

# Human Rights In Counter-Terrorism Investigations



A Practical Manual  
For Law Enforcement Officers

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For Law Enforcement Officers

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# List of Abbreviations and Acronyms

<b>CAT</b>	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>CCTV</b>	Closed-circuit television
<b>CFREU</b>	Charter of Fundamental Rights of the European Union
<b>CPT</b>	European Committee for the Prevention of Torture
<b>ECtHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>IACHR</b>	Inter-American Commission of Human Rights
<b>NGO</b>	Non-governmental organization
<b>NPM</b>	National Preventive Mechanism
<b>ODIHR</b>	OSCE Office for Democratic Institutions and Human Rights
<b>OSCE</b>	Organization for Security and Co-operation in Europe
<b>PEACE</b>	Interview model following five phases: <b>P</b> lanning and <b>P</b> reparation; <b>E</b> nagement and <b>E</b> xplanation; <b>A</b> ccount, clarification and challenge; <b>C</b> losure and <b>E</b> valuation
<b>SITs</b>	Special Investigation Techniques
<b>TNTD</b>	OSCE Transnational Threats Department
<b>TNTD/SPMU</b>	OSCE Transnational Threats Department/ Strategic Police Matters Unit
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations

# Glossary

This glossary clarifies some terms used in this manual and is not intended to provide official definitions. Throughout the manual, the following key terms should be understood exclusively in the anti-terrorism context.

**Arrest:** the act of apprehending a person for the alleged commission of an offence or by the action of an authority.<sup>1</sup>

**Data-mining:** searching personal data sets based on presumed characteristics of suspects.<sup>2</sup>

**Detention:** the condition of any person deprived of personal liberty, except as a result of conviction for an offence.<sup>3</sup>

**Extraordinary rendition:** the transfer – without legal process – of a detainee to the custody of a foreign state for purposes of detention and interrogation.<sup>4</sup>

**Imprisonment:** condition of any person deprived of personal liberty as a result of conviction for an offence.<sup>5</sup>

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<sup>1</sup> United Nations General Assembly, Resolution 43/173, "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment", New York, 9 December 1988, <<http://www.un.org/documents/ga/res/43/a43r173.htm>>.

<sup>2</sup> United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Report to the UN Human Rights Council, 29 January 2007, A/HRC/4/26, para. 35, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/HRC/4/26>>.

<sup>3</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *op. cit.*, note 1.

<sup>4</sup> *Globalizing Torture, CIA Secret Detention and Extraordinary Rendition* (New York: Open Society Foundations, 2013), p.13, <<http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>>.

<sup>5</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *op. cit.*, note 1.

**Incommunicado detention:** deprivation of a person's liberty by state authorities acting in their official capacity, or persons acting under the orders thereof, with the authorization, consent, support or acquiescence of the state, or in any other situation where the action or omission of the detaining person is attributable to the state, where the person is not permitted any contact with the outside world such as family, friends, independent lawyers and doctors.<sup>6</sup>

**Informant:** any person who voluntarily provides information to the authorities. They can be former criminals or suspected to be part of or otherwise associated with a terrorist group, as well as members of the public. Informants do not provide evidence but sporadic information to the authorities.

**Informant/Undercover agent's handler:** a law enforcement officer who is the point of contact for an informant or undercover agent. They should be carefully selected and trained to provide advice, support or assistance at very short notice. The means of contact and the level of support provided depend on the circumstances, and may go as far as intervening to extract the informant or undercover agent from danger, if required.

**Intelligence:** raw information that is gathered, processed, interpreted and protected by law enforcement agencies to decide upon and support criminal investigations.<sup>7</sup>

**Preventive detention:** detention of an individual considered to pose a national security threat before an offence has been committed and in the absence of reasonable suspicion that he or she is about to commit such an offence.

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<sup>6</sup> United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Vice-Chair of the Working Group on arbitrary detention, Shaheen Sardar Ali, and Chair of the Working Group on enforced or involuntary disappearances, Jeremy Sarkin, "Joint Study on global practices in relation to secret detention in the context of countering terrorism", 20 May 2010, A/HRC/13/42, p. 11, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/HRC/13/42>>.

<sup>7</sup> *Criminal Intelligence: Manual for Front-line Law Enforcement* (Vienna: United Nations, 2010), p.9, <[https://www.unodc.org/documents/organized-crime/Law-Enforcement/Criminal\\_Intelligence\\_for\\_Front\\_Line\\_Law\\_Enforcement.pdf](https://www.unodc.org/documents/organized-crime/Law-Enforcement/Criminal_Intelligence_for_Front_Line_Law_Enforcement.pdf)>.

**Principle of non-refoulement:** absolute prohibition to return, expel or extradite a person to another state where there are substantial grounds for believing that the person would be in danger of being subject to torture, inhuman or degrading treatment.<sup>8</sup>

**Pro-active methods of investigation:** methods of investigation, starting with a suspect and using a variety of strategies to discover and demonstrate his or her involvement in various offences, previously recorded or not.

**Profiling:** a systematic association of sets of physical, behavioural or psychological characteristics with particular offences and their use as a basis for making law-enforcement (investigative) decisions.<sup>9</sup>

**Reactive methods of investigation:** methods of investigation that can be characterized as the application of a set of standard procedures after a terrorism-related crime, such as when a terrorist bombing has been committed.

**Secret detention:** situation in which (a) person(s) is held in incommunicado detention and where the detaining or otherwise competent authority denies, refuses to confirm or deny or actively conceals the fact that the person is deprived of his or her liberty from the outside world, or refuses to provide or actively conceals information about the fate or whereabouts of the detainee. Secret detention can take place in official and unofficial places of detention.<sup>10</sup>

**Special Investigation Techniques:** techniques used to gather information, such as electronic or other forms of surveillance and undercover operations, in such a way so as not to alert the target person(s) and for the purpose of detecting and investigating offences.<sup>11</sup>

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<sup>8</sup> United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), New York, 10 December 1984, Article 3, <<http://www.un.org/documents/ga/res/39/a39r046.htm>>.

<sup>9</sup> United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *op. cit.*, note 2, para. 33.

<sup>10</sup> *Ibid.*, p.11.

<sup>11</sup> Council of Europe Committee of Ministers, Recommendation Rec(2005)10 on “special investigation techniques” in relation to serious crimes including acts of terrorism, Strasbourg, 20 April 2005, Chapter 1, <<https://wcd.coe.int/ViewDoc.jsp?id=849269&Site=COE>>. See also Philippe De Koster P, *Terrorism: Special Investigation Techniques* (Strasbourg: Council of Europe Publishing, 2005), p.13.

**Surveillance:** the monitoring and gathering of information about (a) specific person(s), including the observation or listening to (a) person(s), their movements, conversations or other activities. It may be conducted with or without the use of a surveillance device and includes the recording of any information obtained. Surveillance is used for a specific defined purpose and limited in time.

**Torture:** “an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>12</sup>

**Undercover agent:** any law enforcement officer or other person, including former members of a terrorist group or otherwise associated with it tasked by handlers with gathering information and evidence covertly, for instance by infiltrating an organization suspected of terrorism-related offences. In some OSCE participating States, only law enforcement officers can be involved in undercover operations.

**Witness:** anyone who may give evidence during an investigation and/or before a court, other than suspects, which can include victims of terrorist acts.

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<sup>12</sup> United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), New York, 10 December 1984, Article 1, <<http://www.un.org/documents/ga/res/39/a39r046.htm>>.

# Foreword

The OSCE participating States committed themselves to protect and respect human rights in the fight against terrorism as early as the Madrid Meeting in 1983. This approach reflects the OSCE comprehensive and cross-dimensional concept of security, which recognizes that security goes beyond politico-military issues to fully encompass economic, environmental and human rights issues. Efforts to counter security threats should, therefore, be undertaken in all three OSCE dimensions of security: the politico-military dimension, the economic and environmental dimension, and the human dimension.

The OSCE views security as anchored in the respect for human rights, democracy and the rule of law, and relates the maintenance of peace to the protection of human rights and fundamental freedoms. Similarly, the 2006 United Nations Global Counter-Terrorism Strategy places respect for human rights and the rule of law at the very core of any counter-terrorism measures. In the 2012 OSCE Consolidated Framework for the fight against terrorism,<sup>13</sup> the OSCE participating States strongly reaffirmed that such an approach is well-suited to address challenges posed by terrorism and ensure the respect for the rule of law, human rights and fundamental freedoms.

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) is the principal OSCE institution within the human dimension and assists the 57 OSCE participating States in fulfilling their human dimension commitments. The Strategic Police Matters Unit of the Transnational Threats Department in the OSCE Secretariat assists participating States in police development, reform of criminal justice systems, law enforcement co-operation and efforts to combat organized crime in line with the OSCE Strategic Framework for Police-Related Activities and the OSCE Concept for Combating the Threat of Illicit Drugs and the Diversion of Chemical Precursors.

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<sup>13</sup> OSCE Permanent Council, Decision No. 1063, “OSCE Consolidated Framework for the fight against terrorism”, Dublin, 7 December 2012, <<http://www.osce.org/pc/98008>>.

In particular, ODIHR has been mandated to support the OSCE participating States in developing and implementing human rights-compliant measures to prevent and counter terrorism.<sup>14</sup> As part of this mandate, in 2007 ODIHR published *Countering Terrorism, Protecting Human Rights: A Manual*, which focuses on the main human rights at risk in the anti-terrorism context and ways to ensure the protection of human rights in compliance with international human rights standards and OSCE human dimension commitments. The manual has also aided in training sessions throughout the OSCE region by providing law enforcement officers with practical tools to enable them to respect international human rights standards and OSCE commitments.

ODIHR and the TNTD/SPMU have combined their expertise on human rights and democratic policing respectively to produce this manual, which explores in detail the different phases of counter-terrorism investigations and links them to relevant human rights standards.

We believe that this manual, by examining the topic of protecting human rights in such investigations from an operational point of view, will provide law enforcement officers in the OSCE region with useful and concrete guidance to both respect human rights in their daily work, as well as more effectively and successfully investigate terrorism-related acts.

*Ambassador Janez Lenarčič*

Director, OSCE Office for Democratic Institutions and Human Rights

*Alexey Lyzhenkov*

Co-ordinator

Department for Addressing Transnational Threats

OSCE Secretariat

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<sup>14</sup> *Ibid*; and OSCE Ministerial Council, Annex to Ministerial Council Decision No. 1, “The Bucharest Plan of Action for Combating Terrorism”, Bucharest, 3–4 December 2001, <<http://www.osce.org/mc/40515>>.

# Introduction

*"There should be no conflict between human rights and policing.  
Policing means protecting human rights."<sup>15</sup>*

Human rights are an integral element of all police operations and their practical application is an essential part of any successful investigation. They are the allies of effective police work. Paying attention to the rights and particular needs of the men, women and children who are part of the community that a police officer serves makes the police more effective. This principle applies as much to terrorism-related crimes as it does to other crimes. It is true that the emotion generated by terrorist acts may cloud the judgement of even the most stoic police officer and that the often covert and intense nature of terrorism-related investigations can give rise to acute and specific human rights concerns. However, similar emotion and similar issues often arise in investigations of other serious crimes.

It is a fundamental requirement of international human rights law that a fair trial depend on a fair and impartial investigation conducted in full compliance with legal and human rights standards. A failure to apply these standards increases the risk of offenders escaping justice. Convictions are rendered unsafe either because innocent people subjected to torture or ill-treatment confess to something they have not done, or because of breaches of the respect for private and family life during surveillance or evidence-gathering operations, for example. In such cases, a court of first-instance can refuse to convict or a court of appeal could overturn the conviction.

This is not a hypothetical point. The legal reports about a number of OSCE participating States by bodies such as the European Court of Human Rights (ECtHR) and the Inter-American Commission of Human Rights (IACtHR)<sup>16</sup>

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<sup>15</sup> A New Beginning: Policing in Northern Ireland, the Report of the Independent Commission on Policing for Northern Ireland (Colegate: Crown, 1999), para. 4.1, <<http://cain.ulst.ac.uk/issues/police/patten/patten99.pdf>>.

<sup>16</sup> References will be made throughout the manual to the case-law of international bodies.

demonstrate that the respect for human rights is the cornerstone of law enforcement efforts to counter terrorism. Respect for human rights in counter-terrorism investigation and prosecution is a pre-condition to effectively preventing terrorism. Failure to respect and protect human rights is one of the conditions conducive to terrorism; human rights-compliant investigations are, therefore, key in any effort to counter this security threat.<sup>17</sup>

Respect for human rights – of terrorism suspects, victims, witnesses and police officers alike – also ensures that the innocent are not wrongly convicted and that the offenders do not walk free. Respect for human rights principles is, therefore, a practical necessity, essential to effective investigation.

That is what this manual is about.

In recent years, ODIHR and the OSCE Transnational Threats Department have produced a number of manuals and guidebooks designed to strengthen democratic policing in OSCE participating States and to protect human rights while countering terrorism.<sup>18</sup> In particular, in 2007 ODIHR published *Countering Terrorism, Protecting Human Rights: A Manual*.<sup>19</sup> This is a comprehensive, thorough and detailed examination of the international legal and human rights standards that apply to the fight against terrorism and has been used successfully as part of training programmes throughout the OSCE region. It is of value to police officers, prosecutors, judges, lawyers, academics and civil society organizations.

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<sup>17</sup> United Nations General Assembly, Resolution 60/288, “The United Nations Global Counter-Terrorism Strategy”, 20 September 2006, <<http://www.un.org/en/terrorism/strategy-counter-terrorism.shtml>> and OSCE Ministerial Council, Ministerial Statement, “Supporting the United Nations Global Counter-Terrorism Strategy”, Madrid, 30 November 2007, <<http://www.osce.org/mc/29544>>.

<sup>18</sup> *Guidebook on Democratic Policing by the Senior Police Adviser to the OSCE Secretary General* (Vienna: OSCE, 2008), <<http://www.osce.org/spmu/23804>>; *Good Practices in Building Police-Public Partnerships by the Senior Police Adviser to the OSCE Secretary General* (Vienna: OSCE, 2008), <<http://www.osce.org/spmu/32547>>; *Good Practices in Basic Police Training – Curricula Aspects* (Vienna: OSCE, 2009); <<http://polis.osce.org/library/f/3555/2732/OSCE-AUS-SPM-3555-EN-2732>>; *Trafficking in Human Beings: Identification of Potential and Presumed Victims – A Community Policing Approach* (Vienna: OSCE, 2011), <<http://www.osce.org/node/78849>>; and *Guidelines on Human Rights Education for Law Enforcement Officials* (Warsaw: OSCE/ODIHR, 2012), <<http://www.osce.org/odihr/93968?download=true>>.

<sup>19</sup> *Countering Terrorism, Protecting Human Rights: A Manual*, (Warsaw: ODIHR, 2007) <<http://www.osce.org/odihr/29103>>.

## PURPOSE AND STRUCTURE OF THE MANUAL

This present manual focuses on the investigation process and has been produced following requests from law enforcement officers working in the field for a practical tool to aid their work. It is designed to help improve democratic policing practice across the OSCE and to assist law enforcement practitioners in strengthening their compliance with OSCE commitments and international human rights standards in the investigation of terrorism-related crimes. It is intended to be both a stand-alone tool and a complement to ODIHR's *Countering Terrorism, Protecting Human Rights* manual and training programme, which approaches the subject from a legal standpoint. This present manual, rather, examines the topic from an operational and practical point of view. Therefore, the law will not be quoted in great detail, but there will be frequent reference to the relevant legal standards as set out in *Countering Terrorism, Protecting Human Rights* in order to avoid duplication. The two manuals can be used together by those wishing to further explore the subject.

The manual deals with the policing issues faced by those tasked with the difficult and sensitive job of investigating terrorism-related offences. It applies human rights standards and laws to those issues, using real-life examples that have tested law enforcement agencies in OSCE participating States. The chapters follow, as far as possible, the same sequence that investigations usually follow, using both pro-active and reactive methods of investigation, although real life rarely allows for a neat distinction between the two. Thus, it examines intelligence gathering (including the use of technical surveillance, the interception of communications and the physical surveillance of suspects and suspect premises), before addressing other issues, such as crime scene examination, dealing with witnesses, detaining and questioning suspects, accountability and the security of investigations. Related subjects, such as international co-operation and extradition, are discussed at the appropriate stages.

Its primary target audience is law enforcement personnel working on counter-terrorism issues and prosecuting authorities supervising or involved in the prosecution of terrorism-related offences. However, those involved in combatting organized crime will also find much that is relevant to their work, considering the similarities in law enforcement tactics to counter these two areas of criminality.

The manual gives general guidance about what law enforcement officers should and should not do and what the consequences of their actions may be. Case studies are used throughout the manual to illustrate practical

application of these guidelines; most of these cases have been adapted from real case-law for the purpose of the manual. However, the user should be aware that, to the extent that it gives advice or expresses opinions on operational matters, this manual is not intended to replace any formal and structured course of training in operational police work. Where operational matters are discussed, it is for the purpose of putting the human rights concerns in context and of illustrating how human rights standards and the operational requirements of the police are always complementary. When undertaking investigations and operations, law enforcement officers must consider the law, policy and procedures applicable within their own jurisdictions and defined in accordance with international human rights standards.

The manual also serves as a basis for developing relevant training programmes on the protection of human rights in counter-terrorism investigations at the national level. Training curriculum templates are proposed at the end of each part and identify learning objectives and methodologies to assist national trainers.

# Part 1

## **INTELLIGENCE, PRO-ACTIVE METHODS OF INVESTIGATION AND SPECIAL INVESTIGATION TECHNIQUES**

**KEY QUESTIONS:**

- In processing information and gathering intelligence, what is the best way to ensure the protection of the human rights of both the source and the subject?
- What are the main characteristics of an effective human rights-compliant intelligence system?
- What are the main human rights concerns surrounding the use of special investigation techniques?
- In the use of undercover agents, what practical steps need to be taken to ensure that evidence obtained does not prejudice the right to a fair trial?
- What tensions affecting human rights may occur between the intelligence-gathering and investigative phases?

Any piece of information that is evaluated, collated with other information about the same subject and analysed becomes intelligence that may be sufficiently concrete and important to justify an operation, either against known individuals or focussing on a specific location or event. Since intelligence is usually incomplete, an operation aims at either confirming or denying the arising assumptions and suspicions. It may also involve the gathering of evidence with a view to mounting a prosecution. Operations often entail the physical and technical surveillance of individuals and the recording of their actions or communications, and of personal information about them and the people with whom they associate and come into contact. Undercover agents may also be used to infiltrate groups of terrorism suspects and, sometimes, convicted terrorists may be “turned” and persuaded to inform on their acquaintances.

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The receipt, processing, storage and use of this information and intelligence – which is a specialist task demanding that those involved are appropriately trained – is related to a number of important human rights concerns, largely surrounding the respect for private and family life, but also encompassing the use of information obtained by torture and ill-treatment and the right to life. Law enforcement powers related to intelligence-gathering are limited and interference with human rights is far less permissible because no crime has been committed yet.

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Detailed accounts of the relevant law and standards can be found in Chapters 8–17 of the *Countering Terrorism, Protecting Human Rights* manual.

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Law enforcement personnel need to be familiar with the following human rights standards:

- Right to life;<sup>20</sup>
  - Prohibition of torture and other cruel, inhuman or degrading treatment or punishment;<sup>21</sup>
  - Prohibition of discrimination;<sup>22</sup>
  - Freedom from arbitrary arrest or detention;<sup>23</sup>
  - Right to a fair trial;<sup>24</sup>
  - Respect for private and family life;<sup>25</sup>
  - Freedom of thought, conscience, religion or belief;<sup>26</sup>
  - Freedom of expression; and<sup>27</sup>
  - Freedom of association and the right of peaceful assembly.<sup>28</sup>
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<sup>20</sup> OSCE Ministerial Council, “OSCE Charter on Preventing and Combating Terrorism”, Porto, 7 December 2002, <<http://www.osce.org/odihr/16609>>; OSCE Ministerial Council, Ministerial Statement, “Preventing and Combating Terrorism”, Sofia, 7 December 2004, <<http://www.osce.org/mc/38760>>; OSCE Ministerial Council, Ministerial Declaration, “Ministerial Declaration on the Occasion of the 60th Anniversary of the Universal Declaration of Human Rights”, Helsinki, 5 December 2008, <<http://www.osce.org/mc/35476>>; Article 6, International Covenant on Civil and Political Rights (ICCPR); European Convention on Human Rights (ECHR), Article 2; Charter of Fundamental Rights of the European Union (CFREU), Article 2; and American Declaration of the Rights and Duties of Man (ADRDM), Article 1.

<sup>21</sup> OSCE Conference on Security and Co-operation in Europe, “Questions Relating to Security in Europe: Principles”, Vienna, 1989, <<http://www.osce.org/mc/16262>>; OSCE Conference on the human dimension of the CSCE, Copenhagen Document, Copenhagen, 29 June 1990, <<http://www.osce.org/odihr/elections/14304>>; OSCE Conference on the human dimension of the CSCE, Moscow Document, Moscow, 3 October 1991, <<http://www.osce.org/odihr/elections/14310>>; OSCE Summit, “Charter for European Security: III. Our Response”, Istanbul, 19 November 1999, <<http://www.osce.org/mc/17502>>; OSCE Ministerial Council, Decision No. 12/05, “Upholding Human Rights and the Rule of Law in Criminal Justice Systems”, Ljubljana, 6 December 2005, <<http://www.osce.org/mc/17547>>; OSCE Helsinki Document, op. cit. note 20; OSCE Ministerial Council, Ministerial Declaration, “Ministerial Declaration on the Occasion of the 25th Anniversary of the Adoption of the Convention against torture and other cruel, inhuman or degrading treatment or punishment”, Athens, 2 December 2009, <<http://www.osce.org/cio/40697>>; ICCPR, Article 7; ECHR, Article 3; and CFREU, Article 4.

<sup>22</sup> OSCE Conference on Security and Co-operation in Europe, Final Act, “Questions Relating to Security in Europe: 1(a) Declaration on Principles Guiding Relations between Participating States – Principle VII”, Helsinki, 1975, <<http://www.osce.org/mc/39501?download=true>>; OSCE Copenhagen Document, op. cit. note 21; ICCPR, Article 26; ECHR, Article 14; CFREU, Article 21; and ADRDM, Article 2.

<sup>23</sup> OSCE Copenhagen and Moscow Documents, op. cit. note 21; ICCPR, Article 9; ECHR, Article 5; CFREU, Article 6; and ADRDM; Article 25.

## 1.1 INFORMATION AND INTELLIGENCE-GATHERING

It is extremely important that intelligence systems – whether they are computerized or paper-based systems – are kept to a manageable size. This both makes them practical and facilitates their human rights compliance.

Experience teaches that law enforcement personnel involved in maintaining intelligence systems tend to accumulate information over time, including information that at first sight may appear to be inconsequential or irrelevant and out of date. They assume that one day the information might become useful. However, almost always it results in the system becoming nothing more than a warehouse that gets increasingly full, filled with out-of-context information and, thus, increasingly unmanageable. Even computerized systems, which are easier to search and manage than paper-based systems, become ineffective and of little use to operational police officers. The fact that a piece of information just might be useful one day does not justify keeping thousands of pieces of such information indefinitely.

The most modern and effective intelligence systems work on the principle that “less is more”. A lean system stores only relevant information that has been properly evaluated and that is regularly weeded. It will be of far more use in supporting police operations than one that absorbs everything, keeps it indefinitely and produces nothing. Storing information about crime and criminal suspects is not an end in itself.

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24 OSCE Vienna and Copenhagen Documents, op. cit. note 21; ICCPR, Article 14; ECHR, Article 6; CFREU, Article 47; and ADRDM, Article 18.

25 OSCE Moscow Document, op. cit. note 21; ICCPR, Article 17; ECHR, Article 8; CFREU, Article 7; and ADRDM, Articles 5, 9 and 10.

26 OSCE Helsinki Document, op. cit. note 22; OSCE Conference on Security and Co-operation in Europe, Concluding Document, “Questions Relating to Security in Europe: Principles”, Madrid, 6 September 1983, <<http://www.osce.org/mc/40871>>; OSCE Vienna and Copenhagen Documents, op. cit. note 21; OSCE Conference on Security and Co-operation in Europe, Decision No. VIII, “The Human Dimension”, Budapest, 5-6 December 1994, <<http://www.osce.org/mc/39554?download=true>>; OSCE Ministerial Council, Decision No. 4/03, “Tolerance and Non-discrimination”, Maastricht, 2 December 2003, <<http://www.osce.org/mc/19382>>; ICCPR, Article 18; ECHR, Article 9; CFREU, Article 10; and ADRDM, Article 3.

27 OSCE Copenhagen Document, op. cit. note 21; OSCE Budapest Document, op. cit. note 26; ICCPR, Article 19; ECHR, Article 10; CFREU, Article 11; and ADRDM, Article 4.

28 OSCE Copenhagen Document, op. cit. note 21; OSCE Conference on Security and Co-operation in Europe, “A New Era of Democracy, Peace and Unity”, Paris, 21 November 1990, <<http://www.osce.org/mc/39516>>; OSCE Helsinki Document, op. cit. note 20; ICCPR, Articles 21 and 22; ECHR, Article 11; CFREU, Article 12; and ADRDM, Articles 21 and 22.

Useful guidance on the information that can be lawfully gathered and the conditions under which this information can be processed and stored should be spelled out in domestic legislation and regulations, in line with international human rights standards.

Intelligence systems are not effective if they:

- do not support operational policing;
- do not assist strategic decision-making; and
- do not give operational police teams information that they can act on to prevent and detect crime.

