

The assessment of police violence in the Netherlands

by Jair Schalkwijk¹

This article examines to what extent Dutch legal practice in the criminal assessment of police use of physical force aligns with the case law of the European Court of Human Rights (ECtHR). According to the European Convention on Human Rights (ECHR), police violence must be absolutely or strictly necessary in response to the conduct of the individual concerned, and any investigation into such violence must be independent. Dutch legal practice, however, appears to contain several elements that do not comply with this case law.

1. Introduction

At the end of 2024, the District Court of Midden-Nederland acquitted two police officers from The Hague of assault.² The incident occurred on March 14, 2021, during a demonstration against coronavirus measures on the Malieveld. A demonstrator threw a jumper cable toward a police dog handler. When the demonstrator³ ran toward the handler, another dog handler decided to intervene. The officer pushed the demonstrator, who fell onto his back, after which violence immediately ensued, consisting of baton strikes and kicks.⁴ The demonstrator did not comply with the order to lie on his stomach, prompting the police to use further force. He was bitten by the dog, struck with the baton, and kicked (in the direction of) his stomach. Footage of the violent arrest was widely shared online. The UN Special Rapporteur on Torture described it as ‘one of the most horrific images of police violence he had seen since George Floyd,’ referring to the American man killed by a police officer in Minneapolis on May 25, 2020.⁵ In response, Dutch police unions filed a formal complaint against the UN envoy.⁶ After a criminal report was filed, the Public Prosecution Service brought charges against the two officers. The court ruled that the use of force was proportionate and subsidiary, adding that criminal courts should exercise caution when assessing the use of force by police officers. The acquittal is striking in light of previous international criticism and raises the question of whether the Dutch approach to assessing police violence is consistent with international human rights standards governing the use of force by law enforcement.

Case law of the European Court of Human Rights (ECtHR) under Article 2 of the European Convention on Human Rights (ECHR) establishes that when the police use force with a (potentially) lethal outcome, no more force may be used than is absolutely necessary,⁷ and only to

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 - 2 District Court of Midden-Nederland, December 19, 2024, ECLI:NL:RBMNE:2024:6928; District Court of Midden-Nederland, December 19, 2024, ECLI:NL:RBMNE:2024:6929.
 - 3 The man can no longer invoke the right to demonstrate, as he is no longer acting peacefully. For the sake of clarity, he will hereafter be referred to as ‘the demonstrator.’
 - 4 D. Schouten, ‘Politie slaat met veel geweld demonstranten van Malieveld’ (video), 2022, available at: youtube.com/watch?v=uvUD44YNcDU&t=613s
 - 5 ad.nl/binnenland/vn-rapporteur-haalt-uit-naar-haagse-politie-een-van-walgelijkste-voorbeelden-sinds-george-floyd-a5d0b409/, January 4, 2022.
 - 6 ‘Politiebonden dienen klacht in tegen VN-rapporteur Nils Melzer,’ *de Volkskrant*, January 5, 2022. Available at: volkskrant.nl/nieuws-achtergrond/politebonden-dienen-klacht-in-tegen-vn-rapporteur-nils-melzer-b24f1e9b/
 - 7 European Court of Human Rights, 27 September 1995, *McCann and Others v. the United Kingdom*, ECLI:CE:ECHR:1995:0927JUD001898491, paragraphs 148–150.

avert an immediate threat to life or to prevent serious bodily harm.⁸ The investigation into any fatal incident must be conducted by persons who are practically independent from those involved in the incident or the structures connected to it.⁹ Article 3 of the ECHR prohibits torture and inhuman or degrading treatment or punishment. The general rule is that the use of physical (non-lethal) force by the police is permissible only when strictly necessary due to the person's conduct.¹⁰ A key question in this context is: Was the use of force necessary at all to achieve the intended objective, or could that objective have been achieved without force? This relates to the precise moment at which the police decide to resort to force.¹¹ From a procedural perspective, Article 3 of the ECHR, like Article 2, requires that investigations into the use of force be genuinely independent, with no hierarchical or institutional connections to the individuals or bodies involved.¹²

