

### MODULE 3: HUMAN RIGHTS ANALYSIS – THE OBLIGATIONS TO RESPECT AND TO PROTECT

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# Human rights analysis – the obligations to respect and to protect

## Introduction

This module provides frameworks to analyse – from a human rights perspective – concrete situations related to police work. This structured step-by-step approach simplifies the analysis of potential violations of human rights, identifying failures of the obligations to respect and protect.

The practice of such human rights analysis is a cornerstone of human rights-based policing. Essentially, it is a simplified version of the analysis courts undertake. To help clarify the relevance of human rights in practice, the module walks participants through case studies drawn from the work of international human rights bodies, in particular the European Court of Human Rights (ECtHR).

These analytical tools are powerful. They familiarise police officers with the relevant legal analysis, helping them to meet their obligations as duty bearers and to claim their rights as rights holders. They translate ‘high’ principles into practice, functioning as a ‘transmission belt’ to break down the general objectives of policing – to respect and to protect human rights – into specific guidelines that facilitate such work. Analysing human rights in practical situations also helps align attitudes with human rights and hones human rights-based policing skills, which, in turn, enable police officers to help internalise human rights.

The module first explores the concept of a human right violation before presenting the two analytical schemes based, respectively, on the obligation to respect and the obligation to protect. Each is analysed in turn. Then the four case studies are introduced and analysed separately. The overall goal is the systematic integration of a human rights perspective into police work and police thinking. The Supplementary material section provides more information on the module’s key concepts. To help deepen understanding, the police manual also includes additional court findings on the four case studies examined.

## Activity: Human rights analysis – obligations to respect and to protect

### Purpose:

In this activity trainers are often confronted with the question: “Is it a human rights violation if [...]?” The participant then recounts a personal experience and wants it assessed in human rights terms. Often, the answer is far from straight-forward. It depends!

The analytical schemes presented here do not offer ready-made answers but instead help guide police officers to ask the right questions. They provide a checklist of ‘right questions’ in order to identify the most important aspects of these situations, then weigh and balance the interests before taking a decision. They enable police officers to untangle the often thorny issues surrounding possible human rights violations and determine on a case-by-case basis whether or not a specific act or omission constitutes a violation.

### Objectives:

#### Knowledge

- develop a more detailed understanding of the role of police with regard to human rights

#### Attitude

- accept the overall importance of the principles of necessity and proportionality
- realise the importance of the internalisation of human rights principles

#### Skills

- be able to apply human rights norms by using analytical tools in concrete policing situations
- be able to identify aspects that distinguish a justified interference with a human right from a violation of a human right
- be able to identify actions that police must take to protect human rights

### Requirements:

- time: 90–120 minutes
- materials:
  - Handouts 1 and 2 with case studies and human rights analysis tool on the obligations to respect and protect (as required)
  - flip chart
  - optional: power point presentation and projector
- space: plenary room plus two working group rooms
- group size: maximum 20–25 persons



## Activity description: **Human rights analysis – obligations to respect and to protect**

- ❶ Introduce the purpose and objectives of the activity.
- ❷ Distribute and briefly introduce the analytical schemes (Handouts 1 and 2), drawing on real-life situations that participants bring in or that the facilitator has prepared. (about 15–20 minutes)
- ❸ Divide participants into groups of 4–to–6 persons and distribute handouts with case studies, assigning each group one case. (about 25–35 minutes)
- ❹ Make sure that groups:
  - have understood their task well;
  - appoint a rapporteur to bring results back to plenary.
- ❺ Answer any questions that arise during group work.
- ❻ Have groups present their work in the plenary. (about 30 minutes per case)
- ❼ Hold a general discussion of results, reflecting on what has been learned.
- ❽ Summarise major points and, if necessary, provide tailor-made input.

## Handout 1 – Human rights analysis – obligation to respect

### Case study A: Arrest and detention

Mr L is a disabled man who is blind in one eye and has severely impaired sight in the other. With the aid of his guide dog, he went to the post office one day to check his post boxes. He found that his boxes had been opened and were empty. Mr L complained to the post office clerks, which led to a dispute. One of the postal clerks called the police claiming that Mr L was drunk and behaving offensively. The police arrived at the post office and arrested Mr L.

Believing Mr L to be under the influence of alcohol, the policemen took him to a “sobering-up centre”, an establishment in which, according to national law, an intoxicated person can be placed for a period not exceeding 24 hours. A doctor at the centre assessed Mr L as being “moderately intoxicated” and decided that this justified Mr L’s confinement in the centre for six hours. No blood or breath tests were carried out before, during or after that examination. After 6-1/2 hours, Mr L was permitted to leave the centre, subject to payment of fees for his transport to and lodging at the centre. Mr L considered this treatment an unlawful act by state officials.

### Discussion questions:

1. Which human right(s) is/are applicable to this situation?
2. Has the state interfered with these human rights? How?
3. Has a human rights violation occurred?
  - Is there any domestic legal basis for state action?
  - Does the action pursue a legitimate aim?
  - Is state interference necessary and proportionate to the aim?
4. Think of alternative ways of handling this situation. What other options might the police have considered?



## Handout 1 – Human rights analysis – obligation to respect *(continued)*

### Case study B: Using force against suspected terrorists

Government authorities of State A had a strong suspicion that three men were planning a terrorist attack against the military in Territory X. The government decided to let the suspected terrorists enter Territory X under police observation. Special forces from State A were sent to assist the local Territory X police. The police had an idea of when and where the suspected attack would take place. It was assumed that the suspected terrorists would use a car bomb that could be remotely controlled and detonated at short notice.

The day after the suspects arrived in Territory X, they left a car in a parking lot. Four undercover, special forces officers followed them and examined the car from the outside. They strongly suspected that the car had a bomb inside. The officers decided to apprehend the three suspects when they returned to the car. When the suspects returned, the police called out to them, but none of them showed any signs of surrendering. On the contrary, their abrupt movements indicated that they might indeed detonate a bomb. The three suspects were shot and killed.

It turned out, however, that the suspects were not armed, and that there were no explosives in the car. However, materials for a time bomb were found in another car that one of the suspects had rented in another place.

### Discussion questions:

1. Which human rights are applicable to this situation?
2. Has the state interfered with these rights? How?
3. How would you assess the actions by the special forces officers?
4. How would you assess the overall operation against the suspected terrorists?
5. Has a human rights violation occurred?
6. Think of alternative ways of handling this situation. What other options might the police have considered to avoid the use of lethal force?

## Handout 1 – Human rights analysis – obligation to respect *(continued)*

### Human rights analysis – obligation to respect

#### PART 1: APPLICABLE HUMAN RIGHTS/STATE INTERFERENCE

1.1. Which human right(s) is/are applicable to the concrete situation?

1.2. Has the state interfered with these human rights? How?

#### PART 2: JUSTIFICATION OR VIOLATION?

2.1. Is there any domestic legal basis for state action?

2.2. Does the action pursue a legitimate aim?

2.3. Is state interference necessary and proportionate to the aim?

- Is the action suitable to achieve a legitimate aim?
- Is it necessary (a 'pressing social need')?
- Is it the least intrusive measure? Are there any other alternatives?





## Handout 2 – Human rights analysis – obligation to protect

### Case study C: Handling a demonstration and a counter demonstration

In a small village, an association of doctors were campaigning against abortion. The doctors' association planned a demonstration and, as stipulated by national legislation, had given prior notice to police of the planned demonstration. The police, without objection, gave the participants permission to use the public highway for their demonstration. The police did, however, later ban two other planned demonstrations by abortion supporters, as these were planned for the same time and place as the doctors' anti-abortion demonstration.