Such intelligence systems, filled with out-of-context and outdated information, are also incompatible with human rights standards, in particular the right to privacy. As in so many other areas of law enforcement work, applying human rights standards not only allows officers to work in compliance with international and domestic law, but also makes them more effective in their work. It is, therefore, crucial to look at various elements of processing information and intelligence to assess the operational benefits of applying human rights standards at each stage.

### *1.1.1 Gathering Information*

Information is collected by law enforcement agencies from a variety of sources, some of which will be routine (e.g., the examination of operational databases and crime recording systems) and some that is volunteered (e.g., by members of the public, informants, or domestic or foreign law enforcement agencies). Information may be gathered “overtly” from “open sources” available to the public and “covertly” through the lawful use of police methods, such as surveillance and informants. It is necessary that domestic laws and regulations specify precisely the powers, methods and conditions under which law enforcement officers can gather information.

#### *Handling human sources of information*

Human rights are usually regarded as principally concerning the relationship between the individual and the state. They aim to ensure that the power of the state is exercised in a responsible and accountable manner and that the state is held responsible and accountable for violations. Law enforcement agencies, representing the state, have a duty to prevent crime and offences

against citizens.<sup>29</sup> If they fail to exercise that duty without good cause, they can be held responsible for any breach of human rights that ensue.

In the same vein, law enforcement agencies have a duty to take steps to prevent harm coming to those who provide information, as established by OSCE commitments and international human rights law. This duty applies also to information on terrorism-related acts.

Whatever the gathering method, in some circumstances, especially when handling human sources of information, the source may need to be treated in confidence or in a sensitive manner. It is here that the first human rights concerns arise.

Most law enforcement personnel who deal with the receipt of information from third parties are aware of the practical necessity of maintaining the confidentiality of their sources. Quite simply, if the source expects that their identity will be kept secret and the expectation is not met, then they are extremely unlikely to provide more information in the future. It is not just this practical aspect, however, that needs to be considered; the human rights of the source are also an important consideration, among them the right to life and the respect for private and family life.

Reprisals of any kind – be they physical attacks, threats or the spreading of rumours and incitements to ostracize within a community – against those who provide information to law enforcement agencies are real possibilities. It is essential that adequate security measures, such as restricted access to databases and the use of codenames or numbers, are put in place to protect the identity of the sources. This is especially so with respect to counter-terrorism databases, where the consequences of information being leaked will often be more serious than might be the case with other criminal intelligence databases.

Action that would lead to the inadvertent identification of the source should also be avoided as far as possible. Whether the state will have breached this duty in a particular case depends on the circumstances and on such factors as the nature of the information supplied, the potential consequences for the terrorism suspects of law enforcement agencies becoming aware of it, and the subsequent foreseeable risk to the informant. Where the risk is high due to the proximity of the

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<sup>29</sup> See for example, ECtHR, *Osman v. UK*, Application No. 87/1997/871/1083, 28 October 1998, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58257>>.

source to the subject of the information (e.g., a close family member) or because of the environment in which the source lives or works (e.g., in a community with a history of witness intimidation), the greater the duty is of law enforcement. However, a failure to take sufficient security measures in all cases is likely to weigh heavily with any tribunal judging the issue. When protecting the life of the source, this positive obligation must also be balanced against other human rights, so as not to violate, for example, the right to a fair trial or the right to private and family life of those suspected of placing the source at risk.

#### *Racial, religious and ethnic profiling in the counter-terrorism context*

Profiling is one method to gather information. It is a permissible policing activity when profiles are not discriminatory, but narrowly defined on the basis of factors statistically proven to correlate with certain criminal conduct.

The United Nations (UN) Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism distinguishes descriptive and predictive profiling:

**Descriptive profiling** aims at identifying those likely to have committed an offence on the basis of evidence gathered by the police about a criminal act. Such profiling may be an effective policing tool.

**Predictive profiling** is designed to identify those who may be involved in some future, or as-yet-undiscovered, crime based on stereotypical assumptions that a person from a certain racial, ethnic or religious background is more likely to commit a crime. Such profiling contravenes the principle of non-discrimination and, therefore, violates human rights. It is also counterproductive.<sup>30</sup>

Resorting to predictive profiling is not only discriminatory but also ineffective. Terrorist groups have proved their ability to circumvent established profiles by recruiting people who are less likely to get searched under predictive profiles. Recent examples of this ineffectiveness include the extensive identification controls carried out at mosques, large-scale data-mining exercises, as

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<sup>30</sup> United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Report to the UN Human Rights Council, 29 January 2007, op. cit., note 2, para. 33.

well as stop-and-search programmes conducted in some OSCE participating States, none of which resulted in any terrorism-related convictions.<sup>31</sup>

### **Case Study – A data-mining exercise\***

In order to identify terrorist sleepers, police forces of state A start using public and private databases to gather and screen personal records of individuals. The criteria used for the search are: being male, being aged 18 to 40, being a current or a former student, having a traditionally Muslim name, and being born in or having the nationality of several specified countries with a predominantly Muslim population. Through this data-mining exercise, millions of personal records are collected and thousands of people are identified as potential terrorist sleepers and, subsequently, more closely examined. However, none of these people are charged with a terrorism-related offence.

#### ***Question: Does this data-mining initiative comply with human rights?***

In principle, data-mining could be a legitimate tool for protecting national security. However, the criteria used in this case were not based on evidence gathered during an investigation related to a particular terrorism-related offence. There was no evidence of an imminent and specific danger motivating the creation of such a profile. There was only the general threat of a hypothetical future attack and general stereotypical assumptions about who would carry out an attack.

The use of such broad profiles that include characteristics such as the presumed religion and national origin of individuals interferes unnecessarily and disproportionately with their right to private and family life and the principle of non-discrimination.

\* This case study is taken from the facts of a case before the Federal Constitutional Court of Germany and the analysis of the case by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.<sup>32</sup>

<sup>31</sup> “Report on the Expert Meeting on Security, Radicalization and the Prevention of Terrorism”, OSCE Office for Democratic Institutions and Human Rights, 28–29 July 2008, para. 25, <[www.osce.org/odihr/34379](http://www.osce.org/odihr/34379)>.

<sup>32</sup> German Federal Constitutional Court, BVerfG, 1 BvR 518/02 and United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Report to the UN Human Rights Council, 29 January 2007, op. cit., note 2.

Predictive profiling is not only unlawful and ineffective, but it also creates adverse effects. Such methods seriously impact innocent individuals who happen to fit the profile. It results in the stigmatization of certain individuals and communities and the social construction that all those who share the same racial, ethnic or religious characteristics are potential terrorism suspects. Such stigmatization and alienation hinder potential co-operation between the police and the public and may contribute to the terrorist radicalization of individuals and groups who are wrongfully targeted.

It cannot be stated too strongly that addressing the complex subject of terrorism in this manner is simplistic and counterproductive. Indeed, the OSCE Charter on Preventing and Combating Terrorism,<sup>33</sup> states unequivocally that “action against terrorism is not aimed at any religion, nation or people” and the practice of ethnic and religious profiling has been widely condemned by international human rights bodies and mechanisms.<sup>34</sup> Terrorism should not be linked to any national, religious or ethnic group.

The fight against terrorism does not constitute an exception to lawful profiling. Information gathered for the purposes of countering terrorism should be relevant to individuals, not to categories of people, and should be connected to the commission of a terrorism-related offence.

### *1.1.2 Recording and Evaluating Information*

After gathering information, law enforcement agencies will record and evaluate it. This is best done in a systematic way, following a prescribed method. There are a number of systems in use, but the best involve the contextualization of information, an assessment of the reliability of the source (ranging from “known to be true” to “suspected to be false”). This objective and

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<sup>33</sup> OSCE Porto Document, op. cit., note 20..

<sup>34</sup> See for example, United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Report to the UN Human Rights Council, 29 January 2007, op. cit., note 2. See also Committee on the Elimination of Racial Discrimination, General Recommendation No. XXXI: Prevention of racial discrimination in the administration and functioning of the criminal justice system, 3 October 2005, A/60/18(SUPP), para. 20, <[http://www2.ohchr.org/english/bodies/cerd/docs/GC31Rev\\_En.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/GC31Rev_En.pdf)>, urging states to “take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person’s colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion”. These factors weigh heavily when judging reasonableness and proportionality of ethnic profiling in counter-terrorism efforts.

scrupulous exercise will help not only in ensuring the operational value of the information, but also in protecting the human rights of both the source and of the subject of the information.

### **The 5x5x5 Recording and Evaluation System**

This system used in a number of OSCE participating States allows the effective management of:

- Evaluating the source of information, such as the person, agency or technical equipment providing the information, on the basis of five grades:
  - A. Always reliable;
  - B. Mostly reliable;
  - C. Sometimes reliable;
  - D. Unreliable; or
  - E. Untested source.
- Evaluating the validity of the information on the basis of five grades:
  1. The information is known to be true, without reservation;
  2. The information is known personally by the source, but not by the person reporting;
  3. The information is not known personally by the source, but can be corroborated by other information;
  4. The information cannot be judged; or
  5. The information is suspected to be false.
- Determining a handling code designed to provide an initial risk assessment, prior to recording material into an intelligence system. It allows the recording officer and others involved in the dissemination of the information to easily record their decision as to the suitability of sharing it with other parties, based on five handling codes:
  1. Dissemination permitted within law enforcement agencies in the country of origin;
  2. Dissemination permitted to other national agencies;
  3. Dissemination permitted to international law enforcement agencies;
  4. Dissemination within originating agency only; or
  5. Permits dissemination, but receiving agency is required to observe the conditions specified.

When deciding on the relevance of information, those involved in the evaluation process will have to be conscious of the following human rights standards:

- Prohibition of torture and other cruel, inhuman or degrading treatment or punishment;
  - Prohibition of discrimination;
  - Respect for private and family life;
  - Freedom of thought, conscience, religion or belief;
  - Freedom of expression; and
  - Freedom of association and the right of peaceful assembly.<sup>35</sup>
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Except for rights such as the prohibition of torture and discrimination, the majority of human rights are not absolute, meaning they can be restricted under certain circumstances, based on law and international human rights standards.<sup>36</sup> Any interference must also be justified, necessary and proportionate to the objectives it aims to achieve.

The assessment of the information provided needs to be more than just a judgement of whether or not it is true; information also needs to be pertinent for policing purposes with regard to the suspected involvement of an individual in terrorist activity. Thus, it may be relevant that someone has joined a violent extremist group if that group is reasonably believed to be involved in terrorist acts. In such case, breaching the subject's privacy by recording the fact in a police database and sharing it with other law enforcement personnel who need to know might be necessary and proportionate. If the group is not believed to be involved in terrorism, then the mere fact of the subject becoming a member is unlikely to be relevant. Getting the balance right between what is relevant and what is irrelevant is not always easy. Something that appears at first sight to be irrelevant may later turn out to be relevant, and vice versa. Maintaining details about a person in a police database simply because of their sexual orientation or belonging to a particular

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<sup>35</sup> OSCE commitments and international standards, *op. cit.*, notes 21, 22, 25, 26, 27, and 28.

<sup>36</sup> See the different types of rights: non-absolute rights are referred to as 'limited' or 'qualified' rights, in *Countering Terrorism, Protecting Human Rights: A Manual*, *op. cit.*, note 19, p. 67 and the five-stages test to lawfully interfere with non-absolute rights, pp. 68–72.

religious, ethnic or racial group is *prima facie* discriminatory and, therefore, prohibited.<sup>37</sup>

*Information and intelligence obtained by torture and other cruel, inhuman or degrading treatment or punishment*

A crucial consideration when evaluating information is whether it has been obtained as a result of torture or ill-treatment. This will be especially important when dealing with information received from law enforcement agencies in countries where there is a history of torture or ill-treatment of suspects.

There is an absolute prohibition in international law on the use of evidence obtained by torture or ill-treatment in judicial proceedings. This will be discussed in greater detail in Part 3.5 of this manual.

The information or intelligence obtained by such illegal means, even when not intended to be used in court proceedings, should always be treated in the same way that a court would treat evidence obtained by illegal means and, thus, be disregarded. Some would argue that the state has a duty to take into account any information, no matter what its source, that may assist in preventing acts of terrorism. However, this viewpoint falls short of practical considerations because the reliability of information obtained through torture or ill-treatment is always doubtful. When tortured or subjected to ill-treatment, people will often admit to things that are not true or provide inaccurate information, simply to make the pain stop.

Moreover, it must be strongly emphasized that the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism criticized the practice of receiving intelligence for operational purposes that may have been obtained as a result of torture on the grounds that it makes the receiving agency complicit in criminal acts.<sup>38</sup>

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<sup>37</sup> See, for example, the case of ECtHR, *Timishev v. Russia*, Application Nos. 55762/00 and 55974/00, 13 December 2005, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-71627>>. In this case police in the Russian Republic of Kabardino-Balkaria received orders not to allow anyone of Chechen origin to enter the republic through checkpoints maintained at the administrative border between Kabardino-Balkaria and the Russian Republic of Ingushtetia. The court found that this was discriminatory and unlawful as being in breach of Article 14 of the ECHR.

<sup>38</sup> United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Report to the UN Human Rights Council, 4 February 2009, A/HRC/10/3, para. 55, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/HRC/10/3>>.

Similarly, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment affirmed that receiving or relying on such intelligence undermines the goal of eliminating torture.<sup>39</sup>

Evaluating the circumstances in which intelligence provided by a foreign agency has been obtained may present practical difficulties. Clear procedures and guidelines to follow depending on the source of information should be established to support law enforcement officers in this process. Where there is any possibility that a piece of information may have been obtained under torture or other cruel, inhuman and degrading treatment, it is the responsibility of law enforcement officers to proceed with particular caution and to find out, to the extent possible, whether this intelligence has been obtained in accordance with their domestic legislation, defined in line with international human rights standards. It is also their responsibility to decide whether to use it.

The question that intelligence personnel need to ask themselves constantly when assessing the relevance of any information they are processing is whether knowing it and storing it on the police database will advance any operation to prevent or detect terrorism-related offences.

### *1.1.3 Dissemination of Information and Intelligence*

Having been recorded and evaluated, a decision will be taken as to how and to whom the information and intelligence should be disseminated; this may be decided before or after it has been subjected to research and detailed analysis. Once again, operational and human rights criteria converge and demand that adequate security arrangements are put in place to protect both the source and the subject, as well as to ensure the integrity of any operation that is undertaken against the latter. A risk assessment, such as the 5x5x5 system described in section 1.1.2 of this manual, should be carried out, and the information may need to be sanitized and/or restrictions imposed on how it is used and whether it can be disseminated further. This will be an especially important consideration when information and intelligence is passed on to another law enforcement agency, whether domestic or foreign, and more so if the external agency is believed to engage in torture or ill-treatment of suspects.

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<sup>39</sup> United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Theo van Boven, Report to the Human Rights Council, 3 February 2011, A/HRC/16/52, para. 53, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/HRC/16/52>>.

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism issued a compilation of international good practices concerning the work of intelligence agencies in relation to counter terrorism, it states:

“Before entering into an intelligence-sharing agreement or sharing intelligence on an ad hoc basis, intelligence services undertake an assessment of the counterpart’s record on human rights and data protection, as well as the legal safeguards and institutional controls that govern the counterpart. Before handing over information, intelligence services make sure that any shared intelligence is relevant to the recipient’s mandate, will be used in accordance with the conditions attached and will not be used for purposes that violate human rights.”<sup>40</sup>

#### *1.1.4 Maintenance of Intelligence Systems*

An essential part of the intelligence-management process is database maintenance. The operational benefits of maintaining a lean system that is weeded regularly have already been set out above. It also helps to keep the system in compliance with human rights standards.

As with the evaluation of information, weeding is best done systematically, regularly and according to a set of established criteria. Most OSCE participating States have some form of legislation relating to data protection, and these often contain a set of principles that govern how data is to be used, kept, processed, deleted and disclosed. This includes provisions establishing regular checks of the quality of the data and regulating how long information should be kept. Data must be adequate, relevant, non-excessive, accurate, complete and up-to-date, and people should be able to have access to and the opportunity to correct their own personal data. Complying with these requirements necessitates that databases are regularly reviewed and information that is no longer relevant and up-to-date is deleted.

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<sup>40</sup> United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Report to the UN Human Rights Council, 17 May 2010, A/HRC/14/46, para. 46, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/HRC/14/46>>.

The following set of principles reflects international good practices on how to process data in compliance with international human rights standards:

- Data must be collected and processed fairly and lawfully;
- Data must be collected for a determined, explicit and legitimate purpose, and must not be subsequently processed in a manner incompatible with this purpose;
- The data collected must be adequate, relevant and non-excessive for the purposes for which they were collected and subsequently processed;
- The data must be accurate, complete and up-to-date;
- The data must be stored in a form that allows the identification of their subjects;
- The relevance and accuracy of the data must be regularly evaluated; data that are inaccurate or no longer relevant for the purposes for which they were obtained and stored must be updated or deleted; and
- The collection and processing of data should be subject to supervision by an external independent authority.<sup>41</sup>

It should be borne in mind that some material that might normally be expected to be subject to weeding may need to be kept for an extended period if it has been used as part of a criminal prosecution. While information may have been gathered primarily for intelligence purposes, there is always the possibility that it has to be turned into evidence or form the basis of evidence. If a concrete court case should be made, nothing of this nature should be deleted but, instead, it should be handled appropriately in adequate systems until the case has come to trial and any period for which an appeal may be lodged has elapsed. Otherwise a violation of the right to a fair trial may occur.

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<sup>41</sup> *Ibid*, practice 24, para. 38. See also Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28 January 1981, Article 5, <<http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm>>, and Council of Europe Committee of Ministers, Recommendation R (87) 15E on regulating the use of personal data in the police sector, Strasbourg, 17 September 1987, <<https://wcd.coe.int/ViewDoc.jsp?id=704881&Site=CM>>.

## 1.2 DEVELOPMENT OF INTELLIGENCE, PRO-ACTIVE METHODS OF INVESTIGATION AND SPECIAL INVESTIGATION TECHNIQUES

Both the development of intelligence and pro-active methods of investigation almost invariably involve interference with the right to private and family life, due to the use of special investigation techniques (SITs). The right to a fair trial will also be relevant where a prosecution follows the use of SITs, particularly where the prosecutor seeks to protect the secret and sensitive nature of the techniques through court procedures designed to limit disclosure of the details of their use to the defence and in open court.

A series of conditions has to be met before using SITs. These conditions are designed both to safeguard the operational integrity of such techniques, in particular the need for confidentiality surrounding their use, and to ensure the adherence to human rights standards. The main conditions are:

- Judicial authorities or other independent bodies should exert adequate control of the use of SITs, either through prior authorization, supervision during the operation or ex-post facto review. The nature and level of control will depend on the degree of intrusiveness involved;
- SITs should be used only in serious cases;
- SITs should be used proportionally, based on the seriousness of the matter being investigated, and the degree of their intrusiveness should be a major consideration;
- Where the objective of the operation can be achieved “with adequate effectiveness” by use of less intrusive means or by non-SITs, this should always be the preferred option;<sup>42</sup>
- The procedural rules governing the production and admissibility of evidence obtained by SITs should safeguard the right to a fair trial; and
- Those involved in the operational use of SITs should receive adequate training.

As with all methods involving interference with qualified human rights, the correct balance must be struck. Each SIT used should bring an expected benefit to the operation or investigation, and any resulting interference with the right to private and family life must be justified, necessary and proportionate in order for it to be lawful.

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<sup>42</sup> Council of Europe Committee of Ministers, Recommendation Rec(2005)10 on “special investigation techniques” in relation to serious crimes including acts of terrorism, *op. cit.*, note 11, para. 6.

In order to protect both the effectiveness of the techniques and the human rights of the subjects, the number of people who are privy both to the methods themselves and to the fact that they are being used in a particular case should be minimized. Those who are aware of the methods and their use in a particular case should be security vetted.

Great care should be exercised in handling and using information of a confidential nature or related to the private life of the subjects. Such information should be kept confidential and may be disclosed only if the performance of police duty or the needs of justice so require.<sup>43</sup>

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The human rights concerns surrounding some common SITs need to be carefully examined. Including:

- Prohibition of discrimination;
  - Right to a fair trial;
  - Respect for private and family life;
  - Freedom of thought, conscience, religion or belief;
  - Freedom of expression; and
  - Freedom of association and the right of peaceful assembly.<sup>44</sup>
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### ***1.2.1 Surveillance***

Human rights concerns arise in the course of both covert and overt surveillance. Covert surveillance is carried out in a manner designed to ensure that (a) person(s) who is/are subject to it is/are unaware that it is taking place. This is because it is likely to obtain private information about individuals – both the subject and, indirectly, other people with whom the subject comes into contact and who may be innocent parties. None of these persons are in a position to grant or withhold their consent to the recording of information. Legislation in some OSCE participating States requires that people be informed that they have been the subject of covert surveillance; such notification may happen after the fact, e.g., when it does not compromise an on-going investigation.

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43 United Nations General Assembly, Resolution 34/169, "Code of Conduct for Law Enforcement Officials", 17 December 1979, Article 4, <<http://www.ohchr.org/Documents/ProfessionalInterest/codeofconduct.pdf>>.

44 OSCE commitments and international standards, *op. cit.*, notes 22, 24, 25, 26, 27 and 28.

Human rights concerns are intensified where the surveillance is intrusive, i.e., taking place on private premises, especially in someone's home or in a private vehicle, because there is a reasonable expectation of maximum privacy in such locations. By its very nature, intrusive surveillance often involves forcible entry into, or some other interference with, private property that in normal circumstances would be unlawful. It is essential, therefore, that scrupulous procedures are followed throughout the authorization process and in the course of the operation itself. Such procedures ensure the protection of law enforcement personnel from any subsequent prosecution or other legal or disciplinary proceedings for breaching privacy rules. They also ensure that the information will be admissible as evidence before the courts.

Overt surveillance, such as monitoring and following an individual or using means such as car-video systems, body-worn devices or closed circuit television (CCTV) systems in public places, also gives rise to human rights concerns, in particular the right to private and family life. Such surveillance has to be regulated by domestic legislation, with due regard to the principles of justification, necessity and proportionality and to international human rights standards. It is essential to assess the degrees of intrusiveness involved and, therefore, the varying needs for procedural safeguards and appropriate authorization and supervision before and during each stage of a surveillance operation.

### **Case Study – A surveillance operation**

A registered informant points out to his handler that X and Y have repeatedly visited café's and bars where they have spoken out against the government's politics and talked about some "drastic actions" being necessary. The informant is then tasked to secretly obtain more information.

A short time later, a community beat officer is contacted by a member of the community who complains about late night visits at the apartment of X, "who is a known radical", where suspiciously heavy material is shuffled in and around under a cover of darkness. The community beat officer identifies X and, during the following days, gathers more information by discreetly asking neighbors.

He even follows X for a short while during his beat hours and in uniform. He also reports his findings through appropriate channels.

A specialized unit identifies X and Y on the basis of public registers (i.e., of residents, health or welfare service clients, licensed drivers, or those with criminal records). During the following week, more information obtained led to a grounded suspicion that X and Y are planning a terrorist bomb attack at a major public event. Consequently, an investigation of X and Y is opened and a surveillance operation ordered on both men to identify any associates they might have, as well as to discover the location of the intended attack. One evening, a surveillance unit follows X from his home as he walks into the city centre. In front of a bank he meets Y, and the meeting is photographed. Both men walk to a nearby parked car and get into it. They drive away with Y at the steering wheel. This too is photographed.

They drive to the city's football stadium and are followed inside. There is a CCTV system in operation at the stadium, which is made known by notices at various points around the stadium and by the fact that the cameras are easily visible. Two of the surveillance team go to the CCTV control room and observe the section in which X and Y are seated. It is seen that they sit and converse with a third man, Z, who was unknown to the police prior to this meeting. The meeting is recorded using the CCTV system.

During the match, one of the surveillance team enters Y's car using a duplicate key, and plants both a listening device and a tracking device, so that any conversations can be recorded and visible contact with the vehicle re-established should it be lost during surveillance.

After the match, all three men leave together and drive away in Y's car. They go to the home of X and are seen to enter. The house is watched. It is then seen that a light is switched on in a downstairs room. The curtains are open and the three men are visible inside, sitting around a table talking and reading some documents. One of the surveillance team uses a camera with a high powered telephoto lens to photograph the occupants of the room.

About half an hour later, all three men leave together and drive away in Y's car. The surveillance team follows them, but one of the team stays behind and, using a skeleton key, enters X's home and places a listening device in the room where the three men had been, believing that this will be useful during any future meetings the men may have.

***Question: Does the police surveillance operation unlawfully interfere with the suspects' right to private and family life?***

The use of registered informants is a police tool frequently necessary in cases of serious crimes. Informants, when tasked by the police, frequently invade the privacy of people they are asked to collect information about. Therefore, the use of informants is strictly regulated and supervised. Their use is only permitted in cases of serious crimes – sometimes described in national criminal procedure codes – and with carefully selected and trained informant handlers. Another important good practice when using informants is a strict separation between the informant handler and the investigation. The decision to use an informant requires either the permission of a specially selected senior officer in dangerous protection cases or the permission of a judge in criminal cases.

Taking information from members of the public about suspicious behaviour of neighbors is, at most, a low-level invasion of their privacy. This is basic police work and does not require special permission.

Also, discreetly asking questions of neighbours and other members of the public can be considered basic police work and open intelligence gathering for which no special permission is needed. The police officer in uniform and on his beat following X for a short time is also a low-level infringement of X's privacy for which no special permission is needed.

The office-based identification of suspects can interfere with the privacy of those under scrutiny. It can only respect human rights when it is done by agents of a specialized unit. Results must be presented to a senior officer in charge or a prosecutor, who decides whether or not the material leads to an investigation.