This article examines the extent to which Dutch legal practice regarding the criminal assessment of police violence aligns with the case law of the European Court of Human Rights (ECtHR) outlined above. The focus is on the criminal evaluation of police officers' actions. Disciplinary sanctions resulting from internal procedures and procedural irregularities under Article 359a of the Dutch Code of Criminal Procedure fall outside the scope of this article. For the purposes of this study, *legal practice* refers to the assessment of police violence by the police themselves, the Public Prosecution Service, courts handling Article 12 Code of Criminal Procedure cases, and criminal courts. After discussing the relevant literature, the article examines Dutch legal practice in more detail, followed by the findings and conclusions. The article ends with a discussion of the implications of these findings.

2. Strictly necessary and independent

This section examines Dutch academic literature concerning the two ECHR requirements highlighted in the introduction: first, that the use of force must be absolutely or strictly necessary as a result of the individual's own conduct; and second, that any investigation into the use of such force must be independent.

Absolute or strict necessity

In Dutch academic literature, there are very few contributions addressing whether Article 7 of the Police Act, which enshrines the principles of proportionality and subsidiarity, complies with the ECHR requirement of absolute or strict necessity. In a commentary on the *Bouyid v. Belgium*

8 European Court of Human Rights, 6 July 2005, *Nachova and Others v. Bulgaria*, ECLI:CE:ECHR:2005:0706JUD004357798, paragraphs 95 and 107: 'Recourse to potentially deadly force cannot be considered "absolutely necessary" where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence.'

9 European Court of Human Rights, 15 May 2007, *Ramsahai and Others v. the Netherlands*, ECLI:CE:ECHR:2007:0515JUD005239199, paragraph 325: 'For the investigation to be "effective" in this sense, it is generally necessary that those responsible for and conducting the investigation be independent from those implicated in the events. This means not only the absence of any hierarchical or institutional connection, but also practical independence [...]. What is at stake here is nothing less than public confidence in the State's monopoly on the use of force.'

10 European Court of Human Rights, 28 September 2015, *Bouyid v. Belgium*, ECLI:CE:ECHR:2015:0928JUD002338009, paragraphs 100–102: 'Any recourse to physical force which has not been made strictly necessary by the person's conduct diminishes human dignity and is, in principle, an infringement.' The reasoning established in *Bouyid v. Belgium* was reiterated, among others, in European Court of Human Rights, 22 October 2024, *Hesselink v. the Netherlands*, ECLI:CE:ECHR:2024:1022JUD002400820, paragraph 15.

11 Amnesty International Netherlands (2015). *Use of Force*. p. 18. Retrieved from https://www.amnesty.nl/content/uploads/2017/07/guidelines_use_of_force_eng.pdf?x97316

12 European Court of Human Rights, 28 September 2015, *Bouyid v. Belgium*, ECLI:CE:ECHR:2015:0928JUD002338009, paragraph 118: 'Generally speaking, for an investigation to be effective, the institutions and persons responsible for carrying it out must be independent from those targeted by it. This means not only the absence of any hierarchical or institutional connection, but also practical independence.'

judgment, the annotator merely observed that Dutch law is ‘not (entirely) in line’ with the case law of the ECtHR.¹³ A student from Groningen concluded in her master’s thesis that the Dutch assessment framework is less stringent than the European framework, as Dutch criminal courts apply a more restrictive approach.¹⁴ A comprehensive study on the nature, extent, background, consequences, and resolution of police violence in the period 2005–2016 did refer to the ECHR, but did not include the relevant ECtHR rulings on this matter.¹⁵ Likewise, a WODC study on the possibilities for citizens to influence procedures assessing police use of force failed to address this issue.¹⁶ A more recent evaluation of how the police account for and learn from incidents involving the use of force also did not examine this aspect.¹⁷ In recent years, scholarly attention has instead focused on topics such as the draft bill on the use of force by law enforcement officers,¹⁸ the compatibility of officers’ duty to report the use of force with the ECHR (without addressing absolute or strict necessity),¹⁹ and the concept of police disciplinary law.²⁰

The State’s monopoly on the use of force is limited by the Police Act and the Ambtsinstructie. A key legal provision in this regard is Article 7 of the Police Act, which, as noted above, sets out the principles of proportionality and subsidiarity. This means that the risks and consequences of using force must be proportionate to the objective pursued, and that the objective cannot be achieved by less intrusive means or in a less intrusive manner. Moreover, force must always be applied in the least intrusive way possible.²¹ The ECHR standard of absolute or strict necessity may form part of the proportionality test, but this is not necessarily the case – it depends on how the proportionality assessment is conducted.

