Agency.

The focus of these Internal Security Agencies tends to be different to that of the police: their first priority is to prevent acts that may disrupt the State, without having to pay much attention to how this is accomplished. As such, they are less inclined to follow rules of procedure under the Criminal Law, as the police are required to do. In some countries Internal Security Agencies operate under different legislation to the police. Clearly however it is important to note that, when they do have police powers such as the power to arrest and detain, and the power to use force, the principles of the UN Code of Conduct for Law Enforcement Officials should be applied as a safeguard against human rights violations.

Intelligence is a vital 'resource' for both police and Security Agencies. It is not always clear what intelligence is criminal and what is political and information held by police may be interesting for Security purposes. Indeed, the demarcation between police and security agencies can become unclear with Security Agencies, often without proper training in the law of evidence, gathering information that is used as evidence in court and police using their community relations for gathering intelligence that is used for political reasons. Due process standards in criminal trials can be undermined by the fact that Security Agencies tend to be unwilling to disclose both their sources of information and the actual information itself, which often is 'classified'. Conversely, if police start using their community relations for gathering political information they risk losing the trust of their communities. This is especially the case with intelligence regarding "terrorism". "Terrorism" for some involves criminal acts, though with a political motive, and for others is seen as purely a political act. As a consequence both police and Security Agencies may be interested in gathering intelligence about "terrorists."

Security Services in the Council of Europe

Within the Council of Europe, the general characteristics of internal security services of Member States have been identified and defined in recent years.⁴⁴ The Group of Specialists on Internal Security Services (PC-S-SEC) which looked into this issue concluded that the existence of an internal security service is based on the fundamental principle of international law that a state is entitled to protect its national security (which may be defined in national law), which in turn is justified by the principle that national sovereignty requires protection. National security is considered as the backbone of national sovereignty. The internal security services contribute to the protection of human rights; they are part of the constitutional state and operate under the legal system. This

44) The PC-S-SEC was asked by the Council of Europe's Committee on Crime Problems (CDPC) to submit a report on the feasibility of recommendations on security services. The CDPC considered the report of the Group at its 52nd Plenary Session (16-20 June 2003): CDPC (2003) 09, Addendum IV.

means that the functioning of an internal security service is not just aimed at defending the national security but also at protecting and guaranteeing the human rights of its citizens.

The PC-S-SEC further concluded that all internal security services are embedded in their national legal frameworks, either in the constitution, or in specific laws, or in laws regulating other governmental bodies as a means of safeguarding the application of the rule of law. They should be organised and operate based on rules laid down by statute. In this respect it was considered as a general principle that all laws should go through the normal parliamentary law-making process, which is by its nature a public procedure. This means that any statute establishing internal security services should be in accordance with the principle of legality.

The PC-S-SEC identified that one of the functions of internal security services can be to prevent threats of a serious criminal nature and that the information internal security services obtain may be of great assistance to law enforcement agencies. It concluded that since one of the functions of an internal security service can be to assist law enforcement agencies, it is justified – as is the case in some Council of Europe member States – that internal security services are organised within a law enforcement agency. It recognised that the functions and powers of law enforcement and intelligence gathering are separate but complementary and that it was a matter for each member State to decide how best to protect its national security and to structure its internal security services. However, it concluded that whatever structure was adopted must be legal and that where the functions are carried out by different bodies, legislation should build in safeguards to ensure a proper balance between the necessity to keep information confidential, if and when necessary for national security reasons, and, if required by law, a proper mechanism to inform law enforcement agencies, when necessary in a specific case or required by law. Where documentation containing information on persons gathered by internal security services is subsequently used in court as evidence by a public prosecutor, the equality of arms principle requires that this information be accessible to the defendant.

2.4.2.c. Private security providers

As we have seen, the State cannot, and need not, provide security in isolation. Non-State actors, including private security companies, play an important and ever-increasing role. This is sometimes referred to as the ‘privatization of policing’ as if private companies and individuals increasingly take over the police function. This may be an oversimplification. What is happening is not so much the privatization of police functions, but rather ‘multilateralization’: “a host of non-governmental groups have assumed responsibility for their own protection, and a host of non-governmental agencies have undertaken to provide security services.”⁴⁵ Indeed, both sponsors and providers of policing can be public or private. Various groups can authorise policing (the auspices of security) including those representing economic interests (businesses as well

45) Bayley & Shearing, 2001, *The new structure of policing. Description, conceptualization and research agenda*, p.1

as criminal gangs), residential communities, cultural communities, individuals and governments; and various groups can provide (non-governmental) policing, including commercial security companies, non-governmental auspices acting as their own providers (industries, real estate developers, neighbourhoods), individuals and strange enough governments themselves. Governments providing non-state policing services may seem somewhat awkward but is very real as can be seen when governments allow police officials to work in their official uniform off-duty for private gain (called 'moonlighting'); and in situations where governments charge for policing services (such as policing commercial events and responding to private burglar alarms).