Fearing that incidents might occur nonetheless, the anti-abortion organisers consulted with local authorities in an effort to change the demonstration's marching route. The police representatives pointed out that police officers had already been deployed along the original route, and that the proposed new route was unsuited for crowd control. The police did not refuse to provide protection, but said that, irrespective of the route, it would be impossible to prevent counter demonstrators from throwing eggs and disrupting both the march and the planned religious service.

A large number of pro-abortion demonstrators – who had not given prior notice to the police – assembled outside the church and used loudspeakers, threw eggs and clumps of grass to disrupt the doctors' march. The police did not disperse the counter demonstrators.

When physical violence threatened, special riot-control units – which had been standing by without intervening – formed a cordon between the opposing groups, enabling the procession to return to the church.

#### Discussion questions:

1. Which human rights are applicable in this situation?
2. What are the corresponding state obligations?
3. How would you assess the police operation?
4. Has the state interfered with the human rights applicable in this situation? How?
5. Has a human rights violation occurred?
6. Think of alternative ways of handling this situation. What other options might the police have considered?

## Handout 2 – Human rights analysis – obligation to protect *(continued)*

### Case study D: Violence against women

Mr O repeatedly subjected his wife and her mother to violent attacks. After a couple of years, Mr O's violent and threatening behaviour came to the attention of authorities through several beatings, a fight during which Mr O stabbed Mrs O seven times and an incident in which Mr O ran down the two women with his car. Following each assault, doctors examined the women and reported various injuries, including bleeding, bruising, bumps, grazes and scratches. Both women were medically certified as having sustained life-threatening injuries: Mrs O as a result of a particularly violent beating and the knife assault; and her mother, from the assault with the car.

Criminal charges were brought against Mr O on three occasions for death threats, actual, aggravated and grievous bodily harm and attempted murder. Mr O was twice remanded into custody and released pending trial.

In response to Mr O's persistent pressure and death threats, Mrs O and her mother withdrew their complaints during each of these proceedings. The domestic courts subsequently discontinued some cases, but they continued the proceedings concerning the car incident. Mr O was convicted and sentenced to three months in jail, which was later commuted to a fine. He was given a moderate fine for the knife assault.

On two occasions Mrs O and her mother filed complaints with the prosecution authorities about Mr O's threats and harassment. They claimed that their lives were in immediate danger and asked the authorities to take urgent action, such as by detaining Mr O. In response to these requests for protection, Mr O was questioned and his statements taken, but he was then released.

Finally, Mrs O and her mother decided to move to another city, but while travelling in the moving van, Mr O arrived and forced the van to pull over. Mr O opened the passenger door and shot Mrs O's mother. She died instantly.

### Discussion questions:

1. Which human rights are applicable in this situation?
2. What are the corresponding state obligations?
3. How would you assess the reaction of the authorities to these violent incidents?
4. Has the state interfered with the human rights applicable in this situation? How?
5. Has a human rights violation occurred?
6. Think of alternative ways of handling this situation. What other options might the police have considered?

## Handout 2 – Human rights analysis – obligation to protect *(continued)*

### Human rights analysis – obligation to protect

#### PART 1: APPLICABLE HUMAN RIGHTS/WHAT STATE ACTION REQUIRED?

- 1.1. Which human right(s) is/are applicable to the concrete situation?
- 1.2. Is the state obliged to take concrete action to protect the applicable human right?

#### PART 2: DOES STATE INACTION/OMISSION CONSTITUTE A VIOLATION?

- 2.1. Does domestic legislation adequately cover applicable human rights(s)?
- 2.2. Has the state taken reasonable and appropriate measures to protect the applicable human right(s)?
- 2.3. Does state action comply with procedural standards?

## Briefing notes<sup>1</sup>

These Briefing notes provide an analytical framework for the two handouts that are included in this module, structured as follows:

### 1. Key concepts

- a. What is a human rights violation?
- b. What do we mean by necessity and proportionality in human rights?

### 2. Activity guide: human rights analysis

- a. Handout 1 – obligation to respect
- b. Handout 2 – obligation to protect

### 1. Key concepts

#### a. What is a human rights violation?

A human rights violation occurs if state obligations regarding specific human rights are not met.

#### States obligation to respect human rights (Handout 1):

A human rights violation occurs if a state action limits or interferes with a human right and this interference is not justified. The violation occurs through state action.

#### States obligation to protect human rights (Handout 2):

A human rights violation occurs if the state fails without justification to take appropriate steps to protect human rights. The violation occurs through state omission.

There is a distinction between **interference** with human rights and **violations** of human rights. Not every interference with a human right is also a violation of that right.

**\*Exception:** Torture and inhuman or degrading treatment or punishment (Article 3 of the ECHR) are absolutely prohibited and cannot be limited under any circumstances (see Module 4).

Police may interfere with the human rights of perpetrators of crime in order to protect victims. The interference becomes a violation when the action/omission is not based on a legal ground or if the action/omission is arbitrary and/or disproportionate.\*

Most human rights can (or must be) interfered with, or limited, in certain circumstances because the freedom and rights of one person end where the freedom and rights of another person begin. Some legal documents structure human rights in such a way as to allow for interference or limitations in certain circumstances.

Whether or not an act/omission is a human rights violation depends on various factors related to the concrete situation and must be considered on a case-by-case basis. The two handouts presented here can be used to help determine this.

#### b. What do we mean by necessity and proportionality in human rights?

The principles of necessity and proportionality are used to determine whether an action that interferes with human rights is necessary in order to achieve an aim and if the measures used are proportional to the aim pursued.

1. Module 3 'Briefing notes' and 'Supplementary material', including the analytical schemes, are an adapted version of Suntinger, W. (2005), *Menschenrechte und Polizei, Handbuch für TrainerInnen*, Bundesministerium für Inneres, Vienna, pp. 49-76.

To determine necessity and proportionality, one must consider:

- **Necessity of the action:** An action must not go beyond what is strictly required by the circumstances and the need to achieve the aim. The least intrusive and damaging, but still effective, action should be taken. Unnecessary or excessive measures are disproportionate, and should be avoided.
- **Suitability of the action:** The actions selected need to be suitable to achieve the intended objective. Actions that fail to do so can be considered ineffective and disproportionate.
- **Results of the action:** The anticipated result of the action and its interference with human rights must be weighed against the relevance of the aim. This also includes considering the interference or damage non-action could cause. If the harm caused by the action clearly outweighs its benefit, the action must be avoided.

The idea of a ‘pressing social need’ is often used to identify whether an action is necessary. In a democratic society certain rights may be limited only if such a pressing social need exists.

The basic idea of proportionality is encapsulated in common phrases such as “not using a sledgehammer to crack a nut” or performing “a surgical operation with a scalpel and not with a butcher’s knife”. It is about establishing the proper **relationship between the means employed and the aims pursued**. The end does **not** justify the means. It is important to achieve objectives in the least intrusive way.

The principles of necessity and proportionality are complex, but can be reduced to a simple maxim – the Golden Rule – that relates to all human rights: “treat others the way you would like to be treated”. By tying the principles of necessity and proportionality to the Golden Rule, it might help create empathy and sensitivity towards persons who are the object of police intervention.