The initial surveillance of the two men and their meeting outside the bank is the start of the long-term activity, including technical support. The seriousness of the suspected crime they are believed to be plotting justifies the action. However, domestic legislation should require judicial authorization for long-term surveillance with technical support.

The recording of the meeting at the football stadium involves a minimal breach of privacy, given that it is a public place and the participants are expected to be aware that they may be filmed. However, in the context of the suspicion and the aim of the surveillance operation, the evaluation of the pictures taken by CCTV must be included in the surveillance order.

The entry into Y's car and the planting of recording and tracking devices is a more intrusive act, involving a serious breach of privacy. The serious matter being investigated suggests, however, that it is proportionate and could be regarded as necessary for the purposes of obtaining evidence and in order to discover the intentions of X and Y. However, given its serious nature, prior permission from a judge based on the law will be necessary. *Ex-post facto* permission, if the tactic was entered into spontaneously because the opportunity unexpectedly presented itself, should not be lawful.

Watching X's home after the event is another straightforward tactic, normally involving no serious breach of privacy. However, in the context of the long-term surveillance with technical means (and the photographing of the three men using a telephoto lens), the activity is a serious breach of privacy. Photographing them together in the room is additional (corroborating) evidence. The lead investigator might, however, have to justify the value of these photos, given that an association between them has already been demonstrated by their meeting together at the stadium, that the three went to X's home, and that photographs of all three together have already been obtained. Again, these activities must be covered by prior permission.

The entering of X's home and the installation of a listening device is the most serious breach of privacy during the operation. It may well be necessary and proportionate, but is of such a nature that domestic legislation should require prior judicial authority.

### ***1.2.2 Interception of Communications***

The interception of communications – telephone calls, letters or electronic messages (including emails and messages sent via social networking sites such as Facebook, *Vkontakte*, *Odnoklassniki* or Twitter), and other protected communications – is a particularly sensitive matter. It involves very substantial breaches of privacy and, thus, requires that safeguards are applied stringently.

The OSCE commitments are explicit, in that any searches and seizures of persons, private premises and property must take place in accordance with the law and standards that are judicially enforceable.<sup>45</sup> Legislation must specify in detail the precise circumstances in which any such interference is permitted, and the decision to interfere rests only with the authority designated by law.<sup>46</sup> A series of ECtHR rulings dealing specifically with telephone tapping, provide useful guidance on what such laws should entail.<sup>47</sup> Such laws should:

- set out the categories of persons whose telephones may be tapped;
- spell out the nature of the offences justifying the use of tapping;
- indicate the duration of the measure;
- explain the procedure for drawing up the summary reports containing intercepted conversations;
- identify the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and the defence; and
- clarify the circumstances, including a time-limit, in which they are to be erased or destroyed, in particular following discharge or acquittal of the accused.<sup>48</sup>

These principles also serve as useful guidance in cases of electronic surveillance.

The interception of communications entails a high probability of what might be termed “collateral intrusion” into the private lives of people who may not be involved in any criminality and into issues that are not linked to the investigation being undertaken.

<sup>45</sup> OSCE Moscow Document, *op. cit.* note 21, para. 24.

<sup>46</sup> United Nations Human Rights Committee (HRC), General Comment No. 16, Article 17: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation, 8 April 1988, para. 8, <<http://www.unhchr.ch/tbs/doc.nsf/0/23378a8724595410c12563ed004aeecd>>.

<sup>47</sup> ECtHR judgments are legally binding on the member States of the Council of Europe.

<sup>48</sup> *Countering Terrorism, Protecting Human Rights: A Manual*, *op. cit.* note 19, p. 205, footnote 687.

When assessing the necessity and the proportionality of any interception of communication, those responsible for making the decision and granting the authority should assess the effect of this interception on third parties by giving due regard to:

- Who else besides the subject uses the telephone line and what effect will interception have on their privacy?
- Who else lives or works at the address besides the subject and may receive mail there that may be opened, and what effect will this have on their privacy?
- Is an e-mail inbox shared, thereby giving rise to a risk that other people not connected with the investigation may have his or her right to privacy breached?

Communications between a suspect and his or her lawyer are confidential. This will be discussed further in section 3.4.3 of this manual.

The right to privacy of third parties has to be carefully considered when using private companies' call records. This requires, for instance, the weeding of seized transcripts used as evidence so that they contain only information relevant for investigation purposes and do not disclose names of third parties who have no link with the matter under consideration.

Adhering to safeguards, making assessments and adopting SITs only when absolutely necessary not only helps to ensure that interference with the human rights of the subject and others are kept to a minimum, but also has operational benefits. The interception of telephone calls, in particular, can be very time consuming, in that verbatim transcripts have to be made of conversations. Some of these conversations may involve non-standard language and accents that may be difficult for the listener to understand, given the sometimes erratic nature of telephone and mobile phone connections and the fact that parties to the conversations being monitored may be from different regions or countries than those listening. The necessity to monitor lines for twenty-four hours a day also consumes a great deal of resources that may be better employed on other tasks. Thus, this is a tactic to be used with restraint.

### *1.2.3 The Use of Undercover Agents and Informants*

In essence, the use of undercover agents and informants under police instructions involves the covert manipulation of a relationship in order to obtain information that may result in interference with the right to private and family life. This technique also demands that very careful attention is paid to the possibility of breaching the right to a fair trial. Moreover, the human rights of undercover agents should be diligently protected, especially considering the difficulty involved in acquiring and maintaining them as sources of information.

Undercover operations, whether involving specially trained police officers or any other person acting on the instructions of the police, can be an efficient and effective method of penetrating suspected terrorist organizations that are not susceptible to other methods of investigation. Those who participate in them are often very brave individuals who put their physical safety and even their lives at risk. For that reason, the requirement to protect the right to life and the right not to be tortured or subjected to any other ill-treatment are paramount considerations when undertaking undercover operations. The use of undercover agents and informants needs to be regulated and demands adequate safeguards and mechanisms of control.

Adherence to the following guidelines will not only help to safeguard the human rights of everyone involved, but will also substantially enhance the effectiveness of the operation:

- The undercover officer must be a volunteer and ought to be psychologically tested in order to ensure that he or she has the appropriate attributes necessary to perform the role and to withstand the enormous pressure that will be put on him or her.<sup>49</sup> Psychological assessment of informants will usually not be possible, but this does not absolve the police of paying due regard to the psychological and emotional pressures that may adversely affect them during the course of the operation, and of being alert to any development that may endanger their security and that of the operation;
- The undercover officer must receive special training – not only that delivered during a formal training course at a police academy, but also, if possible, “on the job” training, where a novice operative is mentored by

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<sup>49</sup> It is important that such assessment be culturally neutral, especially for individuals belonging to minority groups.

a more experienced officer and is able to carry out some supporting role, where appropriate. This is usually not possible for informants, but they should be given suitable advice;

- Undercover agents must also undergo training that sensitizes them to the specific cultural, social and religious environment in which they are going to operate;
- Similarly, undercover agents must undergo gender awareness training to raise their awareness of the different needs of men and women within different cultural contexts;
- Every aspect of the operation must be carefully planned and potential risks thoroughly assessed;
- Undercover agents must be clear on what they are authorized to do at any particular time;
- Undercover agents must not provide an opportunity to commit an offence to a person they do not reasonably suspect to be engaged in criminal activities. Where they have such reasonable suspicion, they should not induce the commission of an offence where the person had no pre-existing intent of committing it;
- They must also be familiar with the rules that govern their own conduct when the possibility arises that they might commit an illegal act. It is often difficult to predict what may happen during contact with suspects. Agents must be able to use their initiative, but proper selection of people with the appropriate skills, thorough training and comprehensive briefing, should seek to keep such problems to a minimum;
- Undercover agents must be able to contact a handler or controller in order to obtain advice, support or assistance at very short notice. Depending on the nature of the operation and the stage the investigation has reached, a support team able to intervene and extract agents from danger may need to be immediately available. The means of contact and the level of support will also depend on the circumstances at the time;
- Regular psychological assessment of undercover officers should be the norm;
- Counselling and support should be available to the undercover agent and, depending on the circumstances, to informants as well. The role is emotionally draining and can have a substantial adverse effect on personal and family life, especially if it is carried out for a lengthy period; and

- The safety and security of agents is a continuing responsibility of all concerned in managing and authorizing this method. It extends beyond the operation itself, into the trial (where issues of anonymity may arise), and far into the future in order to prevent any harm befalling them.

The conduct of undercover agents, such as when acting as *agents provocateurs* or entrapping suspects into committing crimes, may compromise the integrity of the evidence, thus leading to its inadmissibility in court. This also applies to undercover operations conducted online, for instance through the infiltration of specific forums believed to promote violent and radical ideologies. It is important to keep in mind that procedural rules governing the production and admissibility of evidence gained from the use of SITs must safeguard the right to a fair trial of the accused.<sup>50</sup>

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<sup>50</sup> United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Report to the UN Human Rights Council, 17 May 2010, *Op. cit.* note 40, para 7.

### **Case Study – Agents provocateurs\***

Unconnected to any police anti-drug operation, X, a drug user, is approached by two undercover police officers. The police officers persuade X to identify a supplier and offer to buy several kilograms of heroin from him or her. X mentions the name of Y as someone who might be able to find the drugs. He obtains Y's address from a third person and goes to Y's home in the purported buyers' car. Y has no previous conviction. The officers tell Y that they wish to buy some heroin and produce a roll of banknotes to prove that they can pay. Y agrees to supply the drugs and goes to the home of another man, where he obtains the required amount. He returns to the police officers and exchanges the heroin for money, less than two hours later. The two police officers then identify themselves to Y and arrest him. Y is later convicted of supplying the drugs.

**Question: Do the police officers act as agent provocateurs by inciting Y to commit a crime?**

A distinction should be drawn between cases where the undercover officers create criminal intent where it had previously been absent and cases where the actions of the officers expose a latent pre-existing intent, by providing an individual with an opportunity to act in an illegal way.

Without revealing their identity, the two police officers incited Y to sell them the drugs. Y had no previous convictions and was unknown to the police, who only came into contact with him through the intermediary of X. The police did not appear to have good reasons to suspect that Y was a drug trafficker. In fact, the drugs were not at his home, and he obtained the drugs from a third party. Therefore, it cannot be assumed that he had pre-existing intent to commit a crime, and there is nothing to suggest that he would have done so without the intervention of the police officers. In addition, the two police officers acted on their own initiative, outside a specific anti-drug trafficking operation, and there had been no prior authorization of their actions.

As the police officers created the criminal intent, they acted as *agents provocateurs*.

\* This case study is taken from the facts in *Teixeira de Castro v. Portugal*, and the analysis of the question on the findings of the ECtHR in that case.<sup>51</sup>

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51 ECtHR, *Teixeira de Castro v. Portugal*, Application No. 25829/94, 9 June 1998, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=oo1-58193>>.

### **Case Study – Entrapment\***

X is a former drug user with a number of drug convictions. Over a six-month period, he is persistently approached by Y, a drug user, who turns out to be an undercover officer and persuades X to supply him with drugs by the use of threats and the offer of large amounts of money. X is then arrested and charged with drug trafficking.

#### ***Question: Do the actions of the undercover officer constitute entrapment?***

Entrapment occurs when the police:

- a) provide a person with an opportunity to commit a crime without having reasonable suspicion that the person is already engaged in criminal activity or with other good cause; and
- b) although having such reasonable suspicion or other good cause, induce the commission of an offence.

The absence of reasonable suspicion or other good cause is significant in assessing the conduct of the police because of the risk that the police will attract people who otherwise have no involvement in a crime and because it is not a proper use of the police power to randomly test the virtue of citizens. The presence of reasonable suspicion or other good cause will, however, never justify entrapment techniques. The police may not go beyond providing an opportunity, regardless of their perception of the accused's character and of the existence of an honest inquiry.

A number of factors should be considered to determine if the police have gone further than providing the accused with an opportunity to commit crime. These include:

- the type of crime being investigated and the availability of other investigative techniques;
- whether an average person, with both strengths and weaknesses, in the position of the accused would be induced to commit the crime;
- the persistence and number of attempts made by the police before the accused agreed to commit the offence;
- the type of inducement used by the police, including deceit, fraud, trickery or reward;
- the timing of the police conduct, in particular whether the police have instigated the offence or became involved in on-going criminal activity;
- whether the police conduct involves developing and exploiting intimate relations with the accused;

- whether the police appear to have exploited a particular vulnerability of the accused, such as a mental handicap or a drug addiction;
- the disproportionate involvement of the police, as compared with the accused, and the disproportionate risk or harm faced by the accused, as compared with the police in the commission of any illegal acts; and
- the existence of any threats, implied or express, made to the accused by the police officers.

The persistence of the police requests and the length of time needed to secure X's participation are elements pointing to the fact that the police went further than merely providing X with an opportunity. Nevertheless, the most important factor is that X was threatened by the undercover officer. Despite the reasonable suspicion that X was still involved in criminal conduct, threats are not permissible. Such behaviour constitutes entrapment.

\* This case study is taken from the facts in *R v. Mack*, and the analysis of the question on the findings of the Supreme Court of Canada in that case.<sup>52</sup>

#### **1.2.4 Access to Bank Accounts and Other Confidential Information**

During the course of any intelligence-gathering operation or investigation of terrorism-related offences, it is highly likely that the investigators will wish to access bank accounts or other databases storing information that would usually be regarded as private and confidential. Terrorism suspects use these in the same way as any citizen, and will try to take advantage of the protection of private life to conceal evidence of their unlawful conduct and to evade detection or prosecution. When seeking to access these databases, investigators should keep in mind the right to private and family life, as explored above. However, they should also have due regard for the legitimate needs of banks and businesses to maintain the integrity of their own systems and not to be seen as handing over information to the authorities without having a legal duty to do so. Similarly, potential human rights implications should be carefully considered when entering into an exchange of confidential information on the basis of bilateral agreements between states.

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<sup>52</sup> Supreme Court of Canada, *R v. Mack*, Case number 19747, 15/12/1988, <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/391/index.do>>.

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Within the European Union (EU) and the Council of Europe, specific instruments regulate access to this kind of information. These include the EU Charter of Fundamental Rights (CFREU)<sup>53</sup> and the 1995 EU data protection directive and, within the Council of Europe, the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and a number of recommendations by the Committee of Ministers. Most OSCE participating States also have their own domestic legislation governing the matter.

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**The subject is explored further in the *Countering Terrorism, Protecting Human Rights* manual, on pages 207–209.**

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### 1.3 THE USE OF INTELLIGENCE MATERIAL IN INVESTIGATION AND LEGAL PROCEEDINGS

On the basis of available information, a decision is taken whether to start an investigation. This decision must be based on reasonable suspicion that a terrorism-related offence, as defined in domestic law, has been committed. The start of an investigation, however, should not presuppose that the person suspected of having committed the offence is guilty. The suspect must be presumed innocent until his or her guilt has been proven by a court.

The decision to start an investigation can sometimes create tension between those responsible for information-gathering and development and those responsible for criminal investigation. This has become more pronounced since the terrorist attacks of September 2001.<sup>54</sup> This tension reflects the fundamental differences in purpose between the two disciplines – one is essentially preventive and largely carried on in secret, and the other is largely reactive and open to public scrutiny in the courts.

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<sup>53</sup> CFREU, Article 8.

<sup>54</sup> For a comprehensive discussion of the relationship between intelligence gathering and evidence gathering, see Kent Roach, "The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations", in Nicola McGarritty, Andrew Lynch & George Williams (eds.), *Counter Terrorism and Beyond*, (Abingdon: Routledge, 2010), pp. 48–68, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1884999](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884999)>.

There may be a tendency on the part of intelligence operatives to postpone the start of an investigation because they would prefer to obtain more information in order to build up their database and to find out more about the suspects' activities and links with other terrorism suspects. However, as has already been pointed out, intelligence is not an end in itself. It is intended to lead to an investigation or pro-active measures.

This tension may also manifest itself in withholding details concerning the source or substance of intelligence from the officer in charge of the investigation, or from the prosecutor by intelligence operatives. This is more likely to occur in those systems where there is a clear distinction between the intelligence-gathering and the investigative functions, and where there are separate command structures. Security reasons will often be cited – the need to protect the identity of the source or the method in which the information was obtained – and these may, indeed, be legitimate. Even if such situation can be the cause of frustration to the investigation team, who have equally legitimate reasons for needing to have a complete picture of the case, it may, occasionally, be necessary.

Such a situation can have important human rights implications. For example, the investigation team and the prosecutor may not be absolutely assured that part of the information supporting the investigation was not obtained by torture.

It also impacts the preparation of the case for trial and the admissibility of evidence. It is always better that this type of situation is not dealt with on an *ad hoc* basis, but that formal arrangements are put into place in advance for resolving any dilemmas arising out of a conflict of interest and priorities, taking into account the demands of the legal system in place within the jurisdiction. These may range from a formal system of mediation between the intelligence-gathering and investigative functions to unilateral *in camera* applications to the trial judge by lawyers acting on behalf of the intelligence-gathering function.

The need for security and the question of anonymity for witnesses, informants and undercover agents, as well as the disclosure of operational *modus operandi* generally and in legal proceedings, must always be balanced with the right of a suspect to have a fair trial. Where adhering to the need for secrecy would prevent a fair trial, the right to a fair trial, as defined under international human rights standards, should always prevail.<sup>55</sup>

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<sup>55</sup> HRC, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fGC%2f32&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fGC%2f32&Lang=en)>.

Most OSCE participating States have some legislation or rules of criminal procedure in force that allow the prosecution to withhold from the defence sensitive information that has arisen in a criminal investigation and would otherwise have to be disclosed. However, the judge must assess how well founded the request for non-disclosure is, by having full access to the evidence and facts of the case, and may sometimes rule that the prejudicial effect of non-disclosure is such that it would prevent a fair hearing. Under international human rights standards, it is prohibited to withhold from the defence information that is exculpatory for the accused.<sup>56</sup>

In such circumstances, the prosecution faces the dilemma of having to choose between disclosing information – and the consequential endangerment of the source or of the safety of the witness – or discontinuing the legal proceedings, resulting in the dismissal of the case.

In cases where the judge allows non-disclosure, the limitation of the right to a fair trial of the suspect needs to be counter-balanced by adequate procedural guarantees in order to ensure an overall fair trial.

### **Case Study – Secret evidence\***

X, a non-citizen of state A, is suspected of having connections to terrorism. State A legislation provides for the issuance of security certificates to non-citizens suspected of being a threat to the security of the state, leading to their detention and deportation. Both the certificate and detention are subject to judicial review. However, the government can present secret evidence or intelligence to the judge reviewing X's detention. The domestic legislation prevents the judge from providing access to this evidence and information to the detainee or anyone else if the disclosure would harm national security or the safety of any person. The judge's decision cannot be appealed.

**Question: Does the protection of national security justify the non-disclosure of evidence used to issue the certificate and detain X? Does this non-disclosure violate X's freedom from arbitrary arrest or detention and right to a fair trial?**

Disclosure of evidence should be as specific and complete as possible. Detained individuals or their lawyers should have been allowed to review the evidence

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56 Ibid, para. 33.

against them – including materials affecting the credibility of informants. Preventing this review otherwise interferes with the freedom from arbitrary arrest or detention and the right to a fair judicial process. Adequate measures to compensate for this complete non-disclosure, such as special advocates must be provided to detainees. Less intrusive alternatives exist in such circumstances to protect the individual while keeping critical information confidential.

The right to a fair trial should apply to any proceedings – administrative, civil and criminal – where the liberty of the individual is in question.

\* This case study is taken from the facts in *Charkaoui v. Canada (Citizenship and Immigration)*, and the analysis of the question on the findings of the Supreme Court of Canada in that case.<sup>57</sup>

#### **KEY POINTS – PART 1:**

- In order to comply with international human rights standards, intelligence databases should store only information that is relevant, accurate and up-to-date, and should be subject to regular weeding;
- Intelligence databases should be kept secure in order to protect the security of both sources and subjects;
- SITs should be used only in counter-terrorism cases when no other means of investigation are suitable, and should be subject to either prior external authorization or ex-post facto external review;
- Undercover agents must be carefully selected and properly trained and briefed prior to being deployed, in order to ensure that their safety and security are not compromised and that they do not inadvertently breach the human rights of suspects; and
- An investigation should be launched on the basis of a reasonable suspicion, and the suspect must be presumed innocent until his or her guilt has been proven by a court.

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57 Supreme Court of Canada, Charkaoui v. Canada (Citizenship and Immigration), Cases number 30762, 30929, 31178, 23 February 2007, <<http://scc.lexum.org/decisia-scc-csc/scc-csc/csc-en/item/2345/index.do>>.

## TEMPLATE LEARNING PLAN ON INTELLIGENCE, PRO-ACTIVE METHODS OF INVESTIGATION AND SPECIAL INVESTIGATION TECHNIQUES

Competencies	Learning outcome necessary to attain proficiency	Methods
<p>1. The ability to gather, process, store and use information;</p> <p>2. The ability to use special investigation techniques;</p> <p>3. The ability to manage effectively and efficiently up-to-date verified information; and</p> <p>4. The ability to apply human rights norms when disseminating information;</p> <p>All in compliance with international, regional and national human rights standards.</p>	<p><b>Knowledge of:</b></p> <ul style="list-style-type: none"> <li>• Characteristics of an effective human rights-compliant intelligence system;</li> <li>• Human rights safeguards to be applied when disseminating information to third parties;</li> <li>• Human rights concerns surrounding the use of special investigation techniques, in particular: <ul style="list-style-type: none"> <li>→ Right to life;</li> <li>→ Prohibition of torture and other cruel, inhuman or degrading treatment;</li> <li>→ Respect for private and family life, including the protection of personal data;</li> <li>→ Prohibition of discrimination;</li> <li>→ Freedom from arbitrary arrest or detention;</li> <li>→ Right to a fair trial;</li> <li>→ Freedom of thought, conscience, religion or belief;</li> <li>→ Freedom of expression;</li> <li>→ Freedom of association; and</li> <li>→ Right of peaceful assembly.</li> </ul> </li> <li>• International and national law and procedures relevant to information gathering and data protection;</li> <li>• The different roles and powers intelligence and law enforcement agencies have, the importance of interagency collaboration and what it means in terms of human rights;</li> <li>• The rights of the person(s) under investigation, bystanders and sources of information;</li> <li>• The difference between predictive and descriptive profiling; and</li> <li>• What constitutes a human rights violation during an investigation.</li> </ul>	<p><b>Learning tools:</b></p> <ul style="list-style-type: none"> <li>• Presentations based on text from the manual;</li> <li>• Copies of human rights standards for use when in service;</li> <li>• Group analysis of case studies and sharing outcomes of discussions</li> <li>• Feedback from trainer after group discussions;</li> <li>• Simulations to practice skills and review reactions to challenging situations; and</li> <li>• Recording simulations to reflect on improvements needed and to assess progress.</li> </ul>

	<p><b>Values and Attitudes:</b></p> <ul style="list-style-type: none"> <li>Ability to act to protect the human rights of terrorism suspects and others;</li> <li>Commitment to run intelligence databases that store only information that is relevant, accurate and up-to-date;</li> <li>Capacity to act in a non-discriminatory way, avoiding stereotyping;</li> <li>Respect for the dignity and privacy of all persons; and</li> <li>Proportional and legal use of investigative techniques.</li> </ul> <p><b>Skills:</b></p> <ul style="list-style-type: none"> <li>Ability to evaluate the consequences of actions: If I use a wiretap, what would be the consequences? Do my means correspond to the aims? Are the aims legitimate? Do I have the necessary permission?;</li> <li>Ability to analyse the situation and balance the potential clash between needs, means and human rights;</li> <li>Ability to evaluate information systematically and rigorously, with particular, continuous consideration to: <ul style="list-style-type: none"> <li>→ Prohibition of discrimination;</li> <li>→ Respect for private and family life;</li> <li>→ Freedom of thought, conscience, religion or belief;</li> <li>→ Freedom of expression; and</li> <li>→ Freedom of association and the right of peaceful assembly.</li> </ul> </li> <li>Ability to differentiate accurate and up-to-date information from biased, inaccurate data;</li> <li>Ability to show discretion in processing data following set principles in compliance with international human rights standards;</li> <li>Accountability in use of special investigation techniques, both in overt and covert investigations;</li> <li>Accountability in accessing and handling personal data (communications, financial information, etc.); and</li> <li>Ability to assess the security and protection of the data stored.</li> </ul>	<p><b>Assessment methods:</b></p> <ul style="list-style-type: none"> <li>Written test on knowledge;</li> <li>Fishbowl exercises to test attitudes and skills;</li> <li>Review of performance and progress throughout course; and</li> <li>Aggressive attitude and negative remarks about working in compliance with human rights to weigh strongly in the final pass-or-fail outcome.</li> </ul> <p><b>Follow-up of expected learning outcomes during performance review sessions with superior and supervisors.</b></p>
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## Part 2

**WITNESSES, VICTIMS, CRIME SCENES  
AND THE SEIZURE AND RETENTION  
OF EVIDENCE**

**KEY QUESTIONS:**

- What human rights apply specifically to witnesses?
- What steps can be taken to ensure that witnesses' and victims' rights are protected?
- What is the primary duty of the police at crime scenes, and to whom is it owed?
- What human rights apply when searching crime scenes and when seizing and retaining evidence?
- What are the responsibilities of senior officers when planning the search of scenes of terrorism-related crimes?