'Multilateralization' of police functions is a reality. Moreover this is not new: "it could be argued that the monopolization of policing by government is an aberration. It is only in the past 100 to 200 years that policing has been effectively monopolized by governments, and even that was not uniform across countries."⁴⁶ However, it must be clear that the government remains ultimately responsible for policing. Justice, equality of service and quality of service, are to be respected at all times. In order to understand the current dynamics and complexities in security maintenance the process of multilateralization must be fully understood.

The phenomenon of security provided by private companies is not without concerns. Several observers have pointed to the negative effect on public police practices. As the line between private and public security is not always clear, responsibilities for who is doing what as well as lines of accountability can get blurred, sometimes leading to a loss of trust in public police. Furthermore public and private providers often employ different practices based on the powers they are able to lawfully operate: public police tend to prevent crime through resort to use of force; private providers tend to do so through exclusion and the regulation of access.⁴⁷ All in all it seems that an influx of private security providers seems to lead to public police becoming less service and community-oriented and focused increasingly on situations where they are more prone to use force.

In recent years, Amnesty International has particularly focused on the context of the employment of private security by multinational companies or the secondment of police officers to the employment of such companies to defend property, recommending for example that companies should not employ personnel with a record of human rights abuses and that private security companies should be subject to national regulations ensuring strict accountability and that security procedures employed by private security personnel should be consistent with the human rights standards including measures to prevent excessive force, as well as torture or cruel, inhuman or degrading treatment.⁴⁸

46) Ibid. p.1.

47) Ibid.

48) AI's 2004 booklet on UN human rights norms for business, *Towards Legal Accountability*.

2.4.3. The criminal justice system

The criminal justice system is responsible for criminal investigation, prosecution and adjudication, as well as the execution of sentences. It

includes such institutions as the police, prosecution, judiciary, probation and prisons services (and some would argue it also involves non-State players like private investigators and traditional and informal actors). All agencies within the criminal justice system interrelate and are dependent upon each other. There are countless examples of police keeping someone detained without trial as a means of avoiding an overloaded and/or ineffective court system; public mistrust in trial decisions leading to public and/or police vigilantism; police making crucial procedural errors in investigations leading to release of suspects; sentenced criminals being released because of overcrowded prisons, not to mention corrupt practices where the entire criminal justice system is rendered ineffective.

The quality of the overall criminal justice system undoubtedly contributes to the maintenance of security, though the effect of the criminal justice system on crime is limited: a large percentage of all crimes go unpunished. One important aspect of the criminal justice system that contributes to security has to do with access to justice. Users of this Resource Book researching the role of police should be aware of broader issues around accessing justice – for example the existence of an adequate security and justice infrastructure throughout a country, properly trained representatives of the judiciary, law enforcement and judicial personnel with a knowledge of local languages and culture amongst others – and the role and obligations of police in ensuring access to justice.⁴⁹

Criminal justice systems are ordinarily based on one of two judicial systems: the **accusatorial** (or adversarial) common law system and the **inquisitorial** civil law system:

- Under the inquisitorial civil law system police and prosecution as well as judges are considered as neutral and objective ‘servants of the law’ working to find the objective truth. The pre-trial judge or investigating magistrate, assisted by the prosecutor, is primarily responsible for the criminal investigation, actively involved in determining the facts of the case, whereas one or more judges are in charge of the trial. The system is focused on the accused.
- Under the accusatorial common law system both parties (defence and prosecution) have the same standing at trial and during trial are considered as equal parties in search of the (‘subjective’) truth. The judge, sometimes assisted by a jury, is there to mediate and safeguard the judicial process – as an impartial referee between parties. The purpose of the investigation for the prosecutor is to obtain information that will convince the judge or jury that sufficient proof exists to prosecute and convict the accused.

49) Vera Institute of Justice, 2003, *Measuring progress toward safety and justice: A global guide to the design of performance indicators across the justice sector*. This guide has a section on performance indicators for measuring access to justice.