To do what is required by the principles of necessity and proportionality is a major challenge in policing, particularly in stressful or even dangerous situations. It is key for police officers to internalise the principles of necessity and proportionality. This internalisation can best be achieved by applying human rights concepts in daily work and by continually reviewing one’s knowledge, skills and attitude toward human rights.

#### Training tip: Handling the case study activities

- **Case study descriptions:** Sometimes participants may feel that there is too little information in the case study descriptions to draw appropriate conclusions. The case studies are only a brief description of a scenario, as the crucial learning results depend on the **process of asking the relevant analytical questions**. The path that leads to the conclusion is at least as relevant as the result itself.
- **Discussion of case studies:** The discussion should be structured, while also giving room for ‘creative answers’ by the participants. Encouraging different perspectives offers a good basis for a discussion on the issues and interests involved in the case.

As a trainer at the national level, it is important that you choose cases that are appropriate to your particular training context. Other ECtHR or national cases may be better suited to your training needs. Guidance on how to find ECtHR cases is provided in an annex to this manual.

**Duty bearer** – must meet obligations to respect and protect others' human rights

**Rights holder** – must be aware of their own human rights in order to claim them

## 2. Activity guide: human rights analysis

The two handouts offer police officers a step-by-step 'navigation tool' that is similar to the analytical approach that courts use. They help to develop police officer capacities to meet their obligations (as duty bearers) and to claim their rights (as rights holders).

The goal of each handout is to:

- provide a framework for translating fundamental rights principles into practice by breaking down general principles into practical guidelines;
- present a tool to use human rights constructively and answer practical human rights questions;
- teach how to balance conflicting interests in an impartial way by providing a set of 'right questions' that can be asked to identify the most important fundamental rights aspects of a situation and weigh up the interests of the individuals involved;
- outline a method for supporting the internalisation of human rights through developing a positive attitude and skill set that helps in applying human rights;
- empower police officers with a tool to identify and analyse situations with a similar approach taken by courts and/or non-governmental organisations, while also giving police officers a way to determine if their rights are being abided by.

### Training tip: Using police practice when introducing the human rights perspective

Many police officers analyse concrete situations from a perspective of domestic statutory law, such as penal and police law and police regulations. When observing or intervening in concrete situations, they commonly consider questions such as:

- Which law is applicable in this situation?
- What options do I have on the basis of the applicable legal provisions?
- Is the behaviour of, say, a protester violent or aggressive enough to justify an arrest under a specific law?

Many police officers are already equipped with the analytical skills necessary for adopting a human rights perspective. An analysis from this perspective means applying human rights norms as found in constitutional and/or international human rights instruments and translating situations into human rights language. The goal is to understand whether a certain act or omission constitutes a human rights violation. This perspective takes one step back from statutory law and considers a situation from the broader realm of human rights law.

### a. Handout 1: obligation to respect

**This analysis applies to the case studies in Handout 1.**

Handout 1 provides a framework for analysing the obligation to respect and is comprised of two parts:

**Part 1 – Interference:** Evaluating whether a situation falls within the scope of a human right and if a state action interferes with this right.

**Part 2 – Violation:** Evaluating whether this interference is justified or instead constitutes a human rights violation.

Each part contains questions that are useful for navigating human rights-related situations and breaking down their complexities into digestible portions.



## PART 1: APPLICABLE HUMAN RIGHTS/STATE INTERFERENCE

### 1.1. Which human right(s) is/are applicable to the concrete situation?

For determining which human right(s) is/are involved and applicable to a situation, certain knowledge is required, which can be found by answering the following questions:

- Which human rights are guaranteed in national and international documents?
- What is the scope of application of a human rights norm? As human rights are formulated broadly, case law determines the scope of application of human rights norms.

### 1.2. Does any state action interfere with applicable human rights?

This requires a look at the intensity and/or quality of a state action. As a general rule, the following state actions constitute interferences:

- penalties based on prohibitions of specific behaviour through penal or administrative law, such as fines and detention/imprisonment;
- police actions based on criminal law or police legislation, such as arrest, body search, search of homes, identity checks;
- any act or use of necessary and physical force by police.

Police actions, because of their potentially intrusive nature, are generally close to being an interference with a human right.

## PART 2: JUSTIFICATION OR VIOLATION?

Part 2 is only applicable to certain human rights. There is no justification for interferences with absolute human rights such as the prohibition of torture (Article 3 of the ECHR). Every interference with an absolute human right is also a violation of that right.

In Part 2, the key question is: are there any justifiable reasons for interference with a human right? The analytical questions in Part 2 try to draw out the reasoning behind an action, particularly with regard to the principles of necessity and proportionality. From the answers, one is able to determine whether interference with a human right is justified. The interference:

- **is justified** if the answers to all questions are 'YES'
- **is not justified**, and is considered a human rights violation, if the answer to one or more questions is 'NO'

### 2.1. Is there any domestic legal basis for state action?

To answer this question, one must consider the relevant laws related to the state action and its interference with the human right(s) at stake.

This is because any interference with a human right must be based on a legal provision. This stems from the basic principles of the rule of law and legality.

### 2.2. Does the action pursue a legitimate aim/interest?

Every interference with a human right must serve a legitimate aim or interest. These can include, but are not limited to:

- national security;
- territorial integrity or public safety;
- prevention of disorder or crime;
- protection of health or morals;
- protection of the reputation of others.

To help identify whether there is a legitimate aim or interest involved, consider the law(s) and human right(s) relevant to a situation. Answering the questions in Part 1 and the first section of Part 2 will help you to identify this information.

### **2.3. Is state interference necessary and proportionate to the aim pursued?**

For state interference to be justified, the action constituting interference must be necessary and proportionate to its cause and to the legitimate aim pursued. An interference must not go beyond what is strictly required to achieve the desired result.

To determine necessity and proportionality, ask the following questions:

- Is the action suitable to achieve the legitimate aim?

In answering this question, examine whether the measure is suitable and effective. Ineffective measures are not proportionate.

- Is it necessary (a “pressing social need”)? Is it the least intrusive measure? Are there any alternatives?

Excessive measures are not proportionate.





## Handout 1 – obligation to respect

### Case study A: Arrest and detention – the right to liberty and security

This analysis is based on the ECtHR judgment in *Witold Litwa v. Poland* case, No. 26629/95, from 4 April 2000.

#### PART 1: Applicable human rights/state interference

##### 1.1. Which human right(s) is/are applicable to the concrete situation?

###### European Convention on Human Rights

###### Article 5: Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...]

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; [...]

##### 1.2. Does any state action interfere with applicable human rights?

Any arrest by police is considered an interference with the right to liberty and security.

Therefore, confining Mr L against his will in a sobering-up centre clearly amounted to a “deprivation of liberty” within the meaning of Article 5 (1) of the ECHR, the ECtHR said in its ruling on *Witold Litwa v. Poland* (paragraph 46).

#### PART 2: JUSTIFICATION OR VIOLATION?

##### 2.1. Is there a legal basis for state action?

The relevant question is whether there is an appropriate legal basis for arresting a person whose conduct and behaviour under the influence of alcohol pose a threat to the public or him/herself.

According to the Polish national regulation: “intoxicated persons who behave offensively in a public place or a place of employment, are in a condition endangering their life or health, or are themselves endangering other persons’ life or health, may be taken to a sobering-up centre or a public health-care establishment, or to their place of residence.”<sup>2</sup> In this case, the police followed the procedure provided for by domestic law when arresting the applicant and taking him to the sobering-up centre.