**2.1 WITNESSES AND VICTIMS**

When discussing human rights in the context of criminal investigations, the focus is usually put on the rights of suspects. However, other participants in the judicial process also have human rights, and witnesses and victims are no exception. Witnesses are an essential element of the criminal justice system of every country and if their human rights are not respected, the administration of justice will be severely damaged. Treating witnesses with consideration, respect and in a gender sensitive and non-discriminatory manner not only ensures compliance with human rights standards, but also contributes to people being willing to help the police by coming forward to provide information. The way in which they are treated can have a significant impact on how they co-operate with the investigation and on any subsequent prosecution.

The rights of victims of terrorism should not be overlooked during either the investigative or criminal trial phases. The police are often the first point of contact with victims in the aftermath of a terrorist-related act and, therefore, have a role to play in providing them with prompt aid and directing them to relevant assistance. Informing victims of their rights to seek redress and providing them with regular updates on the progress of the investigation and prosecution is essential, regardless of whether they are giving evidence. Measures to protect their privacy and safety should be taken, as necessary. If victims do wish to testify as witnesses, they should be properly informed about this role, allowed to express their views at the appropriate stages, and provided with the rights and protection described in this section of the manual.

The manual will focus on the protection of witnesses' rights with the understanding that victims may also be witnesses. The two main areas to consider

when discussing the rights of witnesses are their treatment in the process of obtaining evidence and their security once they have assumed the status of a witness.

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The following human rights standards have to be considered:

- Right to life;
  - Prohibition of torture and other cruel, inhuman or degrading treatment or punishment;
  - Prohibition of discrimination;
  - Right to a fair trial; and
  - Respect for private and family life.<sup>58</sup>
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**Detailed accounts of the relevant law and standards can be found in Chapters 8–10 and 12–13 of the *Countering Terrorism, Protecting Human Rights manual*.**

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### ***2.1.1 Dealing with Witnesses***

Witnesses may be identified in several ways: they may be obvious immediately, they may present themselves or they may come forward following a public appeal. There are many reasons why individuals may be reluctant to talk to the police. Fear of reprisals, publicity and inconvenience, as well as fear, mistrust of or hostility towards the police or the legal system are all possible factors. Any public appeal should be done in such a way as to reassure individuals wishing to share information. A confidential telephone line that people can call anonymously may be helpful in encouraging them to come forward, and can provide an opportunity to persuade them to identify themselves.

As with the questioning of suspects, interviewing witnesses is a specialist task that calls for specific training if it is to be performed in a proper manner. The purpose of the interview is to obtain accurate and reliable information about the matters under investigation. A witness interview should be an open-minded exercise in getting an account of what the witness knows, not one in building up a case against a suspect. Those taking evidence from witnesses need to bear in mind that it is very easy to influence witnesses deliberately or inadvertently. Research has demonstrated that witnesses can be susceptible to suggestion and eager to say what they think the investigator wants them to say.

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<sup>58</sup> OSCE commitments and international standards, op. cit., notes 20, 21, 22, 24, and 25.

Some witnesses may be vulnerable, either due to their own personal circumstances or to the traumatic nature of the events they have witnessed, or they may be victims. Investigators need, therefore, to be aware of this possibility and ensure that the way in which they deal with witnesses does nothing to aggravate possible vulnerabilities and traumas. Appropriate training to sensitize investigators to victims' special needs and providing them with adequate guidance is beneficial. Apart from the possibility of violating the prohibition on ill-treatment, inappropriate handling of witnesses is unlikely to result in quality evidence, and will probably make the person lose trust in the police.

The following general points may prove useful when interviewing witnesses, bearing in mind that the legal requirements of the jurisdiction must always be taken into account:

- The interview must be planned in advance, and the interviewer must be prepared, have all the available information about the matter on hand, and clearly understand the objectives of the interview;
- The witness's age, gender, mental capacity, maturity, religion or culture (where this is relevant), emotional state, relationship with the suspect (if any) and relationships with other witnesses must be taken into account. Vulnerable witnesses, such as children, should have an independent party present to protect their interests. Female witnesses might feel more comfortable if they are interviewed by a female police officer;
- As witnesses might often also be victims of terrorist acts, due regard should be paid to their vulnerability, to avoid any additional trauma and re-victimization;
- The interview should take place where the witness feels safe and comfortable, not necessarily in a police station, prosecutor's office or even his or her own home. Sufficient time must also be set aside, and a potentially long interview should not start when either the witness or investigator is tired or hungry or likely to be distracted by other things;
- At the beginning of the interview, the investigator should address any fears or concerns that the witness has. The conversation should deal with non-contentious issues first, and the investigator should use this as an opportunity to assess the witness's understanding of the process and put him or her at ease;

- The investigator should then explain that the witness should not assume that the investigator knows anything about the case, and that the witness should recount everything they remember, in their own words and in their own time, including as much detail as possible, without thinking about whether issues are relevant or not; The witness should first of all be asked to provide a brief account to “set the scene”.
- If appropriate, they can be asked to draw a simple picture or plan. They should be given time to think and to remember everything without being interrupted. Appropriate body language should be used to demonstrate interest, attention and support;
- Since the witness may not relate everything in chronological order, notes should be taken, to refer to later in order to clarify matters, rather than constantly interrupting. In serious cases, it may be advisable to tape-record or even video the interview, as this provides a complete record of what was said and can sometimes be used in court (depending on the rules in force in the jurisdiction);
- When the witness has finished, the investigator should review the account, trying to put the information in logical order. The witness should be encouraged to correct any mistakes and misunderstandings;
- Depending on the legal requirements in force, a detailed written account can then be obtained; and
- Supplementary interviews are normally undesirable and should be done only when necessary to clarify significant contradictions that may have arisen as a result of evidence obtained from other sources. Where a witness is especially vulnerable or where the evidence given is especially traumatic, it may be necessary to carry out several interviews.

A number of OSCE participating States use an interview model that identifies different stages within the interviewing process and constitutes a practical application of the guidance mentioned above. This Interview Model is called “PEACE” in reference to the following five phases:

**P – Planning and preparation**

This phase relates to the different elements the investigator has to take into consideration to properly plan and get prepared for an interview;

**E – Engagement and explanation**

This phase refers to the first steps of the interview, during which the investigator should carefully consider how to start the interview in order to create a climate of trust, establish the ground rules and explain to the witness the reasons for and expectations of the interview;

**A – Account, clarification and challenge**

During this phase, the investigator reviews, challenges and checks facts or obtains details;

**C – Closure**

This phase consists of the steps detailed above necessary before closing an interview, such as asking the witness if he or she wants to add or correct anything and reviewing the account of the interview; and

**E – Evaluation**

During this phase, the investigator reviews the information gathered; decides whether and how it can be useful for the investigation, and identifies next steps, including potential additional interviews.

The legal status of witnesses varies from country to country, as does their legal duty to assist the police and the powers of the police to compel them to provide information. It is important to remember that any person who is obliged to go to a place to be interviewed, to remain with the police for this purpose, or to answer questions, should be afforded the same rights as a suspect as detailed in Part 3.4 of this manual; i.e., the right not to incriminate themselves, to have access to legal counsel and medical attention; to have someone of their choice notified of their arrest, detention, imprisonment and whereabouts, including the fact and place where they are held. If someone is being interviewed as a witness and at some stage the police decide that this individual is actually a suspect and is not free to leave, the moment of that

decision should be recorded and the person should be informed of the reasons and grounds for such a decision.

### *2.1.2 Witness Security and Protection*

In situations when witnesses are targeted for retaliation or intimidation, the fear of reprisals can be substantial and can be a serious barrier to people coming forward to provide information or to giving evidence in court. Apprehension about the legal process itself can also act as a deterrent; most witnesses find the prospect of giving evidence in court stressful and even frightening. So investigators will want to provide reassurance in order to minimize fear. It is essential that they maintain regular contact with witnesses to keep them updated on the progress of the legal proceedings and to support them. Investigators should provide examples of what to expect in court and advice on how to answer questions, without coaching them on what to say.

Witnesses will also be aware that in terrorism cases the risk to them may be greater than in other criminal cases. The security of information sources, including undercover agents, who will often also be witnesses, has already been dealt with in sections 1.1 and 1.2 above, and the principles set out there apply equally to all witnesses in terrorism cases.

Basic security measures, such as not disclosing the witness's address, should be routine, assuming that the legal system in force in the jurisdiction allows for this. Other potential measures include providing the witness with a mobile telephone or a house panic alarm linked directly to a police station, or fitting locks and giving general advice on security. Keeping in touch with witnesses by means of visits or telephone calls can provide both reassurance and an early warning that something may be amiss. When a witness is being intimidated, it is far better to learn about it at an early stage to take appropriate actions, rather than finding out in court by discovering that the witness suddenly "cannot remember" anything.

Bearing in mind that the openness of judicial proceedings is a fundamental principle of a fair trial, other security measures to protect and reassure anxious or vulnerable witnesses may require the permission of the court.

Measures to protect witnesses in use in some countries include:

- screening the witness from the view of the accused and the public gallery in court;
- giving evidence by means of video link;
- giving evidence in private or anonymously;<sup>59</sup> and
- restricting the ability of the media to publish the names of witnesses or any details that may lead to their identification.

Where the threat against a witness is substantial and specific, general security measures may not be adequate, and positive steps to protect witnesses should be taken. Depending on the nature of the threat, these may range from providing a guard when the witness travels to or from the court during the trial, to relocation – either temporary or permanent – or to giving them and their family a completely new identity. The latter measure is difficult to achieve and requires specialist knowledge, resources and the legal co-operation of many agencies, as well as the willingness of the witness.

Relocation and change of identity are serious measures that should not be taken without careful planning and without close consultation with the prosecutor. They are likely to be considered only where the testimony of the witness is crucial to the trial. Care must be taken to ensure that measures cannot be misinterpreted as amounting to an inducement to testify. Unless meticulous attention is paid to all the arrangements, there may be the appearance that the witness is not just being protected, but is actually being rewarded for his or her evidence. This may gravely undermine the credibility of the witness and affect the fairness of the proceedings.

As well as keeping in mind the right of the accused to a fair trial, investigators and prosecutors must also take into account the witness's right to life. If they cannot be protected because a relocation or change of identity cannot be afforded, not just in terms of financial cost, but also in terms of time or effort, or if the logistical and legal means of doing so do not exist, then it may be indefensible to use them.

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<sup>59</sup> Council of Europe Recommendation Rec(2005)10, op. cit., note 11; and *Countering Terrorism, Protecting Human Rights: A Manual*, op. cit., note 19, pp. 178–181 and pp. 186–187.

The impact on the witness and their family must also be assessed, as they may not have the ability to adjust and cope with such a major change in circumstances.

## **2.2 CRIME SCENES AND THE SEIZURE AND RETENTION OF EVIDENCE**

### ***2.2.1 Crime Scene Examination***

A central element of the investigation of any terrorist crime will be the examination of the crime scene, be this the site of an explosion or shooting, a bomb factory, or some other location. This stage of investigation might be thought not to give rise to any human rights implications. More careful consideration, however, will reveal that a number of human rights standards come into play.

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Human rights standards involved in crime scene examination include:

- Right to life;
  - Prohibition of torture and other cruel, inhuman or degrading treatment or punishment;
  - Respect for private and family life;<sup>60</sup>
  - Right to the enjoyment of just and favourable conditions of work;<sup>61</sup>
  - Freedom of movement;<sup>62</sup> and
  - Property rights.<sup>63</sup>
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<sup>60</sup> OSCE commitments and international standards, *op. cit.*, notes 20, 21, 25.

<sup>61</sup> OSCE Madrid Document, *op. cit.*, note 26; OSCE Conference on Security and Co-operation in Europe, Bonn Document, Bonn, 11 April 1990, <<http://www.osce.org/eea/14081>>; International Covenant on Economic, Social and Cultural Rights (ICSECR), Article 7; CFREU, Article 31; and ADRDM, Article 14.

<sup>62</sup> OSCE Conference on Security and Co-operation in Europe, Final Act, "Co-operation in Humanitarian and Other Fields", Helsinki, 1975, <<http://www.osce.org/mc/39501?download=true>>; OSCE Vienna, Copenhagen and Moscow Documents, *op. cit.* note 21; OSCE Ministerial Council, "Border Security and Management Concept: Framework for Co-operation by the OSCE Participating States", Ljubljana, 6 December 2005, <<http://www.osce.org/mc/17452>>; ICCPR, Article 12; Protocol No. 4 to the ECHR, Article 2; CFREU, Article 45; and ADRDM, Article 8.

<sup>63</sup> OSCE Bonn Document, *op. cit.*, note 61; OSCE Copenhagen Document, *op. cit.*, note 21; OSCE Paris Document, *op. Cit.*, note 19; Universal Declaration of Human Rights (UDHR), Article 17; Protocol No. 1 to the ECHR, Article 1; CFREU, Article 17; and ADRDM, Article 23.

Crime scenes can be dangerous. Bomb explosions almost always leave buildings in an unsafe condition, posing grave danger for members of the emergency and security services, and for people who may be in the vicinity. Where the explosion has been caused by a large device, such as a car bomb, the damage and instability may extend over a large area of a city. Debris from the explosion is likely to be scattered. Unexploded devices pose similar dangers. The job of the police in these circumstances is to reconcile the sometimes competing requirements to obtain the best forensic evidence possible with as little danger to investigators and the public, while doing so as quickly as possible so as to cause the least interference with the legitimate activities of people who live and work in the vicinity.

The primary duty of the police in these situations is to ensure the right to life of everyone within the danger zone. Moreover, the safety and security of the police and emergency services personnel working at such sites is also a human right protected by international law. Police officers and members of emergency services should enjoy just and favourable conditions of work that ensure their safety and protect their physical and psychological health. Preventive measures can be taken in this regard in order to mitigate the hazards related to their occupations.

In practice, these rights can be protected in the following ways:

- A security cordon should be placed around the scene, and should be positioned and resourced so as to prevent any unauthorized entry and ensure the safety of the public from the danger of falling masonry or other hazards;
- Crime scene investigators and others working within the cordon should be equipped with suitable protective clothing, especially headgear and footwear; and
- Everyone working within the security cordon and the crime scene should be appropriately trained to carry out their roles and be thoroughly briefed as to the potential dangers. The responsibility of senior officers in this respect is identical to that discussed in the context of the use of force in section 3.2 of this manual.

The positioning of the security cordon and its duration need to be carefully considered, exercising tact and diplomacy. Where an explosion or other major incident has affected a large area of a city, an extended cordon, maintained for a considerable length of time while police search for forensic evidence, may

have a significant impact on commerce. The situation is aggravated if people have to be evacuated from their homes.

While the search for evidence must always assume the highest priority after ensuring the safety of the public and police officers, those responsible for it must be conscious of the legitimate concerns of people who may be adversely affected by lack of access to their businesses or homes. One of the main goals of all terrorists is, after all, to disrupt the daily routine of as many people as possible, and one responsibility of the authorities is to minimize the effect of their criminal acts. Therefore, police operations at the scene must be both thorough and carefully planned so as to be completed in the least time possible.

Police should be aware that both the positioning of a security cordon and the search for evidence may negatively interfere with the right to private and family life, or the right to enjoy one's property or the freedom of movement, for instance. Such interference may be legitimate if carried out in accordance with the law and if proportionate and necessary in the interest of national security, public safety or the prevention of disorder or crime.

### *2.2.2 Seizure and Retention of Evidence*

The searching of crime scenes will inevitably result in the seizure and retention of items to be forensically examined or to be otherwise produced in court as evidence.

Items such as pieces of paper, personal documents, phones, agendas or computers may also be seized and retained for use as evidence during searches of cars, homes and any other premises controlled by terrorism suspects during the execution of search warrants.

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The human rights standards governing these types of search and seizure are the same:

- Right to a fair trial;
  - Respect for private and family life; and
  - Property rights<sup>64</sup>
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**The essential elements of these have already been discussed in previous sections of this manual, and a more detailed account can be found in Chapters 12 and 13 of *Countering Terrorism, Protecting Human Rights: A Manual*.**

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64 OSCE commitments and international standards, op. cit., notes 24, 25, 63.

Entering private premises and seizing private property are interferences with human rights and, therefore, have to be prescribed by law in accordance with international human rights standards. They also have to be justified, necessary, proportionate and non-discriminatory. In the absence of relevant provisions in domestic legislation, the conditions under which interferences with human rights might be lawful should be specified in police regulations.

Moreover, national legislation authorizing the police to enter and search premises and to seize items as evidence should set limits to this power. Investigators should ensure that they understand both the letter and spirit of the law. In some jurisdictions, evidence obtained in breach of the law is automatically excluded from being used in any subsequent trial, because allowing such evidence is regarded as a violation of the right to a fair trial. Courts in other jurisdictions look at all the circumstances surrounding the breach of the rules in order to assess whether the admissibility of such evidence would affect the overall fairness of the trial.<sup>65</sup>

Investigators should also be aware that, while the initial seizure may have been lawful, retaining the items seized for an excessive period without justification can amount to a violation of property rights.

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65 The European Court of Human Rights also adopts this practice and explained its approach in the case ECtHR, *Allan v. UK*, Application No. 48539/99, 5 November 2002, paras. 42–43, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60713>>.

66 ECtHR, *Elçi and others v. Turkey*, Applications No. 23145/93, 25091/94 13 November 2003, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61442>>.

### **Case Study – Search and seizure without a warrant\***

Several lawyers who are suspected of acting as messengers between their clients in custody and members of a terrorist organization are arrested and detained. Although they have no warrant to do so, the police search the lawyers' homes and offices and seize a number of documents, including files of applicants to the ECtHR. No instructions as to the purpose and scope of the search are drawn up before or after the search.

#### ***Question: Does the search and seizure violate the lawyers' right to privacy?***

The searches of the lawyers' homes and offices constituted an interference with their right to respect for their homes and correspondence.

There was no prior or post facto authorization issued by a prosecutor or a judge and no official document or note of verbal instruction describing the purpose and scope of the searches. In addition, the searches were extensive and included the seizure of privileged professional material.

In light of the lack of authorization or safeguards, these searches and seizures violate the lawyers' right to privacy.

\* This case study is taken from the facts in *Elçi and others v. Turkey*, and the analysis of the question on the findings of the ECtHR in that case.<sup>66</sup>

### **KEY POINTS – PART 2:**

- Interviewing witnesses is a specialist task that requires specific training to be conducted in a comprehensive and human rights-compliant manner;
- Law enforcement officers have the duty to provide protection and security to witnesses;
- The scenes of terrorist crimes can be dangerous, and senior officers have a duty to take steps to ensure the safety of both the public and police; and
- Property seized as evidence – either from a crime scene or from a suspect – must be kept for no longer than is required.

**TEMPLATE LEARNING PLAN ON WITNESSES, CRIME SCENES  
AND THE SEIZURE AND RETENTION OF EVIDENCE**

<b>Competencies</b>	<b>Learning outcome necessary to attain proficiency</b>	<b>Methods</b>
<p>1. The ability to deal with witnesses in a fair, respectful, conducive and safe manner;</p> <p>2. The ability to secure a crime scene; and</p> <p>3. The ability to seize and retain evidence correctly;</p> <p>All in compliance with international, regional and national human rights standards.</p>	<p><b>Knowledge of:</b></p> <ul style="list-style-type: none"> <li>• Human rights concerns surrounding the treatment of witnesses and other members of the public:           <ul style="list-style-type: none"> <li>→ Right to life;</li> <li>→ Prohibition of torture and other cruel, inhuman or degrading treatment;</li> <li>→ Respect for private and family life;</li> <li>→ Prohibition of discrimination;</li> <li>→ Right to a fair trial;</li> <li>→ Freedom of movement; and</li> <li>→ Property rights.</li> </ul> </li> <li>• Human rights concerns surrounding law enforcement officials:           <ul style="list-style-type: none"> <li>→ Right to the enjoyment of just and favourable conditions of work;</li> </ul> </li> <li>• How to prepare, conduct and evaluate an interview of a witness;</li> <li>• The needs of the witness, taking into account:           <ul style="list-style-type: none"> <li>→ age, gender, mental capacity, maturity, religion, culture, emotional state, relationship with the suspect (if any) and relationships with other witnesses;</li> </ul> </li> <li>• How to treat vulnerable witnesses, such as children, victims of terrorism-related acts, and survivors of torture and other cruel, inhuman and degrading treatment;</li> <li>• The effects of trauma and shock;</li> <li>• The PEACE interview model;</li> <li>• The means available to protect witnesses at risk of reprisal throughout the criminal justice process;</li> <li>• The actions required to examine a crime scene safely, with as little danger to investigators and the public, while doing so as quickly as possible so as to cause the least interference to the legitimate activities of people who live and work in the vicinity;</li> </ul>	<p><b>Learning tools:</b></p> <ul style="list-style-type: none"> <li>• Presentations based on text from the manual;</li> <li>• Copies of human rights standards for use when in service;</li> <li>• PEACE model as pre-course reading;</li> <li>• Group analysis of case studies and shared discussion of outcomes;</li> <li>• Review of audio-visual materials on how to communicate effectively and conduct an interview;</li> <li>• After group discussions, feedback from the trainer;</li> <li>• Simulation of both interviews and examination of crime scenes to practice skills and review reactions of trainees; and</li> <li>• Recording performance during simulations to reflect on improvements needed and to assess progress.</li> </ul>

<ul style="list-style-type: none"><li>• The procedures to obtain the best forensic evidence possible; and</li><li>• National legislation authorizing the police to enter and search premises and to seize items.</li></ul> <p><b>Values and Attitudes:</b></p> <ul style="list-style-type: none"><li>• Ability to act to protect the human rights of witnesses;</li><li>• Capacity to secure safely a crime scene;</li><li>• Capacity to examine and gather evidence following the spirit of the law;</li><li>• Proportional and legal use of search powers;</li><li>• Commitment to use best practice in accordance with human rights standards when gathering evidence.</li></ul> <p><b>Skills:</b></p> <ul style="list-style-type: none"><li>• Ability to objectively assess the individuals involved and the circumstances with particular continuous consideration to:<ul style="list-style-type: none"><li>→ Right to life;</li><li>→ Prohibition of torture and other cruel, inhuman or degrading treatment;</li><li>→ Respect to private and family life;</li><li>→ Prohibition of discrimination;</li><li>→ Right to a fair trial;</li><li>→ Right to the enjoyment of just and favourable conditions of work;</li><li>→ Freedom of movement; and</li><li>→ Property rights.</li></ul></li><li>• Ability to analyse and determine the security and other needs of any witness;</li><li>• Ability to communicate in an open and respectful manner with all witnesses, free of discrimination;</li><li>• Proficiency in the PEACE interview model; and</li><li>• Ability to analyse the situation and balance potential clashes between needs, means and human rights in the securing and examination of crime scenes and evidence gathering.</li></ul>	<p><b>Assessment methods:</b></p> <ul style="list-style-type: none"><li>• Written test on knowledge;</li><li>• Fishbowl exercises to test attitudes and skills;</li><li>• Review of performance and progress throughout the course; and</li><li>• Aggressive attitude and negative remarks about working in compliance with human rights to weigh strongly in the final pass-or-fail outcome.</li></ul> <p><b>Follow-up</b> of expected learning outcomes during performance review sessions with superior and supervisors.</p>
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## Part 3

**THE ARREST, DETENTION AND  
PROCESSING OF TERRORISM SUSPECTS**

**KEY QUESTIONS:**

- What are the key elements of ensuring that a decision to arrest and/or detain a suspect is human rights-compliant?
- What are the key questions law enforcement officials should ask themselves before using force during an arrest?
- What are the responsibilities of senior officers when directing operations in which force may be used?
- What are the main safeguards for suspects in detention, and what is their rationale?
- What is the purpose of interviewing a suspect?
- What are the legal obligations and moral and practical considerations surrounding the prohibition of torture and ill-treatment of suspects?

The ultimate responsibility for deciding whether and when to arrest a terrorism suspect must lie with those responsible for conducting the criminal investigation. Delaying for too long can be counterproductive, in that opportunities to maximize the gathering of evidence to support a criminal charge are lost or the terrorism suspects may be able to complete their planning and operationalize their plot. In the latter case, investigators may be held accountable if it can be proved that they have been negligent.

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The arrest, detention and processing of terrorism suspects gives rise to a number of important human rights concerns, and those responsible for conducting criminal investigations need to familiarize themselves with the principles surrounding:

- Right to life;
- Prohibition of torture and other cruel, inhuman or degrading treatment or punishment;
- Freedom from arbitrary arrest or detention; and
- Right to a fair trial.<sup>67</sup>

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**Detailed accounts of the relevant law and standards can be found in Chapters 9–12 of the *Countering Terrorism, Protecting Human Rights* manual.**

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<sup>67</sup> OSCE commitments and international standards, *op. cit.*, notes 20, 21, 23 and 24.

### 3.1 ARREST AND DETENTION OF SUSPECTS

The protection of physical liberty and freedom from arbitrary arrest or detention are fundamental characteristics of democratic societies. Arbitrary arrest or detention is prohibited under international human rights law. It may also generate popular support for organizations suspected of terrorism, making the job of the police increasingly difficult. Indeed, arbitrary arrest or detention is often an overreaction by the state that terrorists seek to provoke.

Any arrest or detention of a terrorism suspect must have a legal basis that is pre-existent to the commission of the offence. It must also be justified on specific grounds, either by an evidential threshold that he or she has committed a terrorist offence or is about to commit one, or for the purposes of deportation or extradition.<sup>68</sup> In the former case, the arrest or detention would allow the police to gather evidence without the suspect's interference in the process.

The evidential threshold set by the ECtHR – reasonable suspicion – is helpful in this regard.<sup>69</sup> The reasonable suspicion threshold is met when an objective observer would be satisfied that the person concerned may have committed the offence.<sup>70</sup> This is more than just an honestly held belief that someone is guilty, but it is not as strong as being sufficient to prove beyond any doubt in a court that the suspect has committed a crime. The mere existence of previous convictions for terrorism-related offences cannot, for instance, constitute reasonable suspicion in the eyes of an objective observer and, therefore, cannot be considered as sufficient to arrest and detain a person.