Of-course in practise these systems are not followed in such pure forms and quite often there is mix of an inquisitorial pre-trial phase and an accusatorial trial phase. Very generally speaking one can say that the UK and USA as well as most (former) British Commonwealth countries tend to have a moderately accusatorial and most of the European continental countries, most Latin

American countries and countries that were under Soviet influence have a moderately inquisitorial judicial system.

The different systems result in different roles for the prosecutor – in turn affecting the police. In the inquisitorial (continental) system the investigation takes place under the authority of the pre-trial judge or investigating magistrate assisted by the prosecution. The prosecutor starts the investigation, directs it and takes the results to court. The other party – the suspect and his/her legal representative – are rather passive and usually do not actively conduct any investigation themselves (they may however request the investigative judge to carry out certain actions, e.g. hear certain ‘new’ witnesses that went unnoticed by the prosecution). The prosecution role can be carried out by a prosecutor (a party in the trial) or by an (impartial) examining magistrate or pre-trial judge (for example in France, Italy, Belgium). Countries with such a civil law system often have separate judicial police who carry out criminal investigation functions on behalf of the prosecutor. As judicial officers, the judicial police are separated from other police functions, such as prevention of crime and the maintenance of public order. In this context the ‘other’ police are known as the ‘preventive police’.

In the accusatorial system however, the police carry out the investigation, under their own authority, and take the results of the investigation to the prosecutor who takes them to court. This diminishes the role of the prosecutor substantially but increases the importance of the police role. Such countries often have one police agency carrying out all police functions – though within the agency there are usually separate investigation departments. Further information about the role of police in criminal investigations and prosecutions can be found in Chapter 7.

2.5. Order or disorder?

States are responsible for the maintenance of order. However, this doesn’t mean countries are always ultimately stable, peaceful and tranquil. People disagreeing with a government’s policies have the right to demonstrate and organise opposition. This is laid down in article 21 of the ICCPR (right to peaceful assembly) which also states: *“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.”* Police are to impose these legal restrictions, requiring them to understand people’s rights and freedoms (and to technically know how to deal with demonstrations and assemblies).

It is not always easy to distinguish at what point order becomes disorder, nor can a fully neutral judgment always be made. Small-scale non-violent demonstrations do not have to lead to a situation of disorder. On the contrary, they are an expression of people enjoying their civil and political rights to the

fullest and show functional participation in the political process.⁵⁰ Forming peaceful assemblies and staging peaceful demonstrations are basic rights that the police should facilitate rather than obstruct. Police should manage these professionally, in order to prevent them becoming unlawful and/or violent. Indeed: “when a community, or a section of a community, articulates demands on the political system police are to facilitate the transmission of those demands and not to suppress them; it means that when opponents of a regime or government seek to achieve their ends through violence or intimidation, or otherwise illegally, police should frustrate them; it means that when the means or ends of government are at odds with accountable government or the rule of law, police are not to serve those means or ends. In this sense police can act as a ‘conscience of constitutionality’.”⁵¹

Yet, those in power can regard such demonstrations, even when peaceful, as disorder threatening the continuity of the State and as such may want to disrupt them. The existence of so-called disorder is often used as an excuse by States to lower human rights standards and safeguards. States tend to give preference to security considerations and argue that restoring order should be given priority over human rights, as it is their duty to provide security.

Peaceful assemblies or demonstrations may be an indication of tensions within a society, and these may develop into disturbances – unlawful or violent assemblies. Ultimately, tensions and disturbances may lead to non-international armed conflict (civil war), although on most occasions, of course, they do not. The law protecting people in these various situations is different as thresholds are crossed. International human rights law, which seeks to protect people from abuse of power by the State and to secure remedies in the event of human rights abuse, is applicable across all of the thresholds. It is applicable in times of peace, in times of tension and disturbance and in times of armed conflict – international and non-international. However its effectiveness is reduced through measures of derogation as States seek lawfully to limit human rights in times of emergency that threaten the life of the nation (see Section 2.6). International humanitarian law, or the law of war, becomes applicable in situations of armed conflict (international or non-international). In Appendix H an overview is given of the relevant international humanitarian law.

Whatever the level of tensions within a society, civil policing functions continue: i.e. police continue to investigate crimes, provide assistance (where possible) and maintain order (where possible). Adherence to the rule of law and the bringing to justice of criminal offenders, even in situations of conflict and disorder, are the prime means by which States prevent impunity leading to an increase in civil disobedience and (organized) crime. That said, responsibility for the maintenance of order may be shared with, or transferred to, State agencies other than the police during states of emergency, most notably to Special Forces and the military. In any event, international human rights and humanitarian law tasks States to uphold certain minimum norms regardless of the circumstances. Discrimination and inhumane treatment can never be justified by internal conflicts or any other public emergency.