Independent

When discussing the ECHR requirement of independent investigation, it is essential to distinguish between cases of police violence resulting in death and those without fatal consequences. Incidents involving fatal outcomes are investigated by the Emergency Response Team (TSI) of the National Criminal Investigation Department, under the authority of the Public Prosecution Service.²²

National and international studies often cite the National Criminal Investigation Department as an example of an independent investigative body.²³ In cases of non-fatal police violence, however, the National Criminal Investigation Department does not usually conduct the investigation. As will be

13 J. Emaus, ‘Aansprakelijkheid voor schade door politiegeweld. Annotatie bij EHRM (Grote Kamer), 28 September 2015, No. 23380/09 (*Bouyid v. Belgium*)’, *Nederlands Tijdschrift voor de Mensenrechten*, Issue 6.

14 M. Dijk, *Disproportioneel politiegeweld tijdens of direct na de aanhouding* (Master’s thesis, University of Groningen), 2021. The thesis was published online by *NJB* and is available at <https://www.njb.nl/blogs/disproportioneel-politiegeweld-bij-de-aanhouding/>

15 M. Kuin, H. Kruik & J. Timmer, *Met gepast geweld*, Politie en Wetenschap, 2020.

16 J. Lindeman et al., *Luisteren naar burgers na geweldsaanwending*, WODC, 2021.

17 O. Adang & B. Malie, *Verantwoorden en leren*, Boom criminologie, 2022.

18 P. Mevis, ‘Over de grondslag en de regeling van de beoordeling van geweldsaanwending door Politieambtenaren’, *Delikt en Delinkwent* 2017, afl. 9, pp. 653–668.

19 M. Groenhuijsen & R. Jansen, ‘De toetsing van politiegeweld en het nemo-tene-turbeginsel’, *Delikt en Delinkwent* 2018/22, afl. 4, pp. 254–277.

20 R. Bruinen, ‘Politietucht recht: een toelaatbaar alternatief voor strafrechtelijke vervolging?’, *Praktijkwijzer Strafrecht TPWS*, 2017/14; M. van der Steeg & J. Timmer, ‘Beoordeling van politiegeweld: tucht recht eerst’, *Ars Aequi*, March 2016.

21 Y. van der Vlugt et al., *Verantwoord politiegeweld*, Nationale ombudsman, Rapportnr. 2013/055, p. 18; J. Timmer & V. Cozijn, *Geweld door de politie*, Paper Vrije Universiteit Amsterdam, 2016, p. 4. A revised version was published as Chapter 13 in M. Liem & E. Muller (red.), *Geweld*, Wolters Kluwer, 2016; M. Kuin, H. Kruik & J. Timmer, *Met gepast geweld*, Politie en Wetenschap, 2020, p. 17.

22 Openbaar Ministerie, *Jaarbericht 2023*, 2024, p. 45.

23 B. Rappert et al., ‘A Global Lethal Force Monitor: Comparative Opportunities and Challenges’, *Homicide Studies*, 2022, Vol. 17, pp. 187–203, Special Issue: *Police Use of Deadly Force*; M. van der Steeg, R. ter Haar & J. Timmer, ‘Strafrechtelijke beoordeling van politiegeweld’, *Praktijkwijzer Strafrecht*, 2017/7.

discussed below, the assessment of such cases by the Public Prosecution Service reveals that these criminal investigations are typically carried out by the police themselves. Dutch academic literature does not examine whether these investigations meet the ECHR standard of independence.