In case of arrest or detention on reasonable suspicion that the suspect has committed or is about to commit a terrorism-related offence, such arrest or detention should aim at bringing the detainee before a court. The prompt appearance of the terrorism suspect before a judge or a judicial authority to determine the lawfulness and necessity of the detention is a crucial safeguard against arbitrary arrest and detention. It should happen immediately

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<sup>68</sup> These two reasons are particularly relevant in the context of a counter-terrorism investigation. Additional legitimate reasons to deprive someone of his liberty can be found in Article 5 of the ECHR.

<sup>69</sup> ECtHR judgments, *op. cit.*, note 47.

<sup>70</sup> ECtHR, *Fox, Campbell and Hartley v. UK*, Application Nos. 12244/86, 12245/86 and 12383/86, 30 August 1990, para. 32, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=o01-57721>>.

after the arrest and should not exceed a few days.<sup>71</sup> The context of counter-terrorism investigations does not provide an exception.

The prohibition of arbitrary arrest and detention also includes an express requirement to record the details on an arrest or detention, as explained in section 4.2 of this manual; to inform the individual of the reasons and grounds for his or her arrest; and to notify him or her promptly of any charge against him or her, in a language that he or she understands.<sup>72</sup> This is of particular relevance in counter-terrorism investigations that involve foreign nationals or individuals who are not fluent in the official languages used in police and judicial proceedings. Such people should not be disadvantaged by their inability to communicate fluently with the police. As well as being fair to the terrorism suspect, these requirements are also in the interests of the police and of the investigation, as they help its smooth progress.

### **Case Study – Prompt notification of the reasons for arrest\***

Three individuals are arrested by the police under domestic anti-terrorism legislation and informed that they are suspected of being terrorists, and could be detained for up to 72 hours. Within four hours of being detained and taken to police stations, they are questioned in detail by investigators about their suspected involvement in specific terrorism-related acts and their suspected membership in proscribed organizations. They are released without any charges being brought against them.

#### ***Question: Have the suspects been promptly informed of the reasons and grounds for their arrest?***

When arrested, the three suspects were informed of the reasons for their arrest only, not of the grounds justifying it. The freedom from arbitrary arrest or detention provides for any person arrested to be told in simple and non-technical language that he or she can understand the essential legal and factual grounds for his or her arrest. The person should be provided with all information allowing him or her to decide whether to challenge the lawfulness of his or her

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<sup>71</sup> HRC, General Comment No. 8, Article 9: Right to liberty and security of persons, 30 June 1982, para. 2, <<http://www.unhchr.ch/tbs/doc.nsf/0/f4253f9572cd4700c12563ed00483be>?OpenDocument>.

<sup>72</sup> OSCE Moscow Document, *op. cit.*, note 21; ICCPR, Articles 9 and 14; ECHR, Articles 5 and 6.

arrest before a court. Such information should, therefore, be conveyed promptly. However, it does not have to be explained in its entirety at the very moment of the arrest. The content and promptness of the information conveyed should be assessed on a case-by-case basis to determine if they are sufficient.

The suspects were questioned and detailed allegations were put to them about specific terrorism-related offences within a short time of being detained. Considering that only a few hours passed between arrest and interview, there is no breach of the requirement for promptness. Therefore, there is no violation of their freedom from arbitrary arrest or detention.

\* This case study is taken from the facts in *Fox, Campbell and Hartley v. UK*, and the analysis of the question on the findings of the ECtHR in that case.<sup>73</sup>

### 3.2 THE USE OF FORCE DURING ARREST

Law enforcement officials should, as far as possible, apply non-violent means before resorting to the use of force.<sup>74</sup> Force may, however, be used during an arrest of a suspect if he or she attempts to resist, escape or threatens the life of others. In most cases the “force” used is merely verbal – informing the suspect that he or she is under arrest – or taking hold of him or her by the arm as a clear signal that he or she is no longer free to leave, or even handcuffing him or her. In extreme cases, the use of force may be serious, even lethal.

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73 *Fox, Campbell and Hartley v. UK*, *op. cit.*, note 70.

74 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, “Basic Principles on the Use of Force and Firearms by Law Enforcement Officials”, Havana, 27 August to 7 September 1990, <<http://www1.umn.edu/humanrts/instree/i2bpuff.htm>>.

The use of lethal force is an extreme measure to which the police should resort only in exceptional situations, when it is strictly unavoidable in order to protect life and less extreme measures are not sufficient. It is generally recognized that the police can use lethal force to protect life in the following circumstances:

- self-defence or the defence of any other person against the imminent threat of death or serious injury;
- the prevention of the perpetration of a particularly serious crime involving grave threat to life;
- the arrest of a person presenting a grave threat to life and resisting their authority; and
- the prevention of the escape of such a person.<sup>75</sup>

The questions that law enforcement officials should always ask themselves when using force are:

- Could I achieve my objective by less forceful or violent means?
- Is the likely consequence of the force I am using proportionate to the harm I am trying to prevent?
- Can I use force without jeopardizing the life of uninvolved people?

Any use of force must be prescribed by law, justified, necessary, proportionate and non-discriminatory. Police officers are required to minimize the level of force they apply and to adopt a gradual response, proportionate to the seriousness of the situation they are facing. They should take into consideration the degree of resistance encountered, as well as the legitimate objective to be achieved, such as the arrest and the potential consequences of it not being effected at that time. Even in extreme cases, international human rights standards stipulate that the use of lethal force must be “absolutely necessary” to protect life, as is reiterated in the UN Code of Conduct for Law Enforcement Officials, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the European Code of Police Ethics.

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<sup>75</sup> These circumstances are set down in Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

### Case Study – Use of force

A terrorist group has repeatedly attempted to kill state officials, most of them judges, military and police officers, with side-arms and shotguns. The members of the terrorist group did not succeed in killing people, but they demonstrated a determined will to create public alarm and uncertainty about state capability to enforce the law.

X and Y are police officers assigned to the case. They are investigating Z, a 16-year-old girl suspected of belonging to the terrorist group. They undertake a surveillance operation, in plainclothes, and follow Z at night to an isolated small village. In the darkness they see a girl, whom they believe to be Z, escaping through the window of a house. X and Y repeatedly order her to stop, without identifying themselves, and X fires two warning shots in the air. Almost simultaneously, Y is hit in the arm by shotgun pellets. In response, X shoots and kills the person who is running away.

X and Y then realize that the person killed is not Z and was not armed. It was later demonstrated that Y was shot by a neighbor who was afraid of thieves in the area.

***Question: Do X and Y use their firearms in compliance with international standards on the use of lethal force by law enforcement officials?***

The police officers had received information about a young girl suspected of participating in terrorist activities and, therefore, had reasons to be suspicious. In the meantime, they were unable to identify the girl as being Z, and did not ascertain whether the girl under surveillance was armed.

The police officers did warn the person running away and shoot twice in the air. However, they did not identify themselves as police officers, especially considering it was dark and they were wearing plainclothes.

They could neither confirm the identity of the suspect, nor that he or she had fired the shot that injured Y.

In light of the circumstances, the use of lethal force was disproportionate and, therefore, contrary to international standards on the use of lethal force.

Human rights concerns may also arise in relation to the planning of a police operation to prevent terrorism-related acts. Useful guidance on this issue can be drawn from the case described below.<sup>76</sup> It has important implications for senior police officers involved in leading such operations, as they also have to account for their actions and decisions when force is used.

### **Case Study – Command responsibility\***

Security services in state A have uncovered a bombing plot planned to take place during an official ceremony attended by many tourists. They have also discovered that three known terrorism suspects have travelled to the area of the ceremony's location. One of them is known to be an explosive expert and the two others have previous convictions for possessing explosives and causing explosions. Security services believe that the three suspects intend to place the bomb in a car to carry out this attack. The police, supported by army special forces units, mount an operation to prevent the attack and arrest the terrorism suspects.

Two days before the event, one of the suspects is seen to park a car near the location of the ceremony. He is soon joined by the two other suspects, and all three of them are then seen walking away from the vehicle. The police and army, believing that the car contains a bomb, decide to arrest the suspects. The soldiers have been briefed that the terrorism suspects may be armed and that the detonation of the bomb might be by remote control. As they approach them, the suspects make sudden movements that the soldiers interpret as action to detonate the car bomb. In reaction, the soldiers shoot all three dead.

It is later discovered that none of the suspects was armed, that they did not have a detonator device and that the vehicle did not contain any explosives. The suspects may have been carrying out a trial run for the real attack.

***Question: Is the use of force by the soldiers proportionate to the aim pursued? Has the right to life of the three suspects been violated?***

The use of lethal force by the soldiers was based on an honest belief derived from the information gathered that the suspects had planted a car bomb and that they were armed. The soldiers believed that the bomb was about to be

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<sup>76</sup> ECtHR judgments, *op. cit.*, note 47.

detonated and that the only way of preventing this and the consequential heavy loss of life was to use lethal force. The use of force by the soldiers on the spot may be justified, as it was based on an honest belief, which could be considered valid at the time, but turned out to be mistaken. The contrary view would have imposed an unrealistic burden on the soldiers in the execution of their duty, perhaps to the detriment of their own and others' security and lives.

However, a distinction must be made between the soldiers' and their commanders' responsibilities. Careful scrutiny of the circumstances surrounding the soldiers' actions is required. The anti-terrorism operation as a whole should be assessed, examining how it was controlled and organized and whether the information and instructions provided to the soldiers that led to the use of lethal force adequately took into consideration the lives of the three terrorism suspects.

In the present case, commanders could and should have given the order to stop the car and detain its occupants. This plan would have been a surer way of preventing the plot, while using less forceful means.

The possible disparity between the rules of engagement for use of firearms by the army or by the police may also be examined. Army and police instructions might contrast in the degree of prudence and caution to be expected, even when dealing with terrorism suspects.

Consequently, there has been a violation of the three suspects' right to life, as a result of improper planning and control of the operation.

\* This case study is taken from the facts in *McCann and Others v. UK*, and the analysis of the question on the findings of the ECtHR in that case.<sup>77</sup>

There may be no violation of the right to life if just one or two minor errors are made. Law enforcement officers are human beings who are prone to error on occasion, and the courts are aware of this. However, a violation is likely to occur if a series of mistakes were allowed, calling into question the efficacy of the planning for the entire operation and leading to the loss of life. The duty of the police in such cases is to ensure that there is a leadership and management structure in place that is robust and thorough enough to ensure

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77 ECtHR, *McCann and Others v. UK*, Application No 18984/91, 27 September 1995, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943>>.

that errors are detected quickly and before they result in tragic consequences. It is not just the officers actually applying force to terrorism suspects whose actions will be scrutinized; the senior officers who command and brief them will also have to account for themselves when force is used.

It is equally important to stress that senior police officers have a duty to protect the human rights of all persons involved in the operation (e.g., bystanders, potential hostages), including those that they lead. Besides the issue of blame, knowing that they had killed an innocent man may have severe psychological effects on law enforcement officers and raise questions about their continued ability to carry out their duties and to act decisively in similar situations in the future.

### **Case Study – Planning and implementation of a rescue operation\***

A group of suspected terrorists, armed with machine-guns and explosives, takes more than 900 people hostage in a public building for three days. The building is also booby-trapped and 18 suicide bombers are positioned in the hall among the hostages. Another group of suspected terrorists occupies a different part of the premises. Over the following days, negotiations with the suspected terrorists results in the release of several hostages; others are shot when trying to escape or resist.

On the third day, security forces pump an unknown narcotic gas into the building through its ventilation system. A special intervention unit enters the building a few minutes later, when the suspected terrorists lose consciousness. Most of the suicide bombers are shot while unconscious and others are killed while trying to resist. The evacuation of the building starts more than one hour after the gas is dispersed. There is no clear sorting of the victims depending on the gravity of their condition. According to witnesses, there are not enough ambulances; the hostages are transported to hospitals in ordinary city buses, sometimes without the accompaniment of medical staff and without any assistance from traffic police; there is no clear plan for the distribution of victims among various hospitals; the hospitals' medical staff are not equipped to receive so many victims; the medical staffs have not been informed of the properties of the gas used and do not have appropriate equipment. As a result of the operation, the majority of the hostages are freed. However, a large number of them are affected by the gas and suffer serious damage to their health, and a number die. In the first few days after the event no information is provided about the number of victims, their names and the places to which they have been taken.

**Questions: Is the force used by the authorities proportionate to the threat?  
Does the operation amount to a violation of the right to life?**

Considering the complexity and exceptional nature of the case, several degrees of scrutiny can be applied when assessing whether the authorities succeeded or failed to plan and conduct the rescue operation in such a way as to minimize the risks for the hostages.

In its ruling on the case, the ECtHR noted that the authorities were not in control of the situation inside the building, and had every reason to believe that there was a real, serious and immediate risk of mass human losses, and that a forced intervention was their best option. The use of gas, although dangerous, was aimed at facilitating the liberation of the hostages and reducing the likelihood of an explosion. It left the hostages a high chance of survival, which was dependent upon the efficiency of the authorities' rescue effort. It cannot, therefore, be considered a disproportionate use of force in itself.

However, the evacuation of and medical assistance to the hostages could have been subjected to closer scrutiny, as the authorities had some control of the situation outside the building, should have relied on a generally prepared emergency plan and, to a certain extent, further planned this particular rescue operation over the first two days of the hostage crisis.

It appears that the rescue plan was prepared on the assumption that the hostages would be wounded by an explosion or gunshots. The rescue workers and medics were not informed of the eventual use of gas nor of its properties. The evacuation started long after the gas was dispersed. There was also an inadequate exchange of information between various services and limited on-scene co-ordination between them, as well as a lack of appropriate medical treatment and equipment and inadequate logistical planning.

Therefore, the ECtHR concluded that the inadequate planning and implementation of the rescue operation amounted to a violation of the right to life of the hostages.

\* This case study is taken from the facts in *Finogenov and others v. Russia*, and the analysis of the question on the findings of the ECtHR in that case.<sup>78</sup>

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78 ECtHR, *Finogenov and others v. Russia*, Application Nos. 18299/03 and 27311/03, 4 June 2012, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108231>>.

### 3.3 SEARCHING SUSPECTS

Having arrested and detained a terrorism suspect, an important next step is to search him or her. This is essential for the following reasons:

- to protect others, including police officers, from harm;
- to protect the suspect from harming him or herself;
- to find items that may be used to facilitate escape; and
- to find items that may be evidence connected to the crime for which he or she has been arrested, or any other crime.

The extent of the search depends on all the circumstances, but in terrorism-related cases it is likely that it may be more extensive and intrusive than in other criminal cases. Sometimes it may even extend to a strip search or, exceptionally, an “intimate” search, in which an inspection is made of body cavities. Searches may also extend to personal items of the suspects and any items found at the crime scene, as explored in Part 2.2 of the manual.

Some guidance on how to conduct searches from a human rights perspective would include the following:

- Strip and intimate searches are very invasive and potentially degrading measures, and should be used only when absolutely necessary, as a last resort, and in accordance with gender-sensitive measures;
- There must be reasonable grounds to suspect that the detainee may have traces of explosives or hidden items on his or her body and that such a search is necessary to detect them, as an ordinary search is unlikely to result in their discovery;
- Carrying out such a search requires the authority of a senior officer and should be the subject of a written policy, setting out in clear terms the circumstances in which it is permissible to resort to it, and the reason for the search must be recorded;
- Such a search should be carried out in a manner that provides privacy from other detainees and police officers;
- There should always be at least two police officers present, of the same gender as the suspect;
- Such a search should be carried out by personnel with sufficient medical knowledge and skills to perform the search safely. In the case of body cavity searches<sup>79</sup>, these should only be carried out by a doctor, whose gender has been agreed on by the subject;
- The suspect should be informed that the usual conditions of medical confidentiality do not apply to body searches and their outcome will be revealed to the authorities;<sup>80</sup>

- Performing searches on female suspects raises particular concerns, thus, police investigators must ensure that such searches are performed by women who are aware of gender based sensitivities, as well as the culture of the suspects; and
- Trained professionals who are knowledgeable about children's needs should perform searches on minors.

### **Case Study – Strip searches\***

X is a member of a violent extremist organization and has been sentenced to life imprisonment for a number of serious offences, including murder, possession of illegal weapons, possession of explosives, terrorism and hostage-taking. X is held in different prisons. Because he is a “high risk” prisoner, in varying circumstances he is subjected to body cavity searches, which are sometimes carried out by force. Over a two-year period in one specific prison, he has submitted to these searches at least 11 times, including every time he receives a visit, and sometimes when he is taken out of his cell following exercise or on being taken to a disciplinary cell. On a number of occasions, he is sent to the punishment block for refusing to allow inspection of his body cavities.

#### **Question: Does such treatment amount to cruel, inhuman or degrading treatment or punishment?**

Measures depriving a person of his or her liberty inevitably involve an element of suffering and humiliation. This unavoidable state of affairs does not, in itself, constitute inhuman treatment. Nevertheless, states must ensure that all persons are detained in conditions that are compatible with respect for their human dignity. This obligation applies to all forms of detention in all types of facilities; including police stations, pre-trial detention centres and prisons.

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- 79 The IACHR considers that “*Intrusive vaginal or anal searches shall be forbidden by law*”; see Inter-American Commission on Human Rights, Resolution 1/08, “Principles and Best Practices on the Protections of Persons Deprived of Liberty in the Americas”, Washington, 31 March 2008, Principle XXI – Bodily searches, inspection of installations and other measures, <[http://www.cidh.oas.org/pdf%20files/RESOLUTION%201\\_08%20-%20PRINCIPLES%20PPL%20FINAL.pdf](http://www.cidh.oas.org/pdf%20files/RESOLUTION%201_08%20-%20PRINCIPLES%20PPL%20FINAL.pdf)>.
- 80 See World Medical Association, “Statement on Body Searches of Prisoners”, Budapest, October 1993, <<http://www.wma.net/en/30publications/10policies/b5/>>; and First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, “Standard Minimum Rules for the Treatment of Prisoners”, Geneva, 30 August 1955, <<http://www1.umn.edu/humanrts/institree/g1smr.htm>>.

Strip searches, in particular, might undermine detainees' privacy and dignity, especially where they involve undressing in front of others, and even more so where detainees have to place themselves in embarrassing positions. Such treatment, however, is not in itself illegal: strip-searches, and even body cavity searches, may be necessary on occasion to ensure the security of detention facilities – including the detainee's own safety – or to prevent disorder or crime. Such measures may be permitted only where absolutely necessary in the light of the special circumstances and where there are serious reasons to suspect that a prisoner is hiding a prohibited object or substance in the searched part of the body.

However, while these searches may be necessary, they must also be conducted in an appropriate manner so that the detainee's suffering or humiliation does not go beyond the inevitable element of suffering or humiliation connected with this form of legitimate treatment. The greater the invasion of the privacy of a detainee being strip-searched, the greater the caution required.

In the present case, the frequency and circumstances of the searches varied from one prison to another. Due to this unjustified and arbitrary frequency of the searches and the feeling of inferiority and anxiety these measures have entailed, such treatment amounts to cruel, inhuman or degrading treatment or punishment.

\* This case study is taken from the facts in *Frérot v. France*, and the analysis of the question on the findings of the ECtHR in that case.<sup>81</sup>

### 3.4 SAFEGUARDS FOR SUSPECTS IN DETENTION

As mentioned in section 3.1, detaining a terrorism suspect can be necessary on the basis of reasonable suspicion that he or she has committed a terrorism-related offence or is about to commit one, or for the purposes of deportation or extradition. It is a legal step towards bringing someone to trial. Terrorism suspects detained in police custody have not yet faced a trial and should, therefore, enjoy the presumption of innocence.

Because detention happens in facilities to which the public generally has restricted access, it enhances the risk of a number of human rights violations.

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81 ECtHR, *Frérot v. France*, Application No. 70204/01, 12 September 2007, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81008>>.

Examples of such violations include torture and other forms of ill-treatment, denial of medical attention, and violation of procedural rights.

- Incommunicado detention involves the deprivation of a person's liberty by state authorities acting in their official capacity, or persons acting under the order or with the consent of the state, where the person is not permitted any contact with the outside world, including with family, friends, independent lawyers and doctors.
- Secret detention is the situation in which a person is held in incommunicado detention and where the detaining or otherwise competent authority denies the detention, refuses to reveal information on the fact that the person is deprived of his or her liberty and hidden from the outside world, or refuses to provide information about the fate or whereabouts of the detainee. Secret detention does not necessarily take place in an unofficial place of detention.
- Extraordinary rendition is the transfer – without legal process – of a detainee to the custody of a foreign state for the purposes of detention and interrogation.<sup>82</sup>

Such practices may facilitate the perpetration of torture and other forms of ill-treatment, and may in themselves constitute such treatment. The suffering caused to family members of a secretly detained person may also amount to torture or a form of ill-treatment and, at the same time, violates the right to private and family life. Secret detention constitutes an enforced disappearance and, if widely or systematically practiced, it may even amount to a crime against humanity.<sup>83</sup> International bodies have strongly condemned these practices.<sup>84</sup>

Preventive detention of terrorism suspects raises concerns about the arbitrary nature of such measures and their impact on human rights. Such measures should remain exceptional and comply with international human

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<sup>82</sup> The full definitions of 'Incommunicado detention', 'Secret detention' and 'Extraordinary rendition' are included in the glossary of this manual.

<sup>83</sup> "Joint Study on global practices in relation to secret detention in the context of countering terrorism", *op. cit.*, note 6, para. 30. See also HRC, General Comment No. 20, Article 7: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, 3 November 1992, para. 11, <<http://www1.umn.edu/humanrts/gencomm/hrcom20.htm>>; and United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Sir Nigel Rodley, Report to the General Assembly, 3 July 2001, A/56/156, para. 39(d), <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/56/156>>.

rights standards. Safeguards that apply during detention should be equally respected in case of preventive detention and include the prohibition of arbitrariness, the existence of a legal basis stating the grounds for and procedures of such detention, the notification to the suspect of the reasons and grounds of detention, the judicial control, and the potential compensation in case of a human rights breach.<sup>85</sup>

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OSCE commitments and international human rights law provide guarantees for suspects in detention that, if adhered to, protect them against such violations. These safeguards refer to the following rights:

- Prohibition of torture and other cruel, inhuman or degrading treatment or punishment;<sup>86</sup>
- Right to be promptly informed about one's rights according to domestic law;<sup>87</sup>
- Right to notify appropriate persons of one's choice of one's arrest, detention, imprisonment and whereabouts;<sup>88</sup>
- Right to be brought promptly before a judge to determine the lawfulness of one's arrest;<sup>89</sup>
- Right to legal counsel of one's choice;<sup>90</sup> and
- Obligation of the state to secure medical attention.<sup>91</sup>

These rights apply at all stages of the legal process, from the moment of detention. Local laws must give full effect to them.

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<sup>84</sup> See for example, Dick Marty, "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member States. Draft Report – Part II (Explanatory memorandum)", Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 7 June 2006, AS/Jur (2006) 16 Part II, <[http://assembly.coe.int/committeedocs/2006/20060606\\_ejdoc162006partii-final.pdf](http://assembly.coe.int/committeedocs/2006/20060606_ejdoc162006partii-final.pdf)>.

<sup>85</sup> HRC, General Comment No. 8, *op. cit.*, note 71, para. 4.

<sup>86</sup> OSCE commitments and international standards, *op. cit.*, note 21.

<sup>87</sup> OSCE Moscow Document, *op. cit.*, note 21; ICCPR, Article 9; and ECHR, Article 5.

<sup>88</sup> *Ibid.*

<sup>89</sup> OSCE Copenhagen and Moscow Documents, *op. cit.*, note 21; ICCPR, Article 9.4; ECHR, Article 5.4; and ADRDM, Article 15.

<sup>90</sup> OSCE Vienna and Copenhagen Documents, *op. cit.*, note 21; ICCPR, Article 14; ECHR, Article 5; and CFREU, Article 47.

<sup>91</sup> OSCE Ministerial Council, Ministerial Declaration, "Brussels Declaration on Criminal Justice Systems", Brussels, 5 December 2006, <<http://www.osce.org/mc/23017>>; ICCPR, Article 9; and ECHR, Article 5.

These guarantees do not just help to protect detainees, but also serve to safeguard the police. Most police officers will have experienced at some time in their careers, malicious allegations against them by suspects who falsely claim that the police who dealt with them ill-treated them, forced them to sign confessions, or behaved in some other illegal and unprofessional way. If an independent and professional lawyer and doctor who are not subject to control and instructions from authorities have had access to the suspect, and have been present at the police station and able to examine the suspect, it is less likely that allegations will be made. Furthermore, if a lawyer is present when a suspect makes a confession, it is highly unlikely that the confession will be withdrawn later in court.

### *3.4.1 The Right to be Promptly Informed About One's Rights According to Domestic Law*

Detainees should be informed of their entitlements. As this right exists from the very outset of custody, the information should be conveyed at the commencement of the deprivation of liberty.

Practice has shown that detained persons are not always informed promptly of their rights. Indeed, it is a common error that the notification of rights is delayed until the time that the suspect has been interviewed by criminal investigators, or even until after the interview has been completed.

Yet it is a legal requirement that the authority responsible for the arrest, detention or imprisonment inform the individual at the moment of arrest or promptly thereafter of his or her rights, and explain how to avail himself or herself of such rights.<sup>92</sup> These include the right to notify appropriate persons of their choice of their detention, the right not to confess, the right not to testify against him or herself and to remain silent, the right to be brought promptly before a judge to determine the lawfulness of his or her arrest, the right to access to legal counsel of their choice, and the right to medical attention. It is also recommended that these rights be communicated both orally and in writing, and that the detainee is asked to sign to the effect that he or she has received the notification. Information on rights should be given orally for persons who do not know how to read and through interpretation for persons who do not have sufficient knowledge of any of the languages in which the written version is produced.