50) Crawshaw, R., e.a., 1998, *Human rights and policing. Standards for good behaviour and a strategy for change.*

51) *Ibid.*, p.44.

2.6. A state of emergency

In situations such as those described in the previous Section, States can get to the point where they consider it necessary to declare a state of emergency. Human rights treaties allow States to limit human rights when there are emergencies such as war, civil unrest or natural disasters that threaten the life of the nation.

2.6.1. Derogation of human rights under a state of emergency

Under article 4 of the ICCPR States can declare a state of emergency and may derogate from their obligations under the ICCPR: *“in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.”* This derogation needs to adhere to the principle of proportionality as it is only permitted *“to the extent strictly required by the exigencies of the situation”* and may not be inconsistent with other obligations under international law nor may it be discriminatory. The State Party must notify other State Parties through the Secretary-General of the UN. From these requirements it follows that derogation must be subject to regular review and must be limited in time.

Some rights are non-derogable and these vary according to the treaty. The ICCPR permits no derogation from:

- The right to life (Article 6)
- The prohibition of torture (Article 7)
- Prohibition of slavery (Article 8, paragraphs 1 and 2)
- The right not to be held guilty for crimes that didn't constitute crimes before (Article 15)
- To be recognised as a person before law (Article 16)
- The right to freedom of thought, conscience and religion (Article 18)⁵²

States that are parties to the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, cannot derogate from this obligation as prescribed in Article 6 of that Protocol.

The right to a fair trial can be subject to derogation, as can – amongst others – the rights to freedom of assembly, freedom of association, freedom of expression and the right to privacy.

A State can declare a state of emergency when the life of the nation is threatened. However, it is not always clear if and how 'the life of the nation' is threatened; nor whether it requires the level of derogation as carried out. Many countries have implemented some kind of security law, very often relating to the threat of "terrorism", providing their respective police agencies with wider powers and authority. These *de facto* (but not *de jure*) states of emergency are not always in accordance with Article 4 of the ICCPR, and if so are a violation of international law. Both declaring a state of emergency and implementing security legislation are in practice not always governed by objective considerations: what happens if the vast majority of people of that area do not agree with the government's assessment of the situation and do not want

⁵²) Not to be imprisoned for not fulfilling a contractual obligation (Art.11, ICCPR) is another non-derogable right.

the emergency law to be promulgated? Who will decide that the proclamation of emergency is absolutely essential to meet the threat to the security of the country or province and that the force used is necessary and proportionate to the situation?⁵³

The Human Rights Committee (HRC) has given an elaborate seven-page authoritative interpretation of Article 4 of the ICCPR in its General Comment 29.⁵⁴ It is recommended that readers familiarise themselves with this comment thoroughly and pay particular attention to those aspects dealing with law enforcement and maintenance of public order issues. The comment clearly states that 'restoration of a state of normalcy' must be the predominant objective of derogation. The requirement of Article 4 that derogation measures must be 'limited to the extent strictly required' "relates to the duration, geographical coverage and material scope of the state of emergency and any measures resorted to because of the emergency."⁵⁵ The HRC stresses the importance of adhering to the principles of legality and rule of law 'at times when they are most needed'.

Derogation may not be inconsistent with other obligations under international law, particularly humanitarian law (see appendix H). As stated by the HRC: "States parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."⁵⁶ Other elements of fair trial that should be respected include the condition that only courts may try and convict persons for criminal offences and the right to take proceedings before a court to enable the court to decide on the lawfulness of detention.⁵⁷

All in all, for States to lawfully derogate from human rights they must comply with the following principles:

- Derogation must be exceptional and temporary
- Absolutely necessary
- Proportionate to threat
- Non-discriminatory
- A state of emergency must be officially proclaimed. Declaring such a state of emergency must be necessary to deal with the situation and the measures taken must be appropriate measures
- Respect for the inherent dignity of the human being
- Respect for those non-derogable rights mentioned earlier. In addition, the taking of hostages, abductions or unacknowledged detention are always prohibited
- Derogation must be subject to international review

53) Based on personal communication with Mr. G.P Joshi, CHRI, Police Program Coordinator, India.