The following sections examine in greater detail how the use of force is assessed by the police, the Public Prosecution Service, the courts of appeal in Article 12 Code of Criminal Procedure complaint cases, and by criminal courts. The analysis also explains how police violence is evaluated in Dutch legal practice and explores whether these assessments comply with the ECHR requirements outlined above.

3. Assessment of violence by the police

In 2023, the police recorded 35,542 instances of the use of force by police officers.²⁴ Since the system reform in 2019, the use of force has increased each year.²⁵ This rise is partly attributed to greater awareness of the new reporting procedure for incidents involving the use of force.²⁶ In 88% of cases, force was used against individuals, while the remaining incidents involved property, such as forcing open a door.²⁷ The assistant public prosecutor (HOvJ) conducts the initial assessment of each incident.²⁸ If the use of force may have been unlawful, the case is immediately referred to the Safety, Integrity, and Complaints Department (VIK) or the Public Prosecution Service (OM) (see paragraph 4). If the incident is not immediately referred, a decision is made to record it either as a ‘violence mutation’ or a ‘violence registration.’

A violence *registration* is made when an incident results in more than minor injury or a death, when a firearm has been used, or when the assistant public prosecutor (HOvJ) considers that the use of force warrants such registration.²⁹ The latter category is not further defined. If a report of the use of force does not lead to a violence *registration*, it becomes a violence *mutation* – which is recorded but not further investigated. Violence *registrations* that are not forwarded to the Public Prosecution Service (see Section 4) are sent to the Commission on the Use of Force through the sector head. Each police unit has its own commission, composed of police officers and one external member.³⁰ Both the sector head and the Commission on the Use of Force provide advice to the police chief, who then determines whether the use of force was professional.³¹ In 2023, approximately 2,300 reports of the use of force were assessed in this manner, 15% of which were deemed ‘unprofessional.’ In theory, a use of force assessed as ‘unprofessional’ could subsequently be referred to the Public Prosecution Service for criminal investigation, but no known cases of this have been reported in practice, nor is this discussed in the academic literature. Citizens have no role in this internal procedure.³²

24 Politie, *Geweldsaanwendingen door politieambtenaren 2023. Rapportage cijfers en duiding*, 2024.

25 Politie, *Geweldsaanwendingen door politieambtenaren 2022, 2023*, p. 4; Politie, *Jaarverantwoording politie 2021, 2022*, p. 103; Politie, *Jaarverantwoording politie 2020, 2021*, p. 84; Politie, *De cijfers van 2019, 2020*.

26 Politie, *Geweldsaanwendingen door politieambtenaren 2023. Rapportage cijfers en duiding*, 2024.

27 Politie, *Geweld door politieambtenaren, een analyse van het Informatie-analysteam*. Published on 16 March 2021. Made public following a Freedom of Information (Woo) request by *Controle Alt Delete* on 6 September 2022. The analysis covers the period 2020–2021.

28 W. Verhoeven-Beckers, *Handboek Intern Proces melden, registreren, beoordelen en leren van geweldsaanwendingen*, February 2021 edition. The handbook has not been updated since that date.

29 W. Verhoeven-Beckers, *Handboek Intern Proces melden, registreren, beoordelen en leren van geweldsaanwendingen*, 2021.

30 Politie, *Instellingsbesluit Commissie Geweldsaanwending 2022, 2023*.

31 Politie, *Instellingsbesluit Commissie Geweldsaanwending 2022 artikel 2 lid 2, 2023*.

32 J. Lindeman et al., *Luisteren naar burgers na geweldsaanwending*, WODC, 2021.

Substantively, the internal assessment of the use of force combines the requirements of Article 7 of the Police Act, the Ambtsinstructie, and the standards of professionalism.³³ Key elements in this assessment include legality, subsidiarity, proportionality, de-escalation, and due care. The concept of ‘strict necessity’ does not appear in the internal guidelines for assessing the use of force. As a result, there is no explicit evaluation of the ECHR requirement of necessity. It is possible, however, that the necessity test is applied implicitly within the proportionality assessment.