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<sup>92</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *op. cit.*, note 1, Principle 13.

### *3.4.2 The Right to Notify Appropriate Persons of One's Choice of One's Arrest, Detention, Imprisonment and Whereabouts*

This safeguard is perhaps the most important and effective in ensuring that knowledge that someone has been detained becomes public. It is thus able to act as a particularly effective deterrent to ill-treatment and other violations.

The right provides that, from the very outset of their custody, terrorism suspects can have their family or any other person of their choosing notified about their arrest. Importantly, this includes the notification of their place of detention. A good practice to comply with this requirement is to allow repeat notification whenever a detainee is transferred from one police facility to another.<sup>93</sup> This right does not entitle the detainees themselves to speak to the person they nominate, although this may be allowed at the discretion of the police. However, it requires that the police must ensure that the notification is made with the shortest possible delay.<sup>94</sup>

In exceptional cases, granting this right immediately might hamper police investigations. It could potentially result in alerting potential accomplices that the police have uncovered a plot, thus allowing them to escape or destroy evidence. It is, therefore, logical that there should be some caveat and that a reasonable period of delay is allowed in exceptional circumstances. Such delay should, however, be clearly defined in law, applied in a restrictive manner, proportionate and strictly limited in time.<sup>95</sup> Such exceptions should also be based on clear procedures and an independent decision-making process. This might entail that any delay in notification of custody is recorded in writing, including the reasons for the delay, and require the approval of a senior police officer

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<sup>93</sup> For example, in the United Kingdom; as per the *Police and Criminal Evidence Act 1984*, Section 56(8).

<sup>94</sup> See for example, "Report on the visit of the Subcommittee on prevention of torture and other cruel, inhuman or degrading treatment or punishment to Sweden", 10 September 2008, CAT/OP/SWE/1, para. 53, <<http://www.un.org/Docs/journal/asp/ws.asp?m=CAT/OP/SWE/1>>; and "Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 March to 7 April 1995", European Committee for the Prevention of Torture, 25 September 1995, CPT/Inf (97)1, para. 83, <<http://www.cpt.coe.int/documents/bgr/1997-01-inf-eng-1.pdf>>.

<sup>95</sup> *Ibid*; "Report on the visit of the Subcommittee on prevention of torture and other cruel, inhuman or degrading treatment or punishment to Sweden", para. 53; and "Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 21 October 2011", European Committee for the Prevention of Torture 9 August 2012, CPT/Inf (2012) 21, para. 15, <<http://www.cpt.coe.int/documents/nld/2012-21-inf-eng.pdf>>.

unconnected with the case or a prosecutor. The UN has defined the reasonable period as not exceeding a matter of days,<sup>96</sup> while the Council of Europe has specified that such a delay should last up to a maximum of 48 hours, including for terrorism-related crimes.<sup>97</sup>

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When counter-terrorism investigations involve foreign citizens, an additional set of requirements is applicable under relevant international law.<sup>98</sup> In particular:

- local authorities must inform detained foreigners without delay of their right to have their consulate notified of their detention and their right to communicate with their consulate;
- at the request of the detainee, the authorities must then notify the consular post of the arrest without delay and permit consular access to the detained national; and
- consulates have the right to be promptly informed of the detention at the national's request, to communicate, correspond and visit with their detained nationals, to arrange for their nationals' legal representation, and to provide other appropriate assistance with the detainee's consent.

Special attention needs to be given to refugees who are likely to be reluctant to have their consulate informed of their whereabouts. Therefore, instead of informing consular officials in such cases, the police should inform a "representative of the competent international organization".<sup>99</sup>

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<sup>96</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *op. cit.*, note 1, Principles 15 and 16(4).

<sup>97</sup> "Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 12 April 1991", European Committee for the Prevention of Torture, 5 March 1996, CPT/Inf (96) 9, Appendix II, <<http://www.cpt.coe.int/documents/esp/1996-09-inf-eng-1.pdf>>; and "Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 22 April 1994", European Committee for the Prevention of Torture, 5 March 1996, CPT/Inf (96) 9 [Part 2], para. 60, <<http://www.cpt.coe.int/documents/esp/1996-09-inf-eng-2.pdf>>.

<sup>98</sup> United Nations, Vienna Convention on Consular Relations, Vienna, 24 April 1963, Article 36, <<http://treaties.un.org/doc/Publication/UNTS/Volume%20596/volume-596-I-8638-English.pdf>>; this convention applies to any type of crime; United Nations General Assembly, International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, Article 7, <<http://treaties.un.org/doc/db/Terrorism/english-18-9.pdf>>; United Nations General Assembly, International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, Article 9, <<http://treaties.un.org/doc/db/Terrorism/english-18-11.pdf>>.

<sup>99</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *op. cit.*, note 1, Principle 16(2). "*Competent international organizations*" may include for example, the representative of the UN High Commissioner for Refugees or the Red Cross/ Red Crescent.

### *3.4.3 The Right to Challenge the Lawfulness of One's Arrest*

Any terrorism suspect should be entitled to challenge the lawfulness of his or her arrest and detention before a court, in compliance with international fair trial standards. This right applies from the outset of the arrest and throughout his or her detention.

In the anti-terrorism context, however, the police may be obliged to act with utmost urgency in following up on all information, including from secret sources. Arrests and detention of terrorism suspects, therefore, may happen on the basis of information that is reliable, but that may not be revealed to the suspect or produced in court without putting in jeopardy the source of information. However, protecting the source of information used to justify an arrest and detention should not affect the right of the detainee to challenge the lawfulness of his or her arrest and detention.

### *3.4.4 The Right of Access to Legal Counsel of One's Choice*

Individuals accused of terrorism-related offences have the right to defend themselves through legal assistance of their own choosing. This choice may, however, be restricted for genuine reasons of national security. In practice, the right of access to legal counsel includes being allowed to:

- consult with a lawyer in the police station from the very first moment when a person is obliged to remain with the police;<sup>100</sup> and
- have a lawyer present during any interviews, from the time of the arrest until the first declaration before the competent authority.<sup>101</sup>

The right of access to legal counsel is particularly important in the period immediately following the deprivation of liberty, when the risk of intimidation and ill-treatment is greatest. Access to a lawyer at this time may have not only a dissuasive effect on those intending to ill-treat detainees, but also makes the lawyer well placed to take appropriate action if ill-treatment

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<sup>100</sup> This is the shared view of mechanisms such as CPT and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

<sup>101</sup> IACtHR, Resolution 1/08, *op. cit.*, note 79, Principle V – Due process of law.

actually occurs.<sup>102</sup> Access to a lawyer and the presence of a lawyer during all interviews also ensure the respect of the right to a fair trial of the terrorism suspect at a time when his or her vulnerability might be exploited to unlawfully obtain a confession or to interpret any silence as an indication of guilt.<sup>103</sup>

Moreover, suspects are entitled to talk to their lawyers in private, without interference, censorship, delays or unjustified time limits.<sup>104</sup> Nevertheless, visual observation of contact, without recording or other intrusions, between the suspect and his or her lawyer may be permissible. The manner and duration of police supervision must, however, be subject to oversight, proportionate to the perceived need and have compelling reasons, such as the absolute necessity to prevent collusion or other crimes, as well as to protect witnesses.<sup>105</sup> Similarly, confidentiality applies to the correspondence between a suspect and his or her lawyer. Any restriction on the privacy of the meetings and correspondence should remain exceptional and defined on a case-by-case basis.

It is also crucial that legal counsel have access to appropriate information and documents in police possession or control at the earliest appropriate time.<sup>106</sup>

### **Case Study – Access to legal counsel of one's choice\***

X is arrested in a house where he and other suspected members of a terrorist organization have held an informant captive. He is taken to the police station, where he asks to speak to a lawyer. His request is delayed on the grounds that it would interfere with the gathering of evidence. He is interviewed on multiple occasions before being allowed, two days later, to finally see his lawyer. He is then able to speak with him, but the lawyer is not allowed to stay during further interviews.

<sup>102</sup> "Report to the Government of the Czech Republic on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 26 February 1997", European Committee for the Prevention of Torture, 15 April 1999, CPT/Inf (99)7, para 30, <<http://www.cpt.coe.int/documents/cze/1999-07-inf-eng.pdf>>.

<sup>103</sup> ECtHR, *Salduz v. Turkey*, Application No 36391/02, 27 November 2008, paras. 56–62, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89893>>.

<sup>104</sup> OSCE Brussels Document, *op. cit.*, note 91.

<sup>105</sup> ECtHR, *S. v. Switzerland*, Applications No. 12629/87, 13965/88, 28 November 1991, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57709>>.

<sup>106</sup> Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, "Basic Principles on the Role of Lawyers", Havana, 27 August to 7 September 1990, Principle 21, <<http://www.unrol.org/files/UNBasicPrinciplesontheRoleofLawyers.pdf>>.

**Question: Is the terrorism suspect's right to access of legal counsel of his choice violated in the present case?**

The refusal to allow X access to his lawyer was not only applied just after he was charged, but also during all preliminary investigation stage interviews at the police station, when X should have benefited from such assistance. Denying access to a lawyer during the first two days of police questioning, and during all further interviews, where the rights of the defence may be irretrievably prejudiced, can never be justified.

Therefore, the suspect's right of access to legal counsel of his choice has been violated by the police.

\* This case study is taken from the facts in *John Murray v. UK*, and the analysis of the question on the findings of the ECtHR in that case.<sup>107</sup>

It is, nevertheless, recognized that police have legitimate needs to conduct their investigations without undue hindrance. There may be extraordinary circumstances in which the right to access to a lawyer may be delayed. Restrictions should, however, be decided on a case-by-case basis, remain extraordinary and temporary, and should not result in the right of access to legal counsel of one's choice being fully denied. Lawyers are not to be discretionarily barred from taking part in the criminal investigation process.

There should not be tension between police investigators and lawyers representing suspects. Each year many lawyers are murdered, threatened, intimidated or harassed in various ways by states and non-state actors simply for doing their jobs. Defence lawyers carry out an essential role, testing the evidence against a suspect, and without them justice could not be dispensed properly and credibly. Any improper conduct or attempts to pervert the course of justice by destroying evidence or otherwise acting unlawfully should be investigated and prosecuted to the full extent of the law.

The adequate protection of human rights and fundamental freedoms to which all persons are entitled requires effective access to legal services provided by an independent legal professional. The European Code of Police

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<sup>107</sup> ECtHR, *John Murray v. UK*, Application No. 18731/91, 8 February 1996, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57980>>.

Ethics exhorts the police to “respect the role of defence lawyers in the criminal justice process and, whenever appropriate, assist in ensuring the right of access to legal assistance effective, in particular with regard to persons deprived of their liberty”.<sup>108</sup>

In order to guarantee this effective access, governments should ensure that lawyers are able to perform all their professional functions without intimidation, hindrance, harassment or improper interference.

In particular:

- Lawyers should not suffer or be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics;
- Where the security of lawyers is threatened as a result of discharging their functions, they should be adequately protected by the authorities; and
- Lawyers should not be identified with their clients or their clients’ causes as a result of discharging their functions.<sup>109</sup>

### *3.4.5 Obligation to Secure Medical Attention*

The obligation to secure medical attention is an important safeguard for both the detainee and the police. Police have a duty to provide care to everyone in their custody. When the state deprives a person of liberty, it assumes responsibility to maintain that person’s safety and physical integrity, and to safeguard his or her welfare, from the very outset of custody. If any detainee appears to be ill, injured or otherwise in need of medical attention and treatment, a doctor, whose gender is preliminarily agreed upon by the detainee, should be summoned, or the detainee should be taken to a hospital as soon as possible. Failure to provide proper medical care could leave the police open to allegations of breaching the prohibition on ill-treatment.

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<sup>108</sup> Council of Europe, Committee of Ministers Recommendation Rec(2001)10 on the European Code of Police Ethics, Strasbourg, 19 September 2001, para. 10, <<https://wcd.coe.int/ViewDoc.jsp?id=223251>>.

<sup>109</sup> Basic Principles on the Role of Lawyers, *op. cit.*, note 106, para. 18; and OSCE Brussels Document, *op. cit.*, note 91.

### **Case Study – Medical attention\***

X is suspected of being a member of a terrorist organization and of having carried out bomb attacks. He is arrested and taken into police custody. His first medical examination takes place on the 14th day of his custody and indicates both recent injuries to his forehead and left temple and a pre-existent severe ophthalmological condition. The doctor prescribes him three days of rest for his recent injuries and recommends that he undergo eye surgery for his pre-existent condition. X is then placed in pre-trial detention.

At that time, X files a complaint for ill-treatment for his recent injuries. The police officers who were on duty during his custody state that these injuries have been caused by the force used during his arrest and the fact that X hit his head against the door while attempting to escape during questioning.

X is subsequently sentenced to imprisonment for carrying out terrorist bombings. While in detention he is examined by various specialists on different occasions concerning his ophthalmological problems. All doctors recommend that X be operated upon. For six years, X's surgery is repeatedly postponed and his condition deteriorates, causing him considerable pain and leading doctors to stress, yet again, the urgency of his treatment.

***Question: Have the authorities failed to provide X with medical attention? Can they be held responsible for cruel, inhuman or degrading treatment or punishment?***

Answering this question requires differentiating between X's most recent injuries and his pre-existent severe ophthalmological condition.

Since X's most recent injuries took place while he was in custody, police officers have to provide a plausible explanation as to how he was injured. They must give evidence establishing the facts they allege and casting doubts on X's allegations.

In the present case, there was no medical examination following X's arrest. If force used during the arrest had caused X's injuries, it should have been established at that time and police officers should have provided proof that the use of force was proportionate and absolutely necessary. In the absence of immediate medical examination, there is nothing to corroborate the police officers' version of facts. In addition, no police record mentions the existence of

an incident during questioning, and there is no indication as to when such an incident could have taken place.

Consequently, it cannot be confirmed that X's most recent injuries were the result of his own conduct, as described by the police. Therefore, it must be presumed that they were caused by police conduct. In this case, failure to provide proper medical attention from the outset of custody not only breached the safeguards to which X is entitled to when deprived of his liberty, it also led the police to be held responsible for inhuman treatment.

Another issue arises in relation to the continued postponement of X's eye surgery.

As detainees and prisoners are in a very vulnerable position with regards to their access to medical assistance, authorities have the obligation to provide them with adequate and necessary medical treatment, especially when such treatment is urgent.

X has suffered from severe ophthalmological problems for years. Several medical reports during his detention established the need for him to receive an operation, which the authorities were therefore aware of from very early in his incarceration. As his condition progressed, doctors stressed the urgency of this operation. In spite of this, X was denied medical treatment for 6 years without valid reasons, which caused him considerable pain for a prolonged period of time.

In light of the facts, it can be established that the authorities failed to provide adequate and necessary medical treatment to X for his ophthalmological condition, which amounted to inhuman and degrading treatment.

\* This case study is taken from the facts in both *Wenerski v. Poland* and *Altay v. Turkey*, and the analysis of the question on the findings of the ECtHR in these cases.<sup>110</sup>

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<sup>110</sup> See, ECtHR, *Wenerski v. Poland*, Application No. 44369/02, 20 April 2009, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90722>>; and ECtHR, *Altay v. Turkey*, Application No. 22279/93, 22 May 2001, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-64019>>.

Securing medical attention requires that authorities ensure:

- A person taken into police custody has the right to be examined, if he or she so wishes, by a doctor of his or her own choice, in addition to any medical examination carried out by a doctor called by the police authorities. This does not mean that the detainee has the right to decline to be examined by a doctor who is not of his or her own choosing. The purpose of any second examination is to provide an additional safeguard against ill-treatment and not to supplant the role of the officially-appointed doctor. The detainee might be required to pay the cost of any such second examination;
- All medical examinations of persons in custody are conducted out of the hearing and out of the sight of police officers, unless the doctor concerned expressly requests otherwise in a given case;
- The results of every examination, as well as any relevant statements by the person in custody and the doctor's conclusions, are recorded in writing by the doctor and made available to the person in custody and his or her lawyer; and
- The confidentiality of medical data and the patient-doctor relationship is strictly observed; only the lawyer of the person in custody can have access to these data.<sup>111</sup>

### 3.5 THE QUESTIONING OF TERRORISM SUSPECTS<sup>111</sup>

Questioning terrorism suspects is a major part of the investigation and it is crucial to understand its purpose within the criminal justice process. It is a specialist task that requires specific training. Its foremost aim is to obtain accurate and reliable information in order to discover the truth about matters under investigation. The aim of questioning is not, however, to obtain a confession from somebody already presumed guilty by the interviewing officers. A code of conduct for the questioning of criminal suspects would assist law enforcement officials in this exercise.<sup>112</sup>

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<sup>111</sup> "Report to the Government of the Czech Republic on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 26 February 1997", *op. cit.*, note 102, para. 50. Whilst CPT recommendations are addressed to specific governments, the wording of the recommendation referred to here is one that has been used in visit reports to most, if not all, of the CoE member States.

<sup>112</sup> "12th General Report on the CPT's activities, covering the period 1 January to 31 December 2001, European Committee for the Prevention of Torture, 3 September 2002, CPT/Inf (2002) 15, para. 34, <<http://www.cpt.coe.int/en/annual/rep-12.pdf>>.

In many police forces, a culture has existed whereby the sole and main objective of questioning was to extract a confession from the suspect. Frequently, the fact that a suspect may be innocent of any involvement in terrorism-related offences has been ignored. This has led to grave abuses, sometimes including the deaths of suspects. Police officers participating in such illegal practices often do so because they believe, in good faith, that the suspect is guilty and that the only way of proving this and of obtaining a conviction is to persuade him or her to confess. When the suspect is unwilling to do so, threats and/or physical ill-treatment, sometimes amounting to torture, may be inflicted. In some police forces, resorting to torture and ill-treatment is both systemic and systematic. Such practices cannot be justified under any circumstances, including in the anti-terrorism context, and constitute violations of the prohibition of torture and other cruel, inhuman or degrading treatment.

### **Case Study – Treatment in police custody\***

X is identified by a detainee as being a member of a terrorist organization, and is subsequently taken into custody. He is detained for days. During this period, X is allegedly blindfolded during interrogation; suspended from his arms, which are tied together behind his back; given electric shocks, which are exacerbated by throwing water over him; and subjected to beatings, slapping and verbal abuse. This treatment is inflicted on him in order to persuade him to confess that he knows the detainee who identified him.

After his release, X has lost movement in his arms and hands, and medical reports attest that his condition is consistent with the treatment he allegedly suffered while in custody.

#### ***Question: Does the treatment of the suspect amount to torture?***

If an individual is taken into custody in good health, but is injured at the time of release, it is the police's responsibility to provide a plausible explanation as to what caused the injury. If they fail to do so, there is a strong presumption that the individual was ill-treated by the police.

X's treatment required a certain amount of preparation and exertion, and could, therefore, have only been inflicted intentionally by the police. This treatment caused severe pain, and medical reports indicate that it led to the paralysis in X's arms. Furthermore, it was administered in order to obtain information from X.

In these circumstances, this treatment amounted to torture.

\* This case study is taken from the facts in *Aksoy v. Turkey*, and the analysis of the question on the findings of the ECtHR in that case.<sup>113</sup>

In terrorism cases in particular, the police may be under great pressure, both from their senior officers and government ministers, but also from the media and the public, to obtain information or confessions quickly. This may increase the likelihood that torture and ill-treatment will take place. The risk is even greater if the legal system bases convictions solely or substantially on confessions and on evidence obtained in police custody or pre-trial detention, particularly if questioning is conducted in the absence of a detainee's lawyer. It is the obligation of the police to resist this pressure and to carry out their duties in an independent and objective fashion, with an open mind at every stage of the investigation, even when questioning suspects against whom evidence may be strong. Every criminal investigation should be an open-minded search for the truth. When police forget this, the risk of a mistake and miscarriage of justice is great.

The three components defining torture are:

- the severity of the pain inflicted;
- the purpose of the treatment; and
- the fact that torture is inflicted by, at the instigation of, or with the consent or acquiescence of a person acting in an official capacity.<sup>114</sup>

A distinction exists between torture and other cruel, inhuman or degrading treatment or punishment. They are all inflicted by a person acting in an official capacity. However, torture is used for the particular purpose of gathering

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<sup>113</sup> ECtHR, *Aksoy v. Turkey*, Application No 21987/93, 18 December 1996, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58003>>.

<sup>114</sup> CAT, Article 1, op. cit., note 12.

information or a confession, and the severity of the pain inflicted is higher than in other forms of ill-treatment.

The threshold of severity distinguishing between torture and cruel, inhuman or degrading treatment or punishment is not clearly defined. However, it has been lowered in recent years, and acts that did not necessarily amount to torture in the past are now being considered as such.<sup>115</sup> This determination of what constitutes torture or other ill-treatment remains based on the specific circumstances of each case, taking into account criteria such as the duration of the treatment, its physical and mental effects, as well as the gender, age and the state of health of the victim.<sup>116</sup>

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For all practical purposes, however, the distinction is to a large degree not important. When the term “torture” is used alone in the rest of this section, it also includes other cruel, inhuman or degrading treatment or punishment.

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Torture and other cruel, inhuman or degrading treatment or punishment are all absolutely forbidden under international human rights law.

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Particular practices used in the counter-terrorism context have been identified as constituting torture and ill-treatment.<sup>117</sup> Examples include electric shock, beating on the soles of the feet and mock executions. Other examples include:

- Waterboarding is a torture technique whereby a suspect is immobilized and water is poured over his or her nose and mouth to simulate drowning;
- Sleep deprivation is used primarily as a tool designed to wear down the resistance of suspects to questioning and to obtain confessions from them, and can include interviews during the day and night at different times and for prolonged periods, almost constantly by rotating teams of investigators for periods exceeding 24 hours;
- Humiliation of suspects or their family members is another technique that may include public humiliation by forcing female family members visiting

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<sup>115</sup> For a discussion on this issue, see *Countering Terrorism, Protecting Human Rights: A Manual*, *op. cit.*, note 19, pp. 121–123

<sup>116</sup> *Frérot v. France*, *op. cit.*, note 81, para 35; and ECtHR judgments, *op. cit.*, note 47.

<sup>117</sup> *Countering Terrorism, Protecting Human Rights: A Manual*, *op. cit.*, note 19, p.128.

suspects in detention to strip down in front of others and subjecting them to insults;

- Forcing a suspect to remain for periods of hours in a “stress position” with fingers held high above the head, the legs spread apart and the feet back, causing the suspect to stand on his or her toes putting the weight of the body mainly on the fingers;
- Subjection to noise and deprivation of food and drink are techniques used pending the questioning of suspects; and
- Hooding, the practice of fully covering the head of or blindfolding terrorism suspects, usually aims at preventing them from identifying law enforcement officials who inflict ill-treatment upon them. Individuals subjected to such practices, which are sometimes used in conjunction with beatings, cannot breath freely, are disoriented and under intense stress. Even in cases when no physical ill-treatment occurs, hooding or blindfolding a person in custody – and, in particular, someone undergoing questioning – is a form of oppressive conduct, the effect of which will frequently amount to psychological ill-treatment.

In addition to these specific examples, any other treatment inflicting physical or mental suffering and instigated by someone in an official capacity would be considered torture or inhumane or degrading treatment. Treatments that may not seem at first sight as extreme as the practices above mentioned may amount to ill-treatment, taking into consideration the circumstances in which they are inflicted and the suffering they inflict, or to torture, depending on the level of severity of the pain and the intention of an official to generate it. Both torture and ill-treatment are absolutely outlawed under international law.

Resorting to torture and ill-treatment during questioning is legally prohibited, morally unacceptable and practically inefficient:

- Torture and ill-treatment is a crime in international law and should be outlawed in domestic law;
- Evidence obtained by torture or ill-treatment is inadmissible before any court;
- The principle of *non-refoulement* absolutely prohibits the expulsion, return or extradition of terrorism suspects to countries where they would face risks of torture or ill-treatment;
- Torture jeopardizes co-operation with foreign law enforcement agencies; and
- Torture and ill-treatment are ineffective.

### ***3.5.1 Torture and Ill-treatment is a Crime in International Law and Should Be Outlawed in Domestic Law<sup>118</sup>***

The rule of law focuses not only on what is done, but on how it is done. Law enforcement officials have a duty to respect and enforce all laws, including those that protect human rights. They are to implement any laws in a human rights-compliant manner. If police fail to do so, they are not reducing criminality, but rather adding to it and committing crimes themselves, for which they are liable to be punished.

Torture and other forms of ill-treatment are crimes under international law and all OSCE participating States have committed themselves to criminalize all acts of torture (including other cruel, inhuman and degrading treatment or punishment) in domestic legislation, ensure that these acts are punished by adequate penalties, and provide adequate remedies for victims. Any attempt to commit torture or any participation and complicity in torture should be similarly criminalized. This requires that the definition of torture in domestic law comply with international standards, in particular the Convention against Torture.

#### **Case Study – Complicity in torture\***

X is seized from a bus by officials of state A and held incommunicado for 23 days. He is interrogated repeatedly and accused of being a member of a terrorist organization, without being charged. He is denied access to a lawyer, translator and consular official from his home country, as well as to his family.

He is then handed over to agents of state B, in the absence of any arrest warrant or legitimate request for extradition, and tortured by them at the airport, in the presence of officials from state A.

State A does not seek diplomatic assurances that X will not be tortured by agents of state B, despite publicly available information attesting that there are credible reasons to believe that he may be at risk of torture in their custody.