54) HRC, General Comment No 29 adopted on 24 July 2001.

55) *Ibid.*, para 4.

56) *Ibid.*, para 11.

57) *Ibid.*, para 16.

2.6.2. Restrict or derogate?

Some articles of human rights treaties contain limitation clauses, allowing the rights they embody to be limited under certain circumstances. For example

Article 21 of the ICCPR protects the right of peaceful assembly. However, it allows restrictions, imposed in conformity with the law and necessary in a democratic society, to be placed on that right for a limited number of purposes. These are the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights of others. The articles protecting the rights to freedom of thought, conscience or religion, to freedom of expression; to freedom of association and to liberty of movement contain similar limitation clauses. Indeed, General Comment 29 of the HRC states that not every disturbance or catastrophe qualifies as a public emergency: “[States] must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation.”⁵⁸ In other words, it will not always be necessary to declare a state of emergency and limit peoples’ rights, nor can declaring a state of emergency be used to restrict more rights than was necessary to meet the exigencies of the situation.

2.6.3. Absolute rights

Some rights are absolute in that States can never derogate from them and they may never be limited in any way. Absolute rights are:

- The right to be free from torture and ill-treatment
- The right not to be enslaved
- The right to freedom of thought and conscience

Although the right to life is non-derogable, it is not an absolute right in that there are some circumstances under which agents of the State may use lethal force. However, the right not to be arbitrarily killed is an absolute right. Similarly, the right to liberty of person is not an absolute right as treaty provisions allow for lawful deprivation of liberty. However, the right not to be arbitrarily arrested and/or detained is absolute. See Chapters 5 and 6 for further information on this.

Another absolute right implied from all the human rights treaties is that States cannot treat different people differently under similar circumstances; the right not to be discriminated against is implied in all human rights standards.

2.6.4. “Terrorism”

“Terrorism” represents a particular situation that governments often claim threaten the life of a nation. It is currently viewed as a major threat to security.⁵⁹ There is not one widely accepted definition of “terrorism” to guide international norm-setting, although there are moves to address this.⁶⁰

Amnesty International welcomes initiatives towards a Terrorism Convention as the organization comes across vague definitions in security legislation that may lead to the criminalizing of peaceful activities involving the exercise of rights that are protected under international law as well as the jeopardizing of rights of suspects of security offences.⁶¹

58) Ibid., para 5.0

59) Report of the Secretary-Generals’ High-Level Panel on Threats, Challenges and Changes, 2004, *A more secure world: our shared responsibility*.

60) Ibid, para 164.

61) AI, 2002, *Rights at risk*.

“Terrorism” seeks to create disorder and destabilize States. Since governments have a duty to ensure order in their territory they have the right and the duty to protect their people against such threats. However, the means used by States to achieve this often has far reaching effects on the rule of law. “Terrorism” may lead to States proclaiming a state of emergency. In such cases, States are bound by the conditions discussed above. In practice however, States tend to refrain from officially proclaiming a state of emergency but rather implement some kind of security legislation which very often includes the broadening of police functions, granting law enforcement agencies additional powers to search, arrest and detain while weakening safeguards against abuse of those powers.

An example is Malaysia, where the government, under provisions of the 1957 Constitution allowing for restrictions to fundamental liberties in the event of serious subversion or organised violence, enacted the Internal Security Act (ISA) in 1960. The ISA, whether or not an official state of emergency has been declared, empowers the police to arrest without a warrant any individual they believe has acted, or is “about to act”, in any manner that may threaten Malaysia’s security, “essential services” or “economic life”. Detainees can be held up to 60 days for investigation with access to lawyers, doctors and family members entirely at the discretion of the police. Subsequently the Minister, acting on the advice of the police, can issue a two year detention order renewably indefinitely. As Amnesty International wrote in its 2005 report: “The ISA has, through a series of amendments, incrementally extended executive powers, while stripping away the judicial safeguards designed to protect against their abuses. Once a person is detained under the ISA, he or she has no effective recourse to legal protection, nor any opportunity to establish their innocence.”⁶² Since the ISA was enacted in 1957, states of emergency have been declared on 4 occasions. The declarations in 1964, and 1969 have never formally be annulled by parliament, so many of the legal orders issued under the emergencies remain in force.

In many countries facing “terrorism” governments overlook police misconduct and the public is often willing to accept serious restrictions of their rights if they believe, or are led to believe, it will help them feel safer and protected against “terrorism”. Governments ultimately succeed in conveying to the public that without tough policing they will not be able to provide a feeling of security. This happens in countries where democracy has taken root, as much as in countries that have emerged from military dictatorships and where politics is dominated by a strong military culture, though in such countries the problem is even more acute.

