

Ralf Alleweldt · Guido Fickenscher
Editors

The Police and International Human Rights Law

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

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

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

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

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

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

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

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

Chapter 1

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



Ralf Alleweldt and Guido Fickenscher

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 2

Police and Human Rights: Fundamental Questions



Ralph Crawshaw

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

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

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

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

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

2.1 Introduction

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

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

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

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

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

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

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

2.2 What Branches of International Law Are Relevant to Police?

Branches of international law relevant to police are as follows:

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

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

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

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

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

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

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

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

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

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

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

2.4 What Is the Relationship Between Human Rights and Policing?

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

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

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

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

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

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

2.5 Which Human Rights Instruments Are Relevant to Police?

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

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

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

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

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

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

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

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

Fundamental Principles of International Human Rights Law Applicable to Policing

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

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

2.7 How Does the International System Protect Specific Human Rights?

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

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

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

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

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

2.7.1 The Universal Declaration of Human Rights and International Treaties

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

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

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

2.7.2 Measures to Prevent Torture and Ill-Treatment

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

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

2.7.3 Non-treaty Instruments

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

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

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

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

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

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

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

Or, more specifically:

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

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

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

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

2.9.2 What Types of Conflict Do They Regulate?

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

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

2.9.3 How Are Combatants and Civilians Defined?

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

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

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

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

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

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

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

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

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

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

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

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

2.9.6 *What Are Some Examples of the Laws of War?*

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

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

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

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