However, the police chief’s assessments are not publicly available, so it is unclear how this process functions in practice. The police investigations into violence *registrations* cannot be considered independent within the meaning of the *Bouyid v. Belgium* judgment, as the officers assessing the use of force operate under the same chain of command as those who used it – namely, the unit leader of the police unit.

4. Assessment by the Public Prosecutor’s Office

As noted above, the police create a violence *registration* in cases involving more than minor injury, death, or the use of firearms. The Public Prosecution Service is notified of such a *registration* in cases of serious physical injury or death, when shots have been fired resulting in injury, or when the chief of police deems it necessary to do so. According to the Public Prosecution Service’s annual reports, Team TSI conducts between 25 and 50 investigations of this kind each year.³⁴ This number represents only a small fraction of the 2,300 violence *registrations* created by the police in 2023 – meaning that only 25 to 50 cases per year are assessed by the independent National Criminal Investigation Department.

In addition to the violence *registrations* submitted by the police, the Public Prosecution Service also assesses citizen reports alleging the unlawful use of force by police officers. Between 2017 and 2020, citizens filed between 250 and 300 such reports per year.³⁵ According to the Internal Process Manual, the Safety, Integrity, and Complaints Department (VIK) of the police conducts criminal investigations in cases where the National Criminal Investigation Department does not.³⁶ The criminal investigation into the coronavirus protester mentioned in the introduction is an example of such a case.

After the criminal investigation, the Public Prosecution Service may decide to prosecute if it considers that a criminal offense can be proven and that prosecution is appropriate. The alleged offense may concern a general violent crime, such as assault, but since 1 July 2022, it may also involve a culpable violation of the use of force instruction under Article 372 of the Criminal Code. Specific indications of the assessment framework used by the Public Prosecution Service can be found in the Explanatory Memorandum to the Bill on the Use of Force by Investigating Officers and in the Public Prosecution Service’s guidelines on the use of force by investigating officers.³⁷ The concepts of absolute necessity and strict necessity are not mentioned in these documents, suggesting that they are not explicitly assessed. It is possible that the necessity assessment is incorporated into the proportionality test, but in the absence of systematic insight into the prosecution decisions of the Public Prosecution Service, this cannot be determined.

33 W. Verhoeven-Beckers, *Handboek Intern Proces melden, registreren, beoordelen en leren van geweldsaanwendingen*, 2021, p. 7.

34 Openbaar Ministerie, *Jaarbericht 2022, 2023*, p. 62. Openbaar Ministerie. In 2022 voerde team TSI 42 onderzoeken uit.

35 Politie, *Geweld door politieambtenaren, een analyse van het Informatie-analyseteam*, published on 16 March 2021.

36 W. Verhoeven-Beckers, *Handboek Intern Proces melden, registreren, beoordelen en leren van geweldsaanwendingen*, 2021, p. 17.

37 Memorie van toelichting bij het wetsvoorstel geweldsaanwending opsporingsambtenaar, *Kamerstukken II* 2026/17, 34641, nr. 3, *Stb.* 2021, 233.

Investigations conducted by the National Criminal Investigation Department are formally independent, as there are no hierarchical or institutional links between the police officers under investigation and the department's investigators. However, many investigators within the National Criminal Investigation Department are former police officers.³⁸ In contrast, criminal investigations carried out by the VIK (Safety, Integrity, and Complaints Department) are not independent, as VIK employees operate under the authority of the same unit leader as the officers they investigate.

5. Assessment by the Court of Appeal

This section examines how the courts of appeal of the courts assess police violence in cases where citizens file complaints under Article 12 of the Code of Criminal Procedure, following a decision not to prosecute by the Public Prosecution Service. Citizens have this right when the Public Prosecution Service decides not to pursue prosecution based on their report. In the Amsterdam, The Hague, Limburg, Central Netherlands, North Holland, and East Netherlands police units, citizens filed a total of 685 reports following incidents involving police violence.³⁹ These resulted in prosecution in only ten cases.⁴⁰ The reasons behind the decisions to prosecute or not to prosecute are unknown, as is the number of cases in which citizens subsequently filed a complaint under Article 12. Decisions made under Article 12 following incidents of police violence are not systematically published online. The European Court of Human Rights (ECtHR) already reprimanded the Netherlands in 2007 for this lack of transparency, as publication is a procedural requirement.⁴¹ Of all the courts of appeal, only the Amsterdam Court of Appeal publishes nearly all of its decisions; the other courts of appeal either do not publish them at all or do so only occasionally.