2. Polish Law of 26 October 1982 on Education in Sobriety and Counteracting Alcoholism, Art. 40.

Domestic law must also comply with the requirements of Article 5 paragraph 1 (a-f) of the ECHR. The applicable domestic law falls under paragraph 1 (e):

**Polish Law of 26 October 1982 on Education in Sobriety and Counter-acting Alcoholism**

**Paragraph 1 (e) The lawful detention of persons** for the prevention of the spreading of infectious diseases, of persons of unsound mind, **alcoholics** or drug addicts or vagrants

On this basis, the ECtHR concluded that the applicant's detention fell within the ambit of Article 5 (1) (e) of the ECHR. (*Witold Litwa v. Poland*, supra note 3, paragraph 64). The applicant's detention also had a legal basis in national law. (*paragraph 74*)

## 2.2. Does the action pursue a legitimate aim/interest?

When making an arrest, legitimate aims are protecting the public or the health and personal safety of the person concerned.

## 2.3. Is state interference necessary and proportionate to the aim?

Though the aim may be legitimate, it is still important to check whether the means employed in order to reach that aim are necessary and proportionate.

- Is the action suitable to achieve a legitimate aim?
- Is it necessary (a "pressing social need")? Is it the least intrusive measure? Are there any alternatives?

The two questions used to help determine necessity and proportionality can be answered together in this case.

*"The Court reiterates that a necessary element of the 'lawfulness' of the detention within the meaning of Article 5 § 1 (e) is the absence of arbitrariness. The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances."*(*paragraph 78*)

The arrest of Mr L was considered arbitrary and in violation of Article 5 (1) (e) of the ECHR because:

- there were severe doubts as to whether Mr L actually posed such a threat to his personal security or to that of the public to justify a restriction of liberty; and
- the police had not considered less intrusive measures to secure public order, although domestic law outlines alternative, less intrusive, approaches.

## Summary

The analysis shows that the arrest and detention of Mr L was an interference with his human rights under Article 5 of the ECHR given that any arrest is considered an interference with human rights. When evaluating the necessity and proportionality of the arrest, the analysis reveals that it was considered arbitrary and therefore a violation of Mr L's rights under Article 5 (1) (e) of the ECHR.



## Case study B: Use of lethal force against suspected terrorists – the right to life

This analysis is based on the ECtHR judgment in *Mc Cann and others v. UK* case, No. 18984/91, from 27 September 1995.

### PART 1: Applicable human rights/state interference

#### 1.1. Which human right(s) is/are applicable to the concrete situation?

It is important to highlight that Article 2 of the ECHR, like many human rights, includes provisions that allow for an interference with a right, depending on the circumstances.

#### European Convention on Human Rights

##### Article 2: Right to life

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

#### 1.2. Has the state interfered with these human rights? How?

The loss of life is an irreversible damage to the person concerned and to his/her relatives. Therefore, the objectives of the interference with the right to life must be of great importance and absolutely necessary. Any interference with the right to life must be carefully evaluated to determine whether it is absolutely necessary. The questions in Part 2 can help to determine this necessity.

### PART 2: JUSTIFICATION OR VIOLATION?

#### 2.1. Is there a legal basis for state action?

It can be assumed that police actions are based on legal provisions found in the national constitution and national legislation related to police powers and the use of force. It can also be assumed that these national legal instruments, and therefore police actions, are in accordance with the aims and objectives of the ECHR.

*“It must subject deprivations of life to the **most careful scrutiny**, if deliberate lethal force is used, taking into consideration not only the actions of the agents of the State, but also the surrounding circumstances including the planning and control of the actions under examination. [bold added]”*

*ECtHR, Mc Cann and others v. UK, No. 18984/91, 27 September 1995*

## 2.2. Does the action pursue a legitimate aim?

The decision to use lethal force was based on the assumption that it was necessary in order to protect civilians and police officers from a suspected bomb. When analysing the facts of the case the authorities took several factors into account, such as past terrorist attacks on Territory X, the criminal records of the terrorist suspects and the information gathered by surveillance units. They came to the conclusion that there was a high risk that a suspected bomb could kill or severely injure a significant number of civilians in Territory X.

Under Article 2 paragraph 2 (a) of the ECHR, the interference with the right to life in “defence of any person from unlawful violence” is acceptable when absolutely necessary.

Therefore, police protection in this case is a legitimate aim.

## 2.3. Is state interference necessary and proportionate to the aim?

Unlike in Case study A, the questions on necessity and proportionality in this case must each be answered separately.

- Is the action suitable to achieve the legitimate aim?

The use of lethal force was timely and ended the expected imminent risk of an exploding bomb.

- Is it necessary (a “pressing social need”)? Is it the least intrusive measure? Are there any alternatives?

The terrorist suspects were shot at close range after making what appeared to Soldiers A and B to be threatening hand movements that suggested they were going to detonate a bomb (*Mc Cann*, paragraph 196) It was subsequently discovered, however, that the suspects were unarmed. They did not have a detonating device nor was there a bomb in the car.

In *Mc Cann and others v. UK*, the ECtHR accepted that “the soldiers honestly believed, in the light of the information that they had been given, [...] that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life. [...] Having regard to the dilemma confronting the authorities in the circumstances of the case, the reactions of the soldiers did not, in themselves, give rise to a violation of Article 2.”(paragraph 200)

As mentioned in Part 1 of this sample analysis, the ECtHR “must subject deprivations of life to the most careful scrutiny, if deliberate lethal force is used”, which means that not only the acts of the soldiers involved must be considered, but also those made by the relevant organisation before and during an operation. Therefore, it has been questioned “whether the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2 and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects.”(paragraph 201)

“In sum, having regard to the decision not to prevent the suspects from travelling into [Territory X], to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the ECtHR was not persuaded that the killing of the three terrorists constituted a use of force which was no more than absolutely



*necessary in defence of persons from unlawful violence within the meaning of Article 2-2-a ECHR [altered].”(paragraph 213)*

It was found that there had been a breach of Article 2 of the ECHR. It was not the actual shooting by the soldiers that constituted the violation but rather the overall planning and execution of the operation, as less intrusive measures could have been taken.

### Summary

The analysis shows that the lethal use of force against the suspects was an interference with their human right to life as found in Article 2 of the ECHR. The soldiers were considered to have interfered, but not violated, the right to life, because of their assumption that there was an imminent danger and potential for loss of life. The overall planning and execution of the operation was found, however, to have violated Article 2 because less intrusive, alternative measures could have been taken first.

## b. Handout 2: obligation to protect

**This analysis applies to the case studies in Handout 2.**

Handout 2 provides a framework for analysing the obligation to protect and is comprised of two parts:

**Part 1 – State action required:** Evaluating whether a situation falls within the scope of a human right and whether the state is obliged to take action to protect that right.

**Part 2 – Violation:** Evaluating whether a state omission/failure to protect is justified or if it is a human rights violation.

As with Handout 1, Handout 2 is divided into two parts. Each contains questions that are useful for navigating human rights-related situations and breaking down their complexities into digestible portions.

### PART 1: APPLICABLE HUMAN RIGHTS/WHAT STATE ACTION REQUIRED?

The key question of Part 1 is: should the state take action to protect an applicable human right?

If all questions in Part 1 are answered with ‘YES’, then:

- one or more human right is applicable to the situation;
- there is an omission/failure by the state to protect the applicable human right(s), although a state obligation exists [**Note:** this does not necessarily mean a violation has occurred; Part 2 helps to determine violations].