Moreover, security legislation often facilitates the targeting of particular groups “such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media.”⁶³ Indeed, some States use the threat of “terrorism” to sidetrack rule of law institutions and restrict political, cultural or other opponents.

62) AI, 2005, *Malaysia. Towards human rights-based policing*, p.15.

63) OHCHR, 2003, *Digest of Jurisprudence of the UN and regional organizations, on the protection of HR while countering terrorism* p. 8. The digest discusses relevant jurisprudence under the ICCPR, ECHR, AHRC and the African Charter.

The delicate issue of security and human rights has been addressed by Amnesty International in its *Shattered Lives* report, as well as in the “anti-terrorist” context in recent years, notably its *Rights at Risk* report which focuses on the organization’s concerns regarding security legislation and law enforcement measures. In the latter report, Amnesty International states: “The challenge to States, therefore, is not to promote security at the expense of human rights but rather to ensure that all people enjoy respect for the full range of rights. The protection of human rights has been falsely described as being in opposition to effective action against “terrorism”. Some people have argued that the threat of “terrorism” can justify limiting or suspending human rights. Even the prohibition to torture, one of the most basic human rights principles and a rule of international law which binds every state and every individual, has been called into question.”⁶⁴ Clearly Amnesty International strongly opposes any limitation of rights that is inconsistent with international human rights law.

In its *Annual Report 2005* Amnesty International states: “Governments have a duty to prevent and punish [atrocities like the bombings in Madrid and the hostage taking of school children in Beslan], but they must do so while fully respecting human rights. Not only is it a moral and legal imperative to observe fundamental human rights all the more stringently in the face of such security threats, in practice it is far more likely to be effective in the long term. Respect for human rights and fundamental freedoms is not optional in efforts to defeat “terrorism”. States’ efforts to combat “terrorism” must be firmly and unconditionally grounded in the rule of law and respect for human rights.”⁶⁵ Human rights are not at odds with security but rather the two should go hand-in-hand. Indeed: “Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. Terrorism itself should also be understood as an assault on basic rights.”⁶⁶

2.7. Summary

Any relatively stable government, whether democratic, authoritarian or other bears the responsibility for upholding the rule of law and the maintenance of order. It will therefore develop some security and justice arrangements, including the establishment of law enforcement agencies. The security sector will invariably include non-State actors.

In all their functions police cooperate with other security and justice institutions and entities, both State and non-State actors, to achieve their objectives. Moreover, other entities may share objectives with the police. Indeed, the effectiveness of the security and justice system as a whole depends on the quality of all separate entities involved: the chain is as strong as its weakest link as all entities are interdependent. It is crucial for the effectiveness of the system that different agencies have clear guidelines and instructions on their respective functions which also specify their distinct positions and lines of accountability as well as their points of interface. An important effect of this

64) AI, 2002, *Rights at risk*, p.3.

65) AI, 2005, *Annual report 2005*, p.8.

66) OHCHR (2003), *Digest of Jurisprudence of the UN and regional organizations, on the protection of HR while countering terrorism*, p.9.

interdependence relates to accountability. The police cannot, and should not, be held responsible for misconduct, institutional miscommunication, lack of coordination, policy gaps etc., that are at the responsibility of other 'partners' in the security and justice chain. Human rights advocates need to be aware of the role of different agencies within systems established for maintaining order as a means of targeting research and campaigning activities effectively.

Order, which we characterised as a state of peaceful harmony under a constituted authority, is not threatened by peoples' full enjoyment of their rights, including the right to peacefully assemble. Indeed, demonstrations should not be seen as a sign of disorder. However demonstrations can be a sign of tensions in society that may lead to internal disturbances. In situations of disorder States can, under strict conditions, proclaim a state of emergency. In such situations some rights can be subject to derogation, however some rights are non-derogable. Moreover, some rights are absolute, meaning they are non-derogable and can never be limited in any way.



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Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession

Article 1, UN Code of Conduct for Law Enforcement Officials

The work of law enforcement officials is a social service of great importance (...)

Preamble to the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

Like all agencies of the criminal justice system, every law enforcement agency should be representative of and responsive and accountable to the community as a whole

General Assembly Resolution 34/169 adopting the UN Code of Conduct for Law Enforcement Officials, 17 Dec. 1979