The judiciary's website was searched for judgments in criminal cases using the search terms 'police,' 'violence,' 'police violence' and 'Article 12,' in various combinations within the search function.

The search yielded 31 Article 12 Code of Criminal Procedure (Sv) decisions in Amsterdam. A follow-up inquiry among Amsterdam lawyers identified eleven additional cases. In five of these, no decision had been published online. Upon request, the Amsterdam Court of Appeal subsequently published these five decisions online after receiving the petition numbers. It was established that, in Amsterdam, during the period 2016–2022, at least 36 Article 12 Sv decisions were issued in which police violence was central and police officers were the defendants. In these cases, the court examined whether a criminal court could reasonably reach a guilty verdict based on the evidence in

38 Openbaar Ministerie, 'Topspeler tussen argwaan en gedoe,' *Opportuun* 2018, nr. 4, magazines.openbaarministerie.nl/opportuun/2018/04/de-rijksrecherche

39 These figures were collected in response to questions submitted by municipal councilors in Almere, Amersfoort, Amsterdam, Arnhem, Breda, The Hague, Maastricht, Rotterdam, and Utrecht, in collaboration with Controle Alt Delete. Data from other police units are not available, as no questions were submitted by councillors in those areas.

40 Municipality of Almere, 18 August 2020. Response to written questions from NIDA Almere regarding discrimination and police violence; Municipality of Amersfoort, 14 July 2020. Written questions about the use of force by investigating officers; Municipality of Amsterdam, 10 September 2020. Response to written questions from council members Taimounti, Mbarki, Van Dantzig, Simons, Roosma, Nanninga, Ceder, and Van Soest concerning figures on police violence; Municipality of Arnhem, 14 July 2020. Written questions under Article 44, 'Police Violence in Arnhem'; Municipality of Breda, 2020. Technical questions on police violence; Municipality of The Hague, 18 September 2020. Response from the council to written questions from council members Arp, Çetinkaya, Faïd, Kapteijns, Mahmood, and Tseggai, entitled '*Request for Data on Police Violence*'; Municipality of Maastricht, 9 July 2020. Questions under Article 47 of the Rules of Procedure on Mapping Local Discrimination; Municipality of Rotterdam, 21 July 2020. Response to written questions from council members E. Büyükcıfci (NIDA Rotterdam), S. Leewis (GroenLinks), S.R.T. van Baarle (DENK), and A. van Zevenbergen (SP) on '*Discrimination and Violence by the Police*'; Municipality of Utrecht, 14 July 2020. Response to written council questions 2020, No. 131.

41 European Court of Human Rights, 15 May 2007, *Ramsahai and Others v. the Netherlands*, ECLI:CE:ECHR:2007:0515JUD005239199.

the case file, or whether further investigation might lead to a different conclusion. In seven of the 36 cases, the court found that a conviction would likely be impossible, as the conduct could not be proven or not sufficiently proven.⁴² If a finding of proven conduct were possible, the court then had to assess whether there was sufficient public interest to justify prosecution. According to the Amsterdam Court of Appeal, this was the case in only four instances, where the complaint was upheld.⁴³

It is useful to distinguish between Amsterdam complaint cases involving violence and those involving fatal outcomes. In four cases, the victim died following the use of force. In three of these four cases, the court concluded that the officers had acted in self-defense.⁴⁴ In these judgments, the court examined whether violence was necessary to avert an immediate threat to life. In the fourth fatal case, however, the court did not assess whether the use of force had been necessary.⁴⁵ The remaining complaints concerned cases of non-fatal violence. In these, there was no explicit assessment of strict necessity, as required under Article 3 of the ECHR. When the court did refer to the concept of necessity, its interpretation raised questions. For instance, the Amsterdam Court of Appeal referred to a situation in which ‘more force was used than was necessary,’⁴⁶ a phrasing that appeared to relate more to subsidiarity than to strict necessity. In another case, the court referred – without further explanation – to ‘unnecessary and therefore inadequate and disproportionate violence.’⁴⁷