#### 1.1. Which human right(s) is/are applicable to the concrete situation?

As with Handout 1, the obligation to respect, the human right(s) involved and applicable to a situation must be determined. They can be found by answering the following questions:

- Which human rights are guaranteed in international documents?
- What is the precise scope of application of a human rights norm? As human rights are formulated broadly, case law determines the scope of application of human rights norms.

Determining the scope of a human right is of central importance since it helps to clarify the obligation of the state.

## 1.2. Is the state obliged to take concrete action to protect the applicable human right?

This question directly concerns the concrete obligations a state has in protecting human rights in a specific situation. Examples of obligations related to human rights:

- enacting laws to try cases of domestic violence (prohibition of inhuman or degrading treatment or punishment);
- protecting demonstrators from attacks by counter demonstrators (right to freedom of assembly);
- rendering police protection for cases of serious threats (right to life).

Individuals have a right to be protected from abuses by the state and to be protected from infringements by other private individuals. The state has an obligation to take an active role in rendering protection and can do so through legislative, administrative, judicial and practical measures. With respect to policing, one of the most relevant elements of this obligation is to protect human rights from attacks by other private individuals.

## PART 2: DOES STATE INACTION/OMISSION CONSTITUTE A VIOLATION?

The analysis found in Part 2 helps to determine whether or not the omission/failure by the state is a violation of human rights. The basic question is: are there any reasons that sufficiently justify state inaction/omission with regard to a fundamental right?

The omission/inaction by the state is considered a human rights violation, if the answer to one or more questions in Part 2 is 'NO'.

### 2.1. Does domestic legislation adequately cover applicable human right(s)?

As with Handout 1, to answer this question, one must consider relevant laws and national legal provisions, and whether or not the law provides adequate protection of human rights.

### 2.2. Has the state taken reasonable and appropriate measures to protect the applicable human right(s)?

At this stage, interests are to be balanced according to the principle of proportionality.

On the one hand, the interest of the individual concerned must be considered:

- What is at stake for the person concerned?
- To what extent is the person endangered?
- Which right(s) is/are at stake?

On the other hand, the capacities of the state to provide protection must be taken into account:

- What information does/should the state have regarding the concrete risk/threats to the individual concerned?
- What capacity of protection does/should the state have in order to respond to these threats?
- What are appropriate means for providing protection?
- Has the state taken all reasonable and appropriate measures?

The state is obliged to take all reasonable measures that might have prevented the event from occurring.





## Handout 2 – obligation to protect

### Case study C: Handling a demonstration and a counter demonstration – the right to freedom of assembly

This analysis is based on the ECtHR judgment in *Plattform Ärzte für das Leben v. Austria*, No. 10126/82, from 21 June 1988.

#### PART 1: APPLICABLE HUMAN RIGHTS/WHAT STATE ACTION REQUIRED?

##### 1.1. Which human right(s) is/are applicable to the concrete situation?

###### European Convention on Human Rights

###### Article 11 (1): Right to freedom of assembly

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

##### 1.2. Is the state obliged to take concrete action to protect the applicable human right?

With respect to the right to freedom of assembly, the ECtHR requires the state to protect demonstrators from those wishing to interfere with or disrupt them.

In this case, there is an obligation of the state under Article 11 of the ECHR to protect the demonstrators from attacks by others.

The question is whether the police did enough to protect the right to freedom of assembly. Failure to disperse the large number of counter demonstrators who gathered without prior notice in front of the church and disrupted the march is considered such an omission.

Part 2 will help to evaluate whether this omission also constitutes a human rights violation.

#### PART 2: DOES INACTION/OMISSION CONSTITUTE A VIOLATION?

##### 2.1. Does domestic legislation adequately cover applicable human right(s)?

Yes; in the *Plattform Ärzte für das Leben v. Austria* case, the ECtHR said that “Articles 284 and 285 of the Criminal Code make it an offence for any person to disperse, prevent or disrupt a meeting that has not been prohibited, and sections 6, 13 and 14 (2) of the Assembly Act, which empower the authorities in certain cases to prohibit, bring to an end or disperse by force an assembly, also apply to counter demonstrations.” (paragraph 32)

##### 2.2. Has the state taken reasonable and appropriate measures to protect the applicable human right(s)?

The state is obliged to apply reasonable and appropriate measures to protect the right to freedom of assembly, but the obligation cannot be interpreted as a guarantee that no disturbances will happen. It is left to the state to determine which tactics are to be used.



*“The Court does not have to assess the expediency or effectiveness of the tactics adopted by the police on these occasions but only to determine whether there is an arguable claim that the appropriate authorities failed to take the necessary measures.”(paragraph 36)*

The court determined that reasonable and appropriate measures had been taken to protect demonstrators. Therefore, the police took reasonable and appropriate measures with respect to their obligation to protect under Article 11.

### Summary

The analysis of this case shows that the state has an obligation under Article 11 of the ECHR to protect demonstrators from attacks by others. By failing to disperse the large, unexpected crowd of counter demonstrators, the police committed an omission; however, this omission was not a violation of Article 11 of the ECHR since the police had taken reasonable and appropriate measures to fulfil their obligations under the article.

## Case study D: Violence against women – right to life and prohibitions of torture and discrimination

This analysis is based on the ECtHR judgment in *Opuz v. Turkey*, No. 33401/02, from 9 June 2009. Explanations on the reasoning of the court are taken primarily from the summary of the judgment issued in a press release.

### PART 1: APPLICABLE HUMAN RIGHTS/WHAT STATE ACTION REQUIRED?

#### 1.1. Which human right(s) is/are applicable to the concrete situation?

On the lack of protection of Mrs O's mother that led to her death:

##### European Convention on Human Rights

##### Article 2: Right to life

1. Everyone's right to life shall be protected by law.

On the lack of protection of Mrs O and her mother against the assaults and threats of Mr O:

##### European Convention on Human Rights

##### Article 3: Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

On the general lack of protection by the authorities primarily affecting women and therefore being considered under the principle of non-discrimination:

##### European Convention on Human Rights

##### Article 14: Prohibition of discrimination

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

#### 1.2. Is the state obliged to take concrete action to protect the applicable human right?

With regard to Article 2 on the right to life, the state has the obligation to consider any real and imminent threats to a person's right to life regardless of sex, race, colour, language, religion, political or other opinion, national or social origin. The state is then obligated to do anything that could have reasonably been expected to prevent a death.

With respect to Article 3, a state must render protection, in the form of effective deterrence, from such forms of ill-treatment as took place in *Opuz v. Turkey*. (paragraph 161) The obligation to protect from ill-treatment also refers to the most vulnerable members of society who are entitled to the same protection by the law, the police and the judicial system.



## PART 2: DOES INACTION CONSTITUTE A VIOLATION?

### 2.1. Does domestic legislation adequately cover applicable human rights(s)?

Up until 1998, the national law relevant to this case had not yet provided specific administrative and policing measures to protect vulnerable persons against domestic violence. In January 1998, a domestic law came into force which established a basis to protect persons endangered by domestic violence.

In *Opuz v. Turkey*, the attacks occurred between 1995 and 2002. Prior to the 1998 law on domestic violence, the state had not fulfilled its obligation regarding adequate legislation on domestic violence. Because national legislation to protect against domestic violence was lacking between 1995 and 1998, the attacks on Mrs O and her mother during this period were eligible for consideration under the ECHR and were therefore a violation of Article 3 of the ECHR.