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<sup>118</sup> For a comprehensive explanation of the status of torture in international law and the impact of that status on domestic legal systems see *Countering Terrorism, Protecting Human Rights: A Manual*, *op. cit.*, note 19, Chapter 10.

The agents of state B subsequently fly X to a third country, where he is held for four months. X's conditions of detention while under the custody of country B are inhuman and degrading. He is subjected to beatings by armed guards and to violent and prolonged interrogations. He is also force-fed after a hunger strike, and is denied access to medical treatment. He is neither charged nor brought before a judge, and has no access to the outside world, including to representatives of his government.

Four month later, agents of state B fly X to a different country to release him.

**Question: Are the authorities of state A complicit in the torture of X?**

X has been subjected to torture while in state A and while in the custody of state B. He has also been subjected to torture following his transfer to a third country. When assessing whether authorities of state A can be held responsible for complicity of torture, two situations must be evaluated:

- the ill-treatment that took place at the airport, within their territory; and
- the ill-treatment that occurred in a third country.

Officials of state A facilitated the transfer of X into the custody of state B. They were present while X was tortured at the airport by officials of state B, and did not act to prevent it. As the ill-treatment was performed in state A with the acquiescence or connivance of its officials, authorities of state A are complicit in the torture and must be held responsible.

At the time of transfer, publicly available information indicated that there were serious reasons to believe that X would risk being ill-treated by agents of state B. Therefore, authorities of state A knew or should have known that X faced such a risk.<sup>119</sup> However, they did not take this risk into consideration when deciding to hand over X to state B. In these circumstances, the authorities of state A should be held responsible for complicity in torture.

\* This case study is taken from the facts in *El-Masri v. The former Yugoslav Republic of Macedonia*, and the analysis of the question on the findings of the ECtHR in that case.<sup>120</sup>

<sup>119</sup> The principle of *non-refoulement* will be further explored in section 3.5.3 of this manual.

<sup>120</sup> ECtHR, *El-Masri v. The former Yugoslav Republic of Macedonia*, Application No. 39630/09,

<sup>13</sup> December 2012, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>>.

States have a positive duty to mount an independent and effective investigation whenever there are reasonable grounds to suspect that an act of torture has been committed within their territory.<sup>121</sup> While in some countries the chances of being punished swiftly may be slim and in those countries where resort to torture and ill-treatment is systemic a climate of impunity may exist, perpetrators should bear in mind that situations change. Torture is a crime without a statute of limitations and it may be prosecuted in foreign, as well as domestic jurisdictions. Also, in some circumstances international jurisdiction may exist in cases of torture.<sup>122</sup>

### *3.5.2 Evidence Obtained by Torture or Ill-treatment is Inadmissible before any Court*

Any statements made as a result of torture must not be used as evidence in any proceedings, except in the proceedings against the perpetrator of torture.<sup>123</sup> This includes statements or confessions obtained through other prohibited treatment.<sup>124</sup> Most states have domestic legislation that provides for the exclusion of evidence where there is any doubt about its reliability or about the manner in which it was obtained. Thus, torturing or ill-treating a terrorism suspect will undermine the investigation and prosecution.

#### **Case Study – Non-admissibility of evidence obtained through torture or ill-treatment before a court\***

X is arrested and taken into police custody for suspicion of membership of an illegal organization. He is held for 11 days. In the absence of a lawyer, X makes detailed statements about the organization and its members. He later claims that law enforcement officers tortured him so he would confess.

On the last day of his custody, X is examined by a doctor, who indicates that he has severe injuries. X is then brought before a judge, who orders his detention

<sup>121</sup> See OSCE commitments and international standards, *op. cit.*, note 21; and CAT, Article 12.

<sup>122</sup> The International Criminal Court by virtue of Articles 5 and 7 of the 1998 Rome Statute can have jurisdiction over cases of torture in some circumstances. In addition, a number of countries have, under their domestic legislation, the power to prosecute cases of torture wherever they may have occurred.

<sup>123</sup> CAT, Article 15.

<sup>124</sup> See for example, HRC, General Comment No. 20, *op. cit.*, note 83, para. 12; and IACtHR, Resolution 1/08, *op. cit.*, note 101, Principle V – Due process of law.

pending trial. A complaint of ill-treatment is filed and criminal proceedings are instituted against the officers on duty.

The domestic legislation prohibits the use of evidence obtained from torture. Nevertheless, X's statement is used as evidence during his criminal trial, along with materials seized in his apartment at the time of his arrest. X is then convicted of leading an armed gang.

**Question: Does the use of X's statements as evidence violate the right to a fair trial?**

It is necessary to assess:

- whether X's statements have been obtained through torture or other forms of ill-treatment; and
- whether the use of these statements as evidence contravenes fair trial guarantees.

In the present case, there are strong presumptions that law enforcement officers ill-treated him, as corroborated by the medical report. In addition, during criminal proceedings against them, the officers did not provide any explanation for X's injuries.

Moreover, X's right to have access to a lawyer and a lawyer present during the interviews has been denied, whereas he was in a situation of particular vulnerability due to the deprivation of liberty and ill-treatment.

The right to remain silent and the right not to incriminate oneself are essential fair trial guarantees. The latter presupposes that, in a criminal case, the prosecution seeks to prove their case without using coerced evidence acquired in defiance of the accused's will.

Despite procedural guarantees afforded by domestic legislation, the evidence allegedly obtained through torture contributed to X's conviction. No matter their decisiveness in the proceedings, the statements were taken into consideration to establish the facts of the case.

The use of evidence obtained through torture or other forms of ill-treatment is strictly prohibited. X's right to a fair trial was, therefore, violated in this case.

\* This case study is taken from the facts in *Örs and Others v. Turkey*, and the analysis of the question on the findings of the ECtHR in that case.<sup>125</sup>

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<sup>125</sup> ECtHR, *Örs and Others v. Turkey*, Application No. 46213/90, 20 June 2006, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-75914>>.

### *3.5.3 The Principle of Non-refoulement Absolutely Prohibits the Expulsion, Return or Extradition of Terrorism Suspects to a Country Where they would Face Torture*

The principle of *non-refoulement* refers to the universal obligation of states not to return, expel or extradite a person to another state where there are substantial grounds for believing that the person would be in danger of being subject to torture, inhuman or degrading treatment.<sup>126</sup> Therefore, where states have a history of torturing or ill-treating suspects, or a consistent pattern of gross, violations of human rights, it is unlawful for other countries to extradite or deport persons to them.<sup>127</sup> Law enforcement officers who practice torture, including during questioning, will therefore potentially hinder future investigations and judicial proceedings by preventing the extradition and subsequent prosecution of terrorism suspects.

The principle of *non-refoulement* applies also where there are risks of irreparable harm, arbitrary detention, enforced disappearances and manifestly unfair trials.

#### **Case Study – Principle of *non-refoulement*\***

X is suspected of being involved in a clandestine opposition group in his home country. Fearing persecution, he flees to country B, where he is denied asylum. Several years later, he is arrested in country B on suspicion of belonging to a terrorist organization, but is acquitted of all charges. Two years later, when he is found to represent a danger to the national security of country B, he receives an expulsion order. X stresses that he risks being tortured if expelled to his country of origin. Media in both X's country of origin and country B have covered the case.

**Question: Would the authorities violate the principle of *non-refoulement* by expelling X to his country of origin?**

<sup>126</sup> CAT, Article 3. See also United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Report to the UN Human Rights Council, 22 December 2010, A/HRC/16/51, para. 38, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/HRC/16/51>>; and IACtHR, Resolution No. 2/06, "Guantanamo Bay Precautionary Measures", Washington, 28 July 2006, <<http://www.cidh.org/annualrep/2006eng/ANNEXES/Annex%205eng.htm>>.

<sup>127</sup> *Ibid*; CAT, Article 3.

The prohibition of torture and ill-treatment is absolute. It is not permissible to weigh the risk of torture or ill-treatment against the reasons put forward for the expulsion, including national security.

Before deporting a person to another state, national authorities must adequately assess the risk of torture or ill-treatment that the person could face there. Such an assessment should take into consideration the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The overall human rights situation in X's country of origin continues to give rise to serious concerns. Evidence from a number of objective sources demonstrates that detainees are at real risk of being ill-treated there. Although X has been acquitted in country B, his case has had broad media coverage and authorities in his country of origin have been informed of his detention for removal purposes.

Given this information, there are serious reasons to believe that X would be detained and questioned in his home country, and would be at risk of ill-treatment. Accordingly, his expulsion would violate the principle of *non-refoulement* and thus, the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment.

\* This case study is taken from the facts in *A. v. Netherlands*, and the analysis of the question on the findings of the ECtHR in that case.<sup>128</sup>

### 3.5.4 Co-operation with Foreign Law Enforcement Agencies will be Jeopardized

Law enforcement agencies complying with the rule of law and human rights are reluctant to deal with agencies in countries where there is a history of human rights abuses. This can lead to isolation and to the inability to achieve progress in investigations on the part of such agencies. Given its international character, this is an especially important consideration in the fight against terrorism, in particular in relation to the sharing of intelligence material.<sup>128</sup> Some states keep an official list of countries where torture is an issue of concern. Countries may be placed on such lists for resorting to

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<sup>128</sup> United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Theo van Boven, Report to the Human Rights Council, 3 February 2011, *op. cit.*, note 39.

interviewing techniques that use “forced nudity”, isolation, blindfolding and sleep deprivation, among others.

### *3.5.5 Torture and Ill-treatment are Ineffective*

#### **Case Study – Miscarriage of justice\***

As part of a campaign launched by a terrorist organization, two bombs explode in two crowded public places in the centre of a city. Twenty-one people are killed and more than 160 injured, many seriously. A third device, also placed in the city centre, fails to explode.

On that day, five men are stopped by the police at a ferry port. They left the city shortly before the explosions. They are on their way to attend the funeral of a member of the terrorist organization involved in the bombings. When questioned by the police at the port, they do not reveal the true purpose of their journey.

While they are questioned and searched, the police receive the news of the bombings. The men are then taken to the local police station for forensic tests and further questioning. The forensic tests on three of them appear to show that they handled explosives. Police claim that one of the men confessed while they were being held at the police station. The men later allege that they were beaten at the police station.

The following morning, the five men are handed over to police from the city where the bombs exploded. A sixth man, who saw them off at the railway station, is arrested that same day. They are all questioned at length, without being allowed to see lawyers. Five of the six men sign statements admitting they planted the bombs. Their confessions are contradictory, however, and do not add anything to what the police already know about the bombings.

At their trial, the men withdraw their confessions and allege that they were obtained as a result of ill-treatment. They state that their ill-treatment consisted of sustained punches and kicks, blows from batons and burning with cigarettes, as well as sleep and food deprivation. They were also subjected to psychological pressure, in that they were told that mobs were surrounding their houses and threatening to kill their wives and children. One man was told that his family would be protected only if he signed a confession. The men add that

police also threatened to shoot them in the legs and one of them alleges that the barrel of a pistol was put in his mouth and the trigger pulled repeatedly.

During the trial, the reliability of the forensic tests used is also disputed, and various experts state that the evidence obtained from them is unreliable. The judge, nevertheless, rules that the confessions are admissible and stresses that he prefers the evidence supporting the reliability of the forensic tests. The men are all convicted by the jury and sentenced to life imprisonment.

Almost immediately after the trial, a media campaign is launched to have their convictions overturned. A court of appeal hears the case several times and dismisses it each time. Almost 17 years after their arrest, the six men are freed. By this time there is clear evidence that the forensic tests were unreliable and overwhelming evidence that the police are guilty of perjury, violence and threats. The men's convictions are overturned. Each of them is awarded monetary compensation. Three of the police officers involved in the interrogations are later charged with perjury, but their cases are never tried.

**Question: What has been the effect of ill-treatment on the suspects' right to a fair trial? How has it impacted the prosecution of these terrorist bombings?**

The officers probably acted as they did because they felt under pressure to get a result quickly. They believed that the men were terrorist bombers and public feeling was running high. But if the six men were in fact guilty, the reprehensible actions of the police, which were only very belatedly uncovered, resulted in the violation of their right to a fair trial. This violation, in turn, led to their release and the payment of a great deal of public money as compensation. On the other hand, if – as is generally accepted and as all the evidence supports – the men were entirely innocent of any wrongdoing, then six innocent people were sentenced to spend a large part of their lives in prison with devastating effects on them and on the lives of their families, while the guilty terrorists were left free to continue bombing and killing. This case is a textbook illustration of a miscarriage of justice.

\* This case study is taken from the facts in *R v. McIlkenny and Others* before the UK Court of Appeal (Criminal Division), among other sources.<sup>129</sup>

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<sup>129</sup> UK Court of Appeal (Criminal Division), *R v. McIlkenny and Others*, 93 Crim. App. R. 287, 27 March 1991, <<http://netk.net.au/UK/McIlkenny.asp>>.

**Torture and ill-treatment are ineffective:****1. Torture and ill-treatment inhibit present and future investigations;**

Some of the best criminal informants are recruited from those who have been arrested. Violence will always distort this relationship, in turn inhibiting the performance of the police because once, violence has been used, it is almost impossible to use any legitimate interview technique.

**2. Torture and ill-treatment damage police community relations;**

A system that allows or fails to prevent torture and ill-treatment loses the respect and trust of the targeted communities. The police may consequently become the object of distrust or even hatred, thus inhibiting their effectiveness. If particular communities consider themselves to be under attack by the authorities (as a “suspect community”) based on information obtained by illegal means, such as torture, members may be reluctant to provide information that would assist police in counter-terrorism efforts. In addition, members can become radicalized and may look to terrorists for support and protection, spreading terrorism further. The general public may also lose trust in the police and may not support their counter-terrorism efforts.

**3. Torture and ill-treatment adversely affect the perpetrators; and**

People in police custody are, in effect, defenceless and the abuse of defenceless people is contrary to all recognized moral or ethical codes, whether based upon religious, ethical or legal principles. Those who show willingness to torture, abuse or humiliate others run the risk of serious conflict within their own lives and serious risk to their own psychological well-being. There will be aspects of their working lives that they cannot discuss openly with their acquaintances. They will carry the burden of secrets that they can only share with other law-breakers and criminals. Such a burden is harmful to the perpetrator’s mental health in the long term.

**4. Torture and ill-treatment are not reliable.**

Torture and ill-treatment simply do not work. People who are threatened with or subjected to torture or ill-treatment may admit to the most grievous crimes to make the pain stop, even when they are innocent of any wrongdoing. The police may not know if what is admitted is true. The result is that innocent people may be imprisoned and the offender may be left free to commit further serious crimes

### *Professional skills and interview training*

Adhering to a human rights-based approach in investigations impels the police to become more professional in their work and, thus, more effective. Abusing or neglecting human rights is “lazy policing”. It is a relatively quick and easy task to force a confession out of a suspect by ill-treating him or her. It can be a little more time consuming to gather enough evidence to make it irrelevant whether or not a suspect confesses. But with compelled confessions there is always the concern that an innocent person has been wrongly convicted.

The establishment of a formal set of rules governing the conduct of police questioning of suspects has been advocated by a number of international bodies. This may be a “Code of Practice”, form part of the law of criminal procedure, or be merely an internal policy document. Its form is largely immaterial, provided that it sets out a framework that gives clear guidance to interviewing officers. Adherence to the rules is a means of ensuring that a suspect’s human rights are not breached and provides effective protection for police officers against allegations of impropriety.

The exact content of the rules will be governed by the local legal tradition and local conditions. The following topics are examples of what a code of practice should deal with:

- At the outset of each interview, the detainee should be informed of the identity (name and/or number) of all persons present;
- The identity of all persons present should be noted in a permanent record, which should detail the time at which interviews start and end, as well as any request made by the detainee during the interrogation;
- The detainee should be informed of the permissible length of an interview, the procedure for rest periods between interviews and breaks during them, places in which they may take place, and whether the detainee may be required to stand while being questioned;
- The detainee should have the right to have legal counsel of his or her choice present during any interview;
- All interview sessions should be recorded, and the detainee or, when provided by law, his or her counsel should have access to these records;
- The authorities should regularly review procedures governing the questioning of persons who are under the influence of drugs, alcohol or medicine, or who are in a state of shock; and

- The position of particularly vulnerable persons (for example, children, those who are mentally disabled or mentally ill) should be the subject of special safeguards.<sup>130</sup>

Lack of professional skills and training in the art of questioning may be a contributing factor to the use of torture and ill-treatment. The questioning of suspects is a specialist task that calls for specific training. This is especially so in terrorism-related cases, which are often very challenging, in particular where suspects may have received training in how to counter police interview tactics. Dealing with people from different cultures, who may react in unexpected ways, and conducting the interview through an interpreter may compound these challenges.

Interviews are conducted in the context of the legal system that applies in a particular country, the role of the police *vis-à-vis* prosecutors and the facilities, such as video and audio recording, that may be available.

Some general advice and points for consideration from a human rights perspective may prove helpful:

- It is important to take time to establish a relationship with the suspect who, if he or she speaks, must do so freely and under no improper pressure from the police;
- The interviewing officers must be fully familiar and fully comply with the applicable law and the rules of procedure governing police interviews of suspects;
- They must also be fully familiar with the legal definition of the crime of which the interviewee is suspected and know what elements of the suspect's conduct they have to probe, the points they have to prove and any legal defences they may have to explore;
- They should research or be provided with the suspect's personal history and background, his or her previous dealings with the police and his or her personal circumstances;

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<sup>130</sup> Preventing Torture – *A Handbook for OSCE Field Staff*, (Warsaw: ODIHR, 1999), pp. 55–56, <<http://www.refworld.org/docid/498aaaf2.html>>.

- They must also be fully familiar with what is known about the interviewee's suspected role in the crime. This means that they have to take time to prepare by reading intelligence reports and witness statements, and by ensuring that they are properly briefed. It can be an embarrassing and significant setback to the progress of an interview if a suspect realizes that the interviewing officers are not entirely familiar with their brief and that he or she, therefore, has the upper hand;
- If the suspect is a female or a minor, it may be advisable for at least one of the interviewing officers to be female, although this is not a default rule and the relevance of doing so should be assessed on a case-by-case basis. Cultural factors existing in the jurisdiction or pertinent to the suspect should be taken into account here. In the case of a minor or other vulnerable person, such as someone who is mentally ill, a parent or guardian or other adult independent of the police should also be present to protect their interests;
- If the suspect is a member of an ethnic minority, it may be advisable for at least one of the interviewing officers to be from the same minority, so as to contribute to greater confidence and relationship-building. The particular circumstances of the case have to be taken into consideration before deciding to proceed in this way;
- The interviewing officers must also have undergone training programmes to raise their awareness of the different needs of men and women, as well as to sensitize them to the specific social, cultural and religious background of the person they will interview;
- Before starting the interview, the interviewing officers must have a plan for how they are going to conduct it. This involves more than simply deciding who will ask which questions, but must extend to the topics they intend to deal with in the interview. Not every element of the terrorism-related offence or the interviewee's suspected role in it has to be dealt with at the same time, and focussing on just one aspect in an interview can be an effective tactic;
- The plan must anticipate the likely reaction of the suspect. What are law enforcement officials going to do if he or she refuses to answer questions from the outset? What are they going to do if he or she refuses to answer any more questions after a particularly difficult question or an overwhelming piece of evidence has been put before him or her? What are they going to do if the lawyer intervenes? What are they going to do if he or she puts forward an unexpected defence?;

- The fact that a suspect does not confess does not negate the value of the interview. Depending on the laws of evidence and criminal procedure applicable in the jurisdiction, lies, evasions or a failure to explain or to contradict facts can be just as damning to a suspect as a full confession. Allowing the interviewee to spin these lies and evasions is not a waste of time; and
- Where video or audio recording facilities exist they should be used, without exception, to protect both the suspect and the police in the same way as the presence of a lawyer does. Confessions or other significant statements made by the suspect that are recorded in this way cannot later be denied in court.

Training in interview techniques, such as the PEACE Interview Model detailed in section 2.1.1 of the manual, benefit the effectiveness of police interviews and enhance the human rights of terrorism suspects. Investigators and those who assist them should receive comprehensive training – backed up by regular refresher training – in general investigation techniques, including the interviewing of witnesses, the gathering of physical evidence and the packaging and handling of forensic exhibits, with an emphasis on ensuring the continuity of the evidence chain. Any improvement in dealing with witnesses and forensic evidence will reduce the reliance on obtaining confessions for the purpose of securing convictions.

### **3.6 PROLONGED DETENTION AND ADDITIONAL QUESTIONING OF SUSPECTS**

In principle, the maximum length of initial police detention should be of short duration, no more than two or three days. Although it has not been uncommon in terrorism-related investigation to extend the periods of detention, either before or after charges are brought against a suspect, this must be strictly defined in domestic legislation, in compliance with international human rights standards. Such extended periods of detention usually take place in police stations, but sometimes also in special police detention facilities or in so called “investigative isolators” used in some OSCE participating States. These are usually manned by prison staff, but allow police and criminal investigators easy access. Both extended detention pending trial and the ease of access that the police may have to detainees can give rise to specific human rights concerns.

### *3.6.1 Prolonged Detention*

Detainees whose cases are still under investigation may be kept in detention pending trial, which should take place within a reasonable time. Such extended detention should, however, be the exception, and the release of the detainee pending trial can be decided by a judicial authority and subject to particular conditions.

Any prolonged detention, whether before or after charges are brought against a suspect, should be as short as possible, and detainees should be treated in accordance with the presumption of innocence. Particular human rights concerns arise when detention is unduly prolonged or not subjected to periodic judicial review. Prolonged and indefinite detention, as well as the uncertainty as to its duration, render any detention arbitrary and illegal. They also raise concerns related to the prohibition of torture or inhumane or degrading treatment, due to their potential effects on the mental health of the terrorism suspect. Investigations of terrorism-related offences cannot justify keeping detainees without charging them or for a prolonged or indefinite duration without trial.

Detainees suspected of terrorism-related offences sometimes may be kept in solitary confinement. This is designed to ensure that they have no opportunity to contact other suspects involved in the crimes with which they are charged and, thus, to interfere with the course of justice. It may also be justified by the potential danger posed by the suspect and should end as soon as the suspect no longer poses a security risk. However, solitary confinement should be strictly justified on these grounds and not used as a punishment. Any detainee subjected to solitary confinement should have access to an independent judicial authority to review the lawfulness of his or her isolation, including its potential continuation.

Solitary confinement of suspects poses serious human rights concerns. The impact of the solitary confinement on the suspect's mental and physical health should also be closely monitored, and any failure to end isolation in the case of negative effects would amount to cruel, inhuman and degrading treatment. Extended periods of confinement may amount to inhuman or degrading treatment, taking into consideration the purpose of the application of solitary confinement, the conditions, such as the level of sensory deprivation and social isolation, the length and effects of the treatment on the detainee's mental and physical health, and the particular

characteristics of each detainee that make him or her more or less vulnerable to those effects.<sup>131</sup>

Solitary confinement should remain exceptional.

### **Case Study – Solitary confinement\***

X is suspected of being involved in terrorist activities and is placed in solitary confinement for security reasons. Despite domestic regulations limiting the use of solitary confinement to up to 30 days, X is systematically put back in isolation after very short breaks. His solitary confinement lasts close to 18 months in total.

Different reports by NGOs allege that the prolongation of his confinement aims at countering his resistance, pressuring him and causing him stress. Evidence indicates that X is also subjected to practices that include withholding of clothes or of hygienic products, permanent light in his cell, cultural and religious harassment, intimidation, total sensory deprivation and total social isolation. X is also denied access to independent tribunals.

#### ***Question: Does X's solitary confinement constitute torture or cruel, inhuman or degrading treatment or punishment?***

Placing a dangerous terrorism suspect in solitary confinement is an extraordinary measure that may be necessary for security reasons. However, depending on its length, purpose, conditions and other practices inflicted on the detainee, solitary confinement may amount to torture or cruel, inhuman or degrading treatment.

- Length of the solitary confinement: the longer the isolation, the greater the risk of serious and irreparable harm to the detainee. A “prolonged solitary confinement”, defined by international bodies as exceeding 15 days, might amount to torture or other cruel, inhuman or degrading treatment. In the present case, the initial period of solitary confinement exceeded twice this threshold, and lasted 18 months in total. The uncertainty surrounding the length of solitary confinement exacerbated X's pain and suffering.

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<sup>131</sup> United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, Report to the General Assembly, 5 August 2011, A/66/268, paras. 70–78, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/66/268>>.

- Purpose of the solitary confinement: The confinement was allegedly to “break” X. The use of solitary confinement during pre-trial detention to put pressure on detainees to confess or collaborate undermines the integrity of the investigation and amounts to torture or other cruel, inhuman or degrading treatment.
- Conditions of the solitary confinement: Although they are not all fully known, these included complete sensory deprivation and total social isolation, which constitute a form of inhuman treatment. When solitary confinement is used as part of a coercive interviewing technique and coupled with other coercive practices, such as withholding clothes or hygienic products, permanent light in the cells or cultural and religious harassment and intimidation, they undoubtedly constitute inhuman or degrading treatment, and might in some instances even amount to torture.

In light of the above, the length, purpose and conditions of solitary confinement constitute inhuman or degrading treatment and, therefore, violate the prohibition of torture and other cruel, inhuman or degrading treatment on several grounds.