After January 1998, although the relevant law had come into force, the authorities had not yet effectively applied measures and sanctions in order to protect Mrs O from domestic violence. The remainder of this analysis will help to evaluate the attacks that occurred between 1998 and 2002.

### 2.2. Has the state taken reasonable and appropriate measures to protect the applicable human right(s)?

#### European Convention on Human Rights, Articles 2 and 3:

Mr O had a history of violent behaviour and a criminal record for his actions against his wife and her mother. He persistently threatened their health and safety. Given this background, it was not only possible but even foreseeable that Mr O's violent behaviour would likely continue and escalate.

The court therefore concluded that the national authorities had not shown due diligence in preventing violence against Mrs O and her mother, in particular by failing to pursue criminal action or other appropriate preventive measures against Mr O. (paragraph 199)

The national authorities violated Article 2 on the right to life by not preventing Mr O from killing Mrs O's mother. In light of the threats against Mrs O's mother, the authorities could have taken appropriate and reasonable protection measures to avoid this outcome.

The ECtHR further concluded that Article 3 was violated because the authorities had failed to take effective deterrence measures to protect Mrs O from Mr O's physical attacks.

#### European Convention on Human Rights, Article 14:

The case of Mrs O and her mother suggests a more general concern. Tolerating such domestic violence and failing to deal with it effectively, breach women's right to equal protection under the law.

The ECtHR found that a violation of Article 14 of the ECHR had also occurred: *"Bearing in mind its finding above that the general and discriminatory judicial passivity in [case study country], albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women."*(paragraph 200)

### Summary

This case analysis shows that the state has an obligation to protect a person from domestic violence in order both to: protect the right to life (Article 2 of the ECHR) and to effectively deter ill-treatment (Article 3 of the ECHR). The state is also obligated to establish and apply a system which safeguards victims sufficiently and punishes domestic violence, even in situations where victims withdraw their complaints. The analysis also revealed that what was seen as authorities' passivity in the case study country mainly affected women, which was interpreted as contributing to gender-based violence, a form of discrimination against women (Article 14 of the ECHR).

#### 2.3. Does state action comply with procedural standards?

Despite the withdrawal of the victims' complaints, the legislative framework should have enabled the prosecuting authorities to pursue criminal action against Mr O because his violent behaviour had constantly threatened the women's physical integrity and had been sufficiently serious to warrant prosecution. The more serious the offence or the greater the risk of further offences, the more likely it should be that the prosecution continues its investigations in the interest of the public, even if victims withdraw their complaints.

In this case, the state failed to establish and effectively apply a system to punish all forms of domestic violence and to safeguard victims sufficiently. (paragraph 169)



## Supplementary material

This section provides in-depth information on the key analytical concepts presented in this module. Following this more detailed discussion, additional court findings for the four case studies analysed are examined to enrich training course discussions.

### Interfering with relative fundamental rights

Some human rights are **absolute** and cannot be abridged or infringed for any reason, such as the prohibition against torture. Others are structured to allow for interference or limitations under certain conditions. These are **relative human rights**, which can (must) be limited in certain circumstances, following the maxim that the freedom/rights of one person end where the freedom/rights of another person begin.

The rationale for interference in relative rights must be grounded in law and based on the principles of necessity and proportionality. The Charter of Fundamental Rights of the European Union phrases this rationale so:

#### EU Charter of Fundamental Rights

##### Article 52 (1): Scope of guaranteed rights

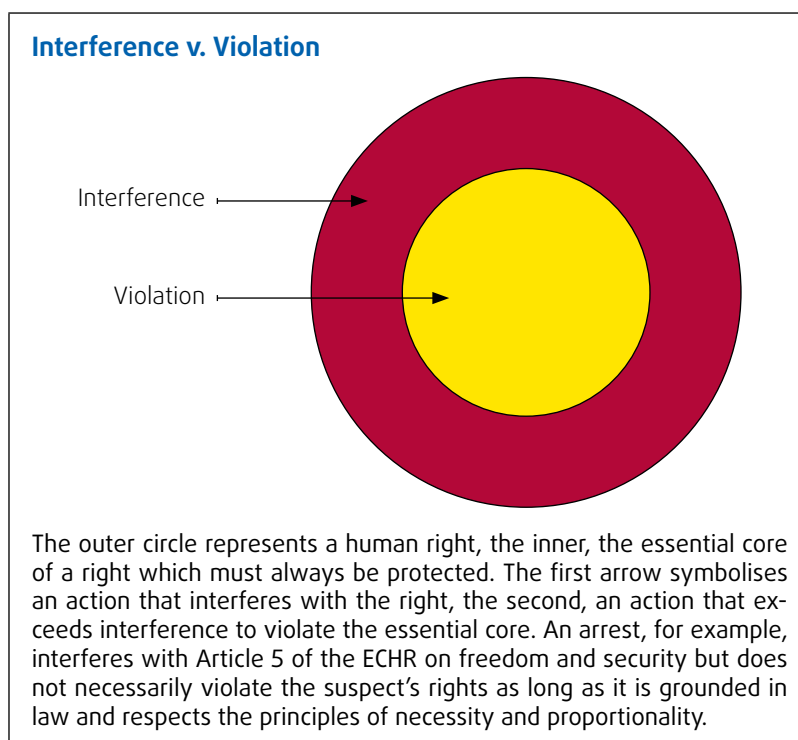
Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Article 8 of the ECHR on the right to private and family life offers a specific example:

#### European Convention on Human Rights

##### Article 8: Right to respect for private and family life

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



### Police interference and human rights

When exploring the idea of police intrusion and interference with human rights, the Briefing notes mention that “police actions, because of their potentially intrusive nature, are generally ‘close’ to an interference with a human right”. Here is a list of some examples of police-related interferences with different human rights. This can be a useful reference for identifying which rights are at stake in different scenarios.

**Table 3.1: Police-related examples of interferences with particular human rights**

Fundamental rights	Police interference
<b>Right to life</b> (Article 2 ECHR; Article 2 EU Charter)	<ul style="list-style-type: none"> <li>Any use of lethal force by police (see Case study B)</li> </ul>
<b>Prohibition of torture</b> (Article 3 ECHR; Article 4 EU Charter)	<ul style="list-style-type: none"> <li>Torture (see Module 4)</li> </ul>
<b>Right to liberty and security of person</b> (Article 5 ECHR; Article 6 EU Charter)	<ul style="list-style-type: none"> <li>Any formal arrest</li> <li>Restrictions of physical movement of a certain duration (see Case study A)</li> </ul>
<b>Right to a fair trial</b> (Article 6 ECHR; Articles 47 and 48 EU Charter)	<ul style="list-style-type: none"> <li>Any penalty based on criminal or administrative law</li> <li>Police investigations</li> </ul>
<b>Right to private and family life, home and correspondence including data protection</b> (Article 8 ECHR; Articles 7 and 8 EU Charter)	<ul style="list-style-type: none"> <li>Identity check</li> <li>Taking away of identity card</li> <li>Stop and search</li> <li>Search of private premises</li> <li>Prohibiting the perpetrator of domestic violence to approach the victim or enter the common apartment</li> <li>Video or communication surveillance</li> <li>Processing of personal data, data mining</li> </ul>
<b>Right to freedom of association and assembly</b> (Article 11 ECHR; Article 12 EU Charter)	<ul style="list-style-type: none"> <li>Ban on demonstrations by police authorities</li> <li>Dissolving a demonstration</li> <li>Ban on political parties or associations</li> </ul>



## Rule of law and legality

Interferences with human rights must be grounded in law. This stems from the basic principle of the rule of law and legality. The rule of law means that the state/police must act in accordance with the law and that there are mechanisms in place for challenging the legality of state action or omission. The principle of legality is a fundamental safeguard against arbitrary state action. The rule of law and legality is a central pillar of the human rights system and of the legal system in general.

Interferences with human rights must meet certain requirements. The extent and detail in which interferences are legally determined depends on the particular right at stake. Some rights can be legally restricted in certain circumstances (Article 8 of the ECHR on the right to private and family life or Article 11 of the ECHR on freedom of assembly, for example), while others may be legally restricted on a very limited basis (Article 5 of the ECHR on the right to liberty and security of person) or, in some cases, not at all (Article 3 of the ECHR on the prohibition of torture).

To illustrate the point: restrictions of the right to personal liberty are only accepted under the limited conditions enumerated in Article 5 of the ECHR:

### European Convention on Human Rights

#### Article 5: Right to liberty and security

- [...] (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

## Necessity and proportionality

The principles of necessity and proportionality are often the central elements of human rights analysis. They are also fundamental principles of professional policing and are contained – in differing terminologies – in national police laws, (in part) pre-dating human rights law.

Understanding the principles of necessity and proportionality is particularly important for police as they must effectively and adequately use the right measures to cope with dangers and threats to others and to themselves. In cases of use of force by the police, especially lethal use of force, it is particularly relevant to thoroughly

review the main points of consideration for necessity and proportionality. Adhering to the principle of proportionality is one of policing's major challenges: thinking of different options, balancing the various interests involved, identifying the least intrusive measures and determining the right measure to take. This is particularly difficult in stressful or dangerous situations where events happen quickly.

The principle of proportionality must be internalised; it needs to become 'second nature'. Such internalisation requires the practical application of human rights theories and learning in all three dimensions: knowledge, skills and attitude.

**Perspectives on necessity and proportionality**

Ex-ante: This element of human rights analysis considers the moment when police action is taken. This means that when performing a human rights analysis of a situation, one must ask whether an action was reasonable and proportionate at the moment it was taken, even if it later becomes apparent that police assumptions or information regarding, for example, certain dangers, were wrong.

Organisational negligence: Evaluating proportionality involves more than the last stage of a police operation when police officers must act/react to an actual or perceived threat. The appropriateness of the whole operation – its planning and execution – is also taken into consideration.





## Handout 1: Obligation to respect

### Case study A: Arrest and detention - the right to personal liberty

Article 5 of the ECHR on the right to liberty and security was the primary human right at stake in Case study A, based on *Witold Litwa v. Poland*.

#### In determining the legal basis for state action ...

*“The Court recalls that Article 5 § 1 of the Convention contains a list of permissible grounds of deprivation of liberty, a list which is exhaustive. Consequently, no deprivation of liberty will be lawful unless it falls within one of the grounds set out in subparagraphs (a) to (f) of Article 5.” (Witold Litwa v. Poland, supra note 3, paragraph 49)*

*“The Court observes that the word “alcoholics”, in its common usage, denotes persons who are addicted to alcohol. On the other hand, in Article 5 § 1 of the Convention this term is found in a context that includes a reference to several other categories of individuals, that is, persons spreading infectious diseases, persons of unsound mind, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds. It is therefore legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in paragraph 1 (e) of Article 5 to be deprived of their liberty is not only that they are dangerous for public safety but also that their own interests may necessitate their detention. (Ibid., paragraph 60)*

*“[...] The Court considers that, under Article 5 § 1 (e) of the Convention, persons who are not medically diagnosed as “alcoholics”, but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety. (Ibid., paragraph 61)*

*“That does not mean that Article 5 § 1 (e) of the Convention can be interpreted as permitting the detention of an individual merely because of his alcohol intake. However, the Court considers that in the text of Article 5 there is nothing to suggest that this provision prevents that measure from being applied by the State to an individual abusing alcohol, in order to limit the harm caused by alcohol to himself and the public, or to prevent dangerous behaviour after drinking. On this point, the Court observes that there can be no doubt that the harmful use of alcohol poses a danger to society and that a person who is in a state of intoxication may pose a danger to himself and others, regardless of whether or not he is addicted to alcohol.” (Ibid., paragraph 62)*

*“The Court reiterates that under Article 5 of the Convention any deprivation of liberty must be “lawful”, which includes a requirement that it must be effected “in accordance with a procedure prescribed by law”. On this point, the Convention essentially refers to national law and lays down an obligation to comply with its substantive and procedural provisions.” (Ibid., paragraph 72)*

In this case, it had been made clear that the police, when arresting Mr L and taking him to the sobering-up centre, followed the procedure provided by domestic law, which stipulates:

*"Intoxicated persons who behave offensively in a public place or a place of employment, are in a condition endangering their life or health, or are themselves endangering other persons' life or health, may be taken to a sobering-up centre or a public health-care establishment, or to their place of residence."*

*Polish Law of 26 October 1982 on Education in Sobriety and Counteracting Alcoholism, Article 40*

**In determining whether state interference is necessary and proportionate to the aim...**

*"[...] the Court entertains serious doubts as to whether it can be said that the applicant behaved in such a way, influenced by alcohol, that he posed a threat to the public or himself, or that his own health, well-being or personal safety were endangered. The Court's doubts are reinforced by the rather trivial factual basis for the detention and the fact that the applicant is almost blind."*

*Witold Litwa v. Poland, supra note 3, paragraph 77*

The domestic law applicable in this case, *"provides for several different measures which may be applied to an intoxicated person, among which detention in a sobering-up centre is the most extreme one. Indeed, under that section, an intoxicated person does not necessarily have to be deprived of his liberty since he may well be taken by the police to a public-care establishment or to his place of residence."* (Ibid., paragraph 79)

As the Briefing notes say, since no such measures were taken into consideration, there was a breach of Article 5 (1) (e) of the ECHR.



## Case study B: Use of lethal force against suspected terrorists – the right to life

The analysis of Case study B found that Article 2 of the ECHR on the right to life was the primary human right at stake.

### In determining whether the action pursued had a legitimate aim...

*“According to the information the authorities received presented them with a fundamental dilemma: On the one hand, they were required to have regard to their duty to protect the lives of the people of Gibraltar, including their own military personnel and, on the other, to have minimum resort to the use of lethal force against the suspects in the light of the obligations flowing from both domestic and international law.”*

Mc Cann and others v. UK, *supra* note 8, paragraph 192

### In determining whether state interference was necessary and proportionate to the aim...

*“The authorities were confronted by an active service unit of the IRA [Irish Republican Army, added] composed of persons who had been convicted of bombing offences, and a known explosives expert. The IRA, judged by its actions in the past, had demonstrated a disregard for human life, including that of its own members.” (Mc Cann, paragraph 193)*

*“The soldiers who carried out the shooting (A, B, C and D) were informed by their superiors that there was a car bomb in place which could be detonated by any of the three suspects by means of a radio-controlled device which might have been concealed on their persons; that the device could be activated by pressing a button; that they would be likely to detonate the bomb if challenged, thereby causing heavy loss of life and serious injuries, and were also likely to be armed and to resist arrest.” (Ibid., paragraph 195)*

*“The actions which they took, in obedience to superior orders, were thus perceived as absolutely necessary in order to safeguard innocent lives. It considered that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time, but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.”*

*“The authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.” (Ibid., paragraph 211)*

*“The reflex action of the soldiers in this vital respect lacked the degree of caution in the use of firearms to be expected from law-enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects. This failure by the authorities suggested a lack of appropriate care in the control and organisation of the arrest operation.” (Ibid., paragraph 212)*

## Handout 2: The obligation to protect<sup>2</sup>

### Case study C: Handling a demonstration and a counter demonstration – the right to freedom of assembly

The analysis of Case study C found that Article 11 of the ECHR on the right to freedom of assembly was the primary human right at stake.