\* This case study is based taken from the facts in both *Ramirez Sanchez v. France* and *Öcalan v. Turkey*, and the analysis of the question on the findings of the ECtHR in these cases.<sup>132</sup>

Solitary confinement may also frustrate aspects of the investigation. Confinement can be used – deliberately or not – to put pressure on detainees to confess or to provide information. Where investigators are able to dictate the conditions under which detainees are held (whether in law or merely in practice), as is the case in a number of OSCE participating States, they can take undue advantage of the situation. This creates a real danger that the offer of contact with family or a relaxation in detention conditions can be

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<sup>132</sup> See, United Nations Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui, Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Special Rapporteur on freedom of religion or belief, Asma Jahangir, and Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, “Report on the Situation of detainees at Guantánamo Bay”, 27 February 2006, E/CN.4/2006/120, paras. 53 and 87, <<http://www.un.org/Docs/journal/asp/ws.asp?m=E/CN.4/2006/120>>; and the ECtHR case law on solitary confinement in terrorism-related cases (ECtHR, *Ramirez Sanchez v. France*, Application No. 59450/00, 4 July 2006, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76169>>; and ECtHR, *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022>>).

used, subtly or unsubtly, as an inducement to confess. This gives rise to the potential risk of a confession being ruled inadmissible at a subsequent trial, on the grounds that it was only made in order to obtain some benefit and, thus, is unreliable.

There is the potential that extended periods of confinement will give rise to "Stockholm Syndrome".<sup>133</sup> The detainee may come to depend on the investigators as the only regular contact they have with people other than their lawyer. Often investigators authorize and/or dictate the level and frequency of contact with the lawyer. This will especially be the case when a detainee is frightened, anxious or feels powerless and believes that the investigator is solely responsible for his or her basic needs and well-being. He or she may feel indebted to the investigators whenever some small favour is done, such as the granting of an extended exercise period or the supply of reading material, and feel the need to comply with their wishes. Where this happens, the reliability of any confession or information obtained must be in doubt.<sup>134</sup>

### *3.6.2 Additional Questioning of Suspects Remanded to Prison Custody*

There will be times when it is desirable to interview a detainee who is in pre-trial detention – or even a convict who is serving a term in prison – about serious terrorism-related offences. As a matter of general principle, it is preferable for the investigators to go to the pre-trial detention centre or to the prison where the suspect is being held. Occasionally, however, it may be necessary to transfer the suspect to a police station or other police detention facility. Lengthy interviews or particular procedures, such as identification parades or confrontations, may be more easily carried out in police premises. Whether the interviews take place in pre-trial detention, prison or at the police station, the access of the detainee to legal counsel of his or her choice should be guaranteed.

When such circumstances arise, it is good practice for the transfer to be authorized only at the request of a prosecutor or of a senior police officer, and it is essential that all of the safeguards that would apply in normal police custody also apply in these circumstances. Thus, the suspect will have the same

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<sup>133</sup> This was originally used to describe behaviour in a hostage situation in which some hostages begin to identify with their captors and to develop strong positive feelings for them.

<sup>134</sup> Karl A. Roberts, "Police Interviews with Terrorist Suspects: Risks, Ethical Interviewing and Procedural Justice", *The British Journal of Forensic Practice*, Vol. 13, No. 2, 2011, pp. 124–134.

rights to have someone of his or her choice notified of his or her arrest, detention, imprisonment and whereabouts, to have access to legal counsel of his or her choice and to medical attention, as if he or she had just been arrested.

**KEY POINTS – PART 3:**

- Arrest must be based on reasonable suspicion, suspects must be informed promptly of the reasons for the arrest and must be brought promptly before a judge or judicial authority to determine the lawfulness and necessity of the arrest or detention;
- Any force used during an arrest must be absolutely necessary and proportionate;
- When planning operations to arrest terrorism suspects, senior officers have a responsibility to put in place a system that is robust and thorough enough to ensure that any errors are prevented or detected in time;
- Every suspect in custody has the right to be promptly informed about his or her rights according to domestic law; to have someone of his or her choice notified of his or her arrest, detention, imprisonment and whereabouts; to challenge the lawfulness of his or her arrest and detention; to have access to legal counsel of his or her choice and to medical attention;
- Torture and ill-treatment are crimes; and
- Torture and ill-treatment are ineffective.

**TEMPLATE LEARNING PLAN ON ARREST, DETENTION  
AND PROCESSING OF TERRORISM SUSPECTS**

<b>Competencies</b>	<b>Learning outcome necessary to attain proficiency</b>	<b>Methods</b>
<p>1. The ability to carry out an arrest within the law;</p> <p>2. The ability to know when and how to use force;</p> <p>3. The ability to safeguard a suspect in custody; and</p> <p>4. The ability to interview a suspect;</p> <p>All in compliance with international, regional, and national human rights standards</p>	<p><b>Knowledge of:</b></p> <ul style="list-style-type: none"> <li>• Human rights concerns surrounding arrest, detention and processing of terrorism suspects:           <ul style="list-style-type: none"> <li>→ Right to life;</li> <li>→ Prohibition of torture and other cruel, inhuman or degrading treatment;</li> <li>→ Right to a fair trial;</li> <li>→ Freedom from arbitrary arrest or detention;</li> <li>→ Right to be promptly informed about one's rights according to domestic law;</li> <li>→ Right to notify appropriate persons of one's choice of one's arrest, detention, imprisonment and whereabouts;</li> <li>→ Right to challenge the lawfulness of an arrest and detention;</li> <li>→ Right to legal counsel of one's choice; and</li> <li>→ Obligation to secure medical attention.</li> </ul> </li> <li>• What constitutes reasonable suspicion;</li> <li>• What comprises the prohibition of arbitrary arrest and detention, including the grounds for arrest and detention;</li> <li>• National legislation authorizing arrest and detention;</li> <li>• What techniques exists to avoid the use of force;</li> <li>• When the use of force is permitted, how to apply it as a last resort, proportionally and how to account for it;</li> <li>• The elements for planning operations, particularly in order to protect the life and physical integrity of everyone involved (bystanders, terrorism suspects and officers);</li> <li>• How to question terrorism suspects;</li> <li>• Torture and ill-treatment as a crime;</li> <li>• The principle of <i>non-refoulement</i>;</li> <li>• How to treat the legal counsel of terrorism suspects; and</li> <li>• How to respect the dignity of terrorism suspects when searching them.</li> </ul>	<p><b>Learning tools:</b></p> <ul style="list-style-type: none"> <li>• Presentations based on text from the manual;</li> <li>• Copies of human rights standards for use when in service;</li> <li>• Group analysis of case studies and shared discussion of outcomes;</li> <li>• Group discussions, and feedback from trainer;</li> <li>• Simulation of both arrest and questioning of terrorism suspects to practice skills and review reactions of trainees in challenging situations; and</li> <li>• Recording performance during simulations to reflect on improvements needed and to assess progress.</li> </ul>

**Values and Attitudes:**

- Willingness to act to protect the human rights of everyone involved (bystanders, terrorism suspects and officers);
- Capacity to carry out an operation, arrest and detention effectively and safely;
- Capacity to act under pressure in accordance with the law, particularly in the use of force, firearms and when questioning terrorism suspects;
- Commitment to use force, especially lethal force, as a last resort;
- Readiness to use force proportionally, legally and to account for it;
- Commitment to use best practice in accordance with human rights standards when planning an operation and executing an arrest; and
- Commitment to safeguarding the mental and physical integrity of terrorism suspects in custody.

**Skills:**

- Ability to carry out the arrest or detention of a suspect within the law, with continuous consideration to the:
  - Right to life;
  - Prohibition of torture and other cruel, inhuman or degrading treatment;
  - Right to a fair trial;
  - Freedom from arbitrary arrest or detention;
  - Right to be promptly informed about one's rights according to domestic law;
  - Right to notify appropriate persons of one's choice of one's arrest, detention, imprisonment and whereabouts;
  - Right to legal counsel of one's choice;
  - Obligation to secure medical attention;
- Ability to apply non-violent means before resorting to the use of force and making use of firearms only as a last resort, in compliance with human rights standards;
- How to carry out a search respecting the dignity of the suspect;
- How to question a suspect in order to gather information; and
- How to treat a terrorism suspect in custody.

**Assessment methods:**

- Written test on knowledge;
- Fishbowl exercises to test attitudes and skills;
- Review of performance and progress throughout the course; and
- Aggressive attitude and negative remarks about working in compliance with human rights to weigh strongly in the final pass-or-fail outcome.

**Follow-up** of expected learning outcomes during performance review sessions with superior and supervisors



# Part 4

## **SECURITY, INTEGRITY AND ACCOUNTABILITY**

### **KEY QUESTIONS:**

- What steps must be taken to ensure the security and integrity of investigations?
- In what ways are law enforcement agencies accountable for the manner in which they conduct criminal investigations?

#### **4.1 SECURITY AND INTEGRITY OF INVESTIGATIONS**

Ensuring the integrity of investigations and of intelligence databases is extremely important in all criminal inquiries, but is especially so in investigations into terrorism. Terrorist groups have been known to attempt to infiltrate law enforcement organizations, with a view to discovering what the authorities know about them and to learning of police tactics. Given the nature of terrorism there is also the serious possibility that existing members of the police may, for ideological reasons or monetary gain, betray their oath and divulge confidential information or give warning of impending operations. Moreover, some police officers may be blackmailed using details from their personal lives. For these reasons it is essential that all staff working on counter-terrorism operations are security vetted before being given access to confidential information. An ongoing strategy to maintain security and to prevent and detect corruption also needs to be put in place.<sup>135</sup>

The vetting process has to be thorough but, as with all interference with human rights – in this case, the right to private and family life – it must also be proportionate. The greater the level of access to confidential information and, therefore, the greater the damage that a staff member could inflict, the greater the degree of intrusion into his or her personal life and background. In many cases, members of the officer’s family may also have to be vetted.

Each law enforcement organization will have its own policies governing the prevention and detection of internal threats, based on regulations in force within the jurisdiction. Efficient measures to ensure the integrity and proper performance of law enforcement staff and combat corruption at all levels must, however, safeguard human rights.<sup>136</sup>

<sup>135</sup> There is no common international definition of the term “corruption”, but it is used here in its widest sense to denote activities such as bribery and the fabrication or destruction of evidence for whatsoever motive.

<sup>136</sup> UN Code of Conduct for Law Enforcement Officials, *op. cit.*, note 43, Articles 4 and 7.

The following points of good practice have universal application:

- Ethical personnel policies are essential in maintaining high levels of integrity. Robust systems of selection, including appropriate levels of vetting, should operate at every stage of a police officer's career, from initial recruitment to selection for specialist posts to promotion. Those who apply for certain high risk posts, such as in counter terrorism, should be subject to enhanced vetting, including of their lifestyle and financial affairs and those of their family members. Any change in personal circumstances occurring after the vetting process has been completed should be notified promptly. Vetting should be repeated at regular intervals;
- Integrity should be a standard feature of training courses, especially those for high risk specialist roles and management posts;
- A culture of confidentiality should be established, including a constant assumption that the security of investigations and intelligence databases is at risk. A "clear desk" policy should be the norm. Great emphasis should be placed on the "need to know" and systems put in place to protect information, including auditing of database activity, integrity testing and dip sampling. Physical access to areas within police premises housing intelligence units, counter-terrorism units and those investigating terrorism-related crimes should be restricted. At the same time, the right balance must be struck with the ability to freely share information with others who need to know;
- The use of informants and undercover agents must be properly controlled and their activities constantly assessed for risk that they can be used as a method of infiltrating police organizations. Those responsible for recruiting and handling informants and undercover agents must receive appropriate levels of training and supervision;
- The climate of the agency should encourage and support members of staff who have suspicions about the integrity of colleagues to come forward as courageous "whistle blowers". There is no place in any law enforcement organization for a culture in which police officers keep silent about suspected wrongdoings by other police officers due to a misplaced sense of loyalty;
- All senior officers and supervising officers need to demonstrate leadership and exercise active supervision of their staff. They must be capable of identifying, preventing, challenging and dealing effectively with corrupt and unethical behaviour – complacency is the enemy of security, constant vigilance is essential.

## 4.2 ACCOUNTABILITY

The accountability of law enforcement agencies is a crucial aspect of ensuring that criminal investigations are human rights-compliant. The requirement of justifying decisions and actions to an external, independent body makes law enforcement agencies give more careful consideration to what they are doing and makes them more effective in their work. It is understood that much that these agencies do, especially in terrorism-related investigations, is sensitive and must remain confidential. However, as far as possible, law enforcement agencies should be transparent in order to minimize public misconceptions.

Accountability takes several forms and is not the same as operational control. In democratic societies, law enforcement agencies should not be subject to external direction in operational matters, and should have operational autonomy. In some jurisdictions, criminal investigations are subject to the direction of the prosecutor or other judicial authority.

Accountability is important, as law enforcement agencies possess great authority and power to intrude into the lives of individuals. They have the power to deprive people of their liberty. They do this on behalf of the public and are paid by the public. Therefore, they are accountable to the public for what they do and how they do it. They are also accountable to the executive, legislature and judiciary branches of government. The parliament exercises control by passing laws that regulate the police and their powers, but also by instituting mechanisms, such as commissions or ombudsperson institutions, that may initiate investigations *ex officio* or following complaints by the public. The government at the central, regional or local level, as the case may be, exerts control through the power of the purse. The government, moreover, establishes general priorities and detailed regulations for law enforcement actions, though operational independence remains the prerogative of law enforcement agencies. Finally, the courts serve a control function through civil and criminal proceedings initiated by other state bodies and the public.<sup>137</sup> In counter-terrorism matters, the most important element of this form of accountability is that to the judiciary both at the national and international levels.

An essential element of accountability is the keeping of proper records, especially for subsequent legal proceedings that may take place a long time after

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<sup>137</sup> General guidance is drawn from Council of Europe Recommendation Rec(2001)10, *op. cit.*, note 108, para. 60.

the investigation is begun. The lead investigator should maintain a logbook, in which he or she records all of the critical, significant and strategic decisions, together with the reasons for them, in full. The logbook should be used to record the progress of the investigation.

Examples of the type of decisions that should be recorded in a logbook are:

- The identification of someone as a suspect where reasonable suspicion exists;
- The decision that there are reasonable grounds to arrest a suspect;
- The decision to delay arresting a suspect;
- The decision to arrest and detain a suspect, including the name of the arrestee; the time and place of arrest; the reasons for arrest and detention; the place of custody (and possible transfer of the suspect to another location); the time in and out of detention; the identity of the officers involved; and information on the first appearance of the suspect before a judicial authority;<sup>158</sup>
- The decision to deploy an SIT;
- The main lines of enquiry;
- The area designated as a crime scene;
- The type of forensic examinations requested; and
- The decision to offer witness protection.

It is often just as important to record why something was *not* done as it is to record why it was done, including the key facts impacting the decision, in order to put the decision in context. It is also vital to record the decision at the time it was made, or very shortly thereafter. The facts of a situation can change and a decision that was sound when made may appear unsound many months later in court. If the facts and the reasoning were recorded contemporaneously, it is then easier to justify what was decided. As well as serving as a useful memory aid in subsequent legal proceedings, recording the reasons also helps to focus the lead investigator's mind and ensure that the decision-making process is robust and the rationale for the decision is sound.

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<sup>158</sup> *Guidebook on Democratic Policing by the Senior Police Adviser to the OSCE Secretary General, op. cit.*, note 18, p. 33.

Accountability also entails allowing inspection bodies access to places of detention and police stations. These inspection bodies may be treaty-monitoring bodies established under international human rights treaties that states have ratified, such as the United Nations Subcommittee on the Prevention of Torture and the European Committee for the Prevention of Torture of the Council of Europe; OSCE monitors; National Preventive Mechanisms established in states that have ratified the Optional Protocol to the UN Convention Against Torture, or NGOs monitors. These bodies enter places of detention to inspect material conditions and to ensure the safety and well-being of detainees.

Some law enforcement personnel may be wary of allowing outsiders to enter police stations without notice, to inspect detention areas or to speak in private with detainees.

There are a number of benefits to this type of external inspection:

- It provides an extra level of protection for detainees;
- It provides reassurance to communities, especially to ethnic and other minorities, which may be especially important in terrorism cases;
- It demonstrates the commitment of the police to being transparent and open to the public, especially when civil society is involved by being part of the National Preventive Mechanisms;
- It improves the management of police custody facilities by highlighting areas that need attention;
- It helps to ensure that law enforcement activities are carried out fairly and with respect for all; and
- It provides protection for law enforcement agencies against malicious allegations, in much the same way that the presence of a lawyer does.

Accountability also takes the form of independent and effective investigations, including civilian oversight, into allegations of misconduct. States have a duty under international law to mount such investigations when torture is alleged or police misconduct is suspected. This duty includes holding superior officers accountable when they give unlawful orders or fail to take all measures in their power to prevent, suppress or report misconduct by their subordinates that they were aware of or should have been. Police regulations should provide subordinates with the opportunity to refuse to execute manifestly unlawful orders or to report misconduct without being exposed to

criminal or disciplinary sanctions. In such cases, obedience to superior orders cannot be used to justify misconduct.<sup>139</sup>

An independent and effective police complaints system is of fundamental importance for the operation of a democratic and accountable police service. Independent and effective handling of complaints enhances public trust and confidence in the police and ensures that there is no impunity for misconduct or ill-treatment.

#### *4.2.1 Civil Society*

It is important for overall accountability through the organs of the state to be complemented by means by which law enforcement agencies can be held directly accountable to civil society. There are a number of ways of achieving this, such as the formation of local community groups and/or the involvement of NGOs working in the criminal justice or human rights fields. The public and NGOs could provide oversight in the form of review boards of police casework and detention monitoring. NGOs could also undertake activities such as monitoring and reporting on law enforcement, particularly police practices and ways of investigating cases of misconduct, organizing awareness-raising campaigns and handing public complaints against the police. NGOs also have a role to play in co-operating with law enforcement agencies to enhance the respect for human rights, through contributing to reform processes and developing policy manuals and training programmes on human rights.

The degree of involvement of civil society may vary from one country to another. Civil society oversight is crucial and the fight against terrorism cannot be used as an excuse to deny it; any factors preventing such oversight should, therefore, be removed. When law enforcement misconduct is properly investigated, this oversight can contribute to awareness of law enforcement efforts to investigate and punish human rights violations and, thus, to the building of public confidence.<sup>140</sup>

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<sup>139</sup> UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *op. cit.*, note 74, Principles 24 – 26.

<sup>140</sup> *Guidebook on Democratic Policing by the Senior Police Adviser to the OSCE Secretary General, and Good Practices in Building Police-Public Partnerships by the Senior Police Adviser to the OSCE Secretary General*, *op. cit.*, note 18, p. 25 and p. 24 respectively.

Building public trust in law enforcement activities is pivotal in the anti-terrorism context. Civil society organizations contribute to the prevention of terrorism through their activities addressing the conditions conducive to terrorism, such as by promoting human rights and non-discrimination, preventing and resolving tensions within and between communities, or supporting victims of terrorism to counter the dehumanization of victims in terrorist narratives. Law enforcement authorities should, therefore, seek to engage with civil society organizations based on transparency, trust and accountability.

#### *4.2.2 The Media*

Another means of being accountable to the public is through the mass media. This is the ideal way of informing the public of terrorism-related crimes that have taken place and of providing reassurances that law enforcement agencies are working hard to deal with them and to prevent further offences. It has the added advantage of giving law enforcement agencies, in particular the police, the choice of what to say and when to say it. Information can thus be released at a time when it best suits the needs of the investigation.

The relationship with the media needs to be nurtured, but also needs to be kept on a professional basis. It is essential that law enforcement agencies and the media have strong relationships, recognizing their respective roles in society. A free press is one of the cornerstones of a democratic society and is not served by a relationship of mutual mistrust and hostility, or by collusion between the media and law enforcement. Law enforcement agencies and the media should co-operate, but law enforcement agencies have to recognize that the media play a role in holding them to account, by questioning them and drawing attention to problems, as well as when things have gone well. As far as possible, commensurate with the need to ensure confidentiality, the police should be open with journalists about what they are doing and why they are doing it. They should never lie to reporters or deceive them, as eventually this will almost certainly backfire.

A pitfall to be aware of is the potential for law enforcement statements that are broadcast or published to affect the right to a fair trial, such as in the presumption of innocence. When an alleged terrorism-related crime has taken place it is very easy for the police spokesperson to use immoderate language in describing what has happened and in expressing opinions about the morality of the suspects. There is a need to be especially careful when circulating details about wanted persons, particularly if they are named or if information

on particular characteristics, such as their physical appearance and ethnicity, are not sufficiently grounded. Some countries, especially those where jury trials are used, have very strict laws concerning anything that could possibly affect the outcome of a trial. Public statements that have too great a prejudicial effect can result in judges dismissing charges on the grounds that it is impossible for the accused persons to get a fair trial. The identity or any personal information about the witnesses and victims of a terrorism-related crime should not be disclosed in the media, in order to ensure their security and protect their privacy.

#### **KEY POINTS – PART 4:**

- Taking appropriate measures to protect the security and integrity of investigations and intelligence databases is essential in ensuring the protection of human rights and the effectiveness of investigations;
- Law enforcement agencies in terrorism-related investigations are accountable to the state (the legislature, the executive and the judiciary) and to civil society and the media;
- Accountability contributes to creating trust between the public and law enforcement agencies; and
- Accountability helps to ensure that law enforcement actions and operations are effective.

**TEMPLATE LEARNING PLAN ON SECURITY,  
INTEGRITY AND ACCOUNTABILITY**

<b>Competencies</b>	<b>Learning outcome necessary to attain proficiency</b>	<b>Methods</b>
<p>1. The ability to safeguard the security and integrity of investigations;</p> <p>2. The ability to work in accordance with ethical policies;</p> <p>3. The ability to keep accountable records; and</p> <p>4. The ability to understand the role of external inspections and monitoring;</p> <p>All in compliance with international, regional and national human rights standards.</p>	<p><b>Knowledge of:</b></p> <ul style="list-style-type: none"> <li>What steps need to be taken to ensure the security and integrity of investigations;</li> <li>Ethics policies;</li> <li>The importance of accountability for law enforcement agencies as a crucial aspect of ensuring that criminal investigations are human rights-compliant;</li> <li>The different types of oversight of law enforcement activities;</li> <li>The obligation to investigate any allegations of police misconduct;</li> <li>The significance of keeping proper records and what type of information to record;</li> <li>The external bodies that can inspect premises, their role and the advantages of having inspections take place; and</li> <li>The contribution civil society provides to the work of law enforcement officials.</li> </ul> <p><b>Values and Attitudes:</b></p> <ul style="list-style-type: none"> <li>Ability to act in accordance with ethical codes and policies;</li> <li>Willingness to work in an open, transparent and accountable fashion;</li> <li>Commitment to keeping updated and reliable records of the actions taken;</li> <li>Openness to be subjected to external independent inspections;</li> <li>For senior officers and/or supervisors, commitment to identify, prevent, challenge and deal fairly and effectively with any unethical behaviour;</li> </ul>	<p><b>Learning tools:</b></p> <ul style="list-style-type: none"> <li>Presentations based on text from manual;</li> <li>Copies of ethics policy for use when in service; and</li> <li>Group discussions, feedback from trainer.</li> </ul> <p><b>Assessment Methods:</b></p> <ul style="list-style-type: none"> <li>Written tests on knowledge;</li> <li>Fishbowl exercises to test attitudes and skills;</li> <li>Review of performance and progress throughout the course; and</li> <li>Aggressive attitude and negative remarks about working in compliance with human rights to weigh strongly in the final pass-or-fail outcome.</li> </ul> <p><b>Follow up</b> of expected learning outcomes during performance review sessions with superior and supervisors.</p>

- Commitment to respect the monitoring role of civil society; and
- Willingness to engage with civil society in a transparent, trustful and accountable manner.

**Skills:**

- Ability to follow the necessary steps to ensure the security and integrity of investigations;
- Proficiency in the application of ethical policies when discharging professional duties;
- For senior officers and supervisors, the ability to identify, prevent, challenge and deal fairly and effectively with any unethical behaviour;
- Competence in carrying out criminal investigations that are human rights-compliant;
- Ability to keep detailed and accurate records;
- Ability to welcome external bodies when carrying out inspections; and
- Ability to listen and take into consideration the contributions provided by civil society.

# Conclusion

Human rights are the basic and essential foundation of democratic policing. Without them, policing risks becoming oppressive; with them, it is a powerful means of protecting society. Respect for the individual's fundamental rights as an objective of law enforcement activities is possibly the most significant symbol of a society governed by the rule of law and is an essential commitment made by OSCE participating States.

Those states have committed themselves to put in place national legislative frameworks that translate international human rights standards into domestic laws and to establish relevant accountability and oversight mechanisms.<sup>141</sup> Such a framework and other relevant regulations are crucial to guiding law enforcement officers on how to conduct their duties in line with international human rights standards. Similarly, the rights of these officers themselves have to be spelled out and protected under national legislation and practices, in line with relevant international standards.

It is also important to properly train law enforcement officers to enhance their understanding of human rights standards and their operational applicability. This manual, and its training curriculum templates in particular, aims to support national efforts in developing specific courses on the protection of human rights in counter-terrorism investigations.

The requirement to comply with human rights principles is not a burden imposed on law enforcement that inhibits them from carrying out their duties. It is, on the contrary, a tool for them to more effectively perform their work. Examples throughout this manual have demonstrated that law enforcement officers are better placed to conduct successful counter-terrorism investigations where human rights standards are respected and protected.

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<sup>141</sup> OSCE Copenhagen Document, *op. cit.*, note 21.

Terrorism-related offences are criminal acts and law enforcement responses to these acts cannot, and should not, differ from those used for any other criminal offences. Countering terrorism does not justify exceptions to the adherence to human rights standards by law enforcement officers.

In addition to providing law enforcement officers with operational added value, the observance of human rights equips them with a strategic advantage over the terrorist threat they are fighting. By respecting and protecting the human rights of all – other officers, suspects, victims and witnesses – law enforcement officers contribute to countering the terrorist narratives that, among others, invoke human rights violations by the state to convince new followers.

# Annex A:

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