*“A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.*

*Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11.”*

Plattform Ärzte für das Leben v. Austria, *supra* note 14, paragraph 32

#### In determining if the state has taken reasonable and appropriate measures to protect the applicable human right(s)...

*“While it is the duty of contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used.” (Ibid., paragraph 34)*

Take a look at a couple of reasons why the ECtHR considered that the police took reasonable and appropriate measures to protect the demonstrators:

*“It must first be noted that the demonstration planned by supporters of abortion, which were due to be held at the same time and place as Platform’s demonstration had been prohibited. Furthermore, a large number of uniformed and plain-clothes policemen had been deployed along the route originally planned, and the police representatives did not refuse the applicant association their protection even after it decided to change the route despite their objections. Lastly, no damage was done nor were there any serious clashes; the counter-demonstrators chanted slogans, waved banners and threw eggs or clumps of grass, which did not prevent the procession and the open-air religious service from proceeding to their conclusion; special riot-control units placed themselves between the opposing groups when tempers had risen to the point where violence threatened to break out.” (Ibid., paragraph 37)*

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2. de Schutter, O. (2010), *International Human Rights Law*, Cambridge et al., Cambridge University Press, p. 365.



### Case study D: Violence against women – the right to life

The analysis of Case study D, *Opuz v. Turkey*, found that Article 2 of the ECHR on the right to life was the primary human right at stake.

*“The Court reiterates that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”*

*Opuz v. Turkey*, supra note 19, paragraph 128

*“When repeatedly deciding to discontinue the criminal proceedings against Mr. O, the authorities referred exclusively to the need to refrain from interfering in what they perceived to be a “family matter”. The authorities had not apparently considered the motives behind the withdrawal of the complaints, despite the statements of Mrs. O and her mother to the prosecution authorities that they had felt obliged to do so because of Mr. O’s death threats and pressure. It was also striking that the victims had withdrawn their complaints when Mr. O had been at liberty or following his release from custody.”* (Ibid., paragraph 143)

#### In determining if the state has taken reasonable and appropriate measures to protect the applicable human right(s)...

*“Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”* (Ibid., paragraph 129)

Indeed, the local authorities could have ordered protective measures or issued an injunction banning Mr O from contacting, communicating with or approaching Mrs O’s mother or entering defined areas. On the contrary, in response to Mrs O’s mother’s repeated requests for protection, the authorities, apart from taking down Mr O’s statements and then releasing him, had remained passive. Moreover, the criminal law system had had no deterrent effect in the present case.

## Extended activities

### Extended activity 1: *Scenario training at Austria's police academies*

#### **Purpose:**

Austria's police academies use scenario training to help participants internalise the principle of proportionality. In short role play sequences (stopping a car, domestic violence, stop and search, etc.) participants act out a situation and then reflect on their ability to apply human rights standards in practice, especially the principle of proportionality, according to police officers' role as human rights protectors and service providers.

#### **Objectives:**

##### **Knowledge**

- understand the principle of proportionality within human rights analysis and know the relevant questions related to it
- understand what is meant by taking on a human rights perspective and match it with the role of police in a democratic society

##### **Attitude**

- reflect on one's own perceptions and behaviour in reaction to challenging situations resulting in a more conscious and aware mindset about one's own motivations for action and reaction
- experience a situation from a different perspective (as perpetrator, as victim)
- analyse empathically the counterpart in order to be able to handle the situation
- appreciate the use of feedback and personal reflection as a permanent learning tool in the professional environment

##### **Skills**

- shape communication skills in difficult situations
- apply human rights analysis while acting in a concrete situation
- train the use of force in a proportionate way regardless of the challenges given by counterparts

#### **Requirements:**

Time: the entire course takes a couple of months

- about 2 days for the introduction
- about 1 day discussion of the reading material used as Briefing notes
- 1 day per scenario (including reflection) – depending on the group size

#### **Materials:**

- technical equipment for video role playing and replaying in the plenary
- a set of guiding principles describing the role of police
- Briefing notes/reading material
- group size: 20–25 persons



Extended activity 1  
description:  
*Scenario training at  
Austria's police academies*

- ① **Introduction:** Reflect on the role of police, objectives of policing and the principles of police work with respect to scenario training.
- ② **Scenarios:** Set up the scenarios. Mission-drill practitioners play the main roles of the counterparts and drive the action in the intended direction, participants support them by also taking on the roles of persons involved. Participants who are acting as police officers must cope with the situation and arrive at suitable solutions. After each scenario an on-site de-briefing session takes place under the supervision of the mission-drill practitioners.
- ③ **Video feedback and reflection:** After all the participants have played a scenario, participants gather in the plenary. Each scenario has been video-taped and is shown in plenary. Again the participants are asked for their feedback and have the opportunity to learn from detailed analysis of their actions. The scenarios are 'translated' into human rights-relevant aspects.

**Training tip: Using scenario training**

Scenario training aims at combining (human rights) theory and practice. Only by doing so will students take note of their responsibilities in avoiding potential future abuses of authority and violations of human rights. It is when students are confronted with scenarios in which they have to deal with uncooperative and aggressive opponents that they begin to truly understand the situation and links with human rights.

**Extended activity 2:**  
*Scenario training  
at Germany's State Police  
of North Rhine-Westphalia*

**Purpose:**

Police training practice in Germany is similar to that in Austria. Human rights training based on scenarios and role plays aims at reflecting the actual policing context. In contrast to Austria, however, in Germany professional, external actors take on the roles of the victims and/or perpetrators whereas participants play only the police officers' roles – a reaction to concerns that the former roles might lead to a stigmatisation of those participants playing them beyond the training course. Prepared scripts for the actors determine the flow of action, which the participants then analyse retrospectively.

**Requirements:**

- time: about 2 hours for each two-person role play (including instructions and feedback)
- theoretical preparation is offered over a period of weeks before role plays start.

**Materials:**

- role play set-up (as realistically as possible), premises, props, etc.
- group size: 12 persons (targeted at police recruits)





Extended activity 2  
description:  
*Scenario training at  
Germany's State Police  
of North Rhine-Westphalia*

- ① **Theoretical background:** Over a period of several weeks participants gain a theoretical foundation on the relevant issues that the role plays train.
- ② **Role plays:** The scenarios are set up like real life situations at purpose-appropriate venues. Professional, external actors play the roles of counterparts following prepared scripts which include different steps of escalation. Two participants act as police officers who must handle the situation.
- ③ **Feedback:** Immediately following the role play, the two police officers provide feedback on the results achieved and how they felt in the situation. Then, the actors give feedback from their perspective. Next, all other participants who watched the role play add their comments. At the end, trainers provide their conclusions. Then a new role play starts.

**Training tip: Reflect possible real life situations**

It is extremely important that the scripts and role plays reflect possible real life situations as realistically as possible. The cooperation with professional, external actors, who are unknown to the participants, effectively simulates the interaction of police with society. The preparations for and the reflections after the role plays are equally important.



#### **MODULE 4: THE PROHIBITION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

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