The courts of appeal provide an independent assessment of the use of force, as they are legally and practically independent from the police, with no hierarchical or institutional connections between them. In the complaint cases involving fatalities, three of the four decisions were evaluated in light of the necessity requirement under Article 2 of the ECHR. In contrast, in cases of police violence without fatal consequences, the necessity test was not conducted as required under Article 3 of the ECHR, since it was not, or not sufficiently, examined whether violence could have been avoided at the moment the police decided to employ it.

6. Assessment by criminal judges

There are few opportunities to examine how criminal courts rule in cases where police officers are suspects in incidents of police violence, as officers rarely appear before criminal courts. In 2021,

42 Amsterdam Court of Appeal, 7 November 2016, ECLI:NL:GHAMS:2016:5003; Amsterdam Court of Appeal, 16 April 2018, ECLI:NL:GHAMS:2018:1245; Amsterdam Court of Appeal, 16 April 2018, ECLI:NL:GHAMS:2018:1258; Amsterdam Court of Appeal, 17 July 2018, ECLI:NL:GHAMS:2018:2476; Amsterdam Court of Appeal, 17 December 2019, ECLI:NL:GHAMS:2019:4450; Amsterdam Court of Appeal, 22 July 2020, ECLI:NL:GHAMS:2020:2322; Amsterdam Court of Appeal, 13 July 2020, ECLI:NL:GHAMS:2020:2514.

43 Amsterdam Court of Appeal, 31 January 2022, ECLI:NL:GHAMS:2022:207; Amsterdam Court of Appeal, 23 August 2022, ECLI:NL:GHAMS:2022:2586; Amsterdam Court of Appeal, 17 July 2019, ECLI:NL:GHAMS:2019:2457. Amsterdam Court of Appeal, 17 July 2019, ECLI:NL:GHAMS:2019:2457.

44 Amsterdam Court of Appeal, 5 June 2019, ECLI:NL:GHAMS:2019:1846; Amsterdam Court of Appeal, 4 April 2018, ECLI:NL:GHAMS:2018:1153; Amsterdam Court of Appeal, 21 December 2020, ECLI:NL:GHAMS:2020:3491.

45 Amsterdam Court of Appeal, 31 January 2022, ECLI:NL:GHAMS:2022:207. The complaint was upheld and brought before the court; however, the court accepted a plea of self-defense (*District Court of Midden-Nederland*, 14 June 2024, ECLI:NL:RBMNE:2024:3662).

46 Amsterdam Court of Appeal, 16 July 2018, ECLI:NL:GHAMS:2018:2431.

47 Amsterdam Court of Appeal, 9 May 2022, ECLI:NL:GHAMS:2022:3868. In this case, the Court of Appeal ruled that the police officer was guilty of assault, but no prosecution was pursued because the officer had already received a disciplinary sanction.

five police officers were prosecuted; in 2022, two; and in 2023, one.⁴⁸ It appears that criminal courts are explicitly reluctant to evaluate the use of force by the police. This reluctance is evident, for instance, in the court's reasoning in the criminal case against the officers involved in the death of Mitch Henriquez (2015) in The Hague. The court held that it was necessary to assess 'whether the violence used met the requirements of proportionality and subsidiarity, not whether the police officer could reasonably have made a different choice or whether a different choice would have been more appropriate.'⁴⁹ This line of reasoning can also be found in more recent judgments. In July 2023, the so-called Blue Chamber of the District Court of Midden-Nederland acquitted an officer who had punched an arrestee several times in the face, reasoning that restraint is required when assessing acts of violence by police officers.⁵⁰ In December 2023, a police officer was brought before the court for firing at a moving tractor during a farmers' protest. The officer received a one-month suspended prison sentence and an unconditional community service order of 80 hours. The criminal court stated that 'it must be assessed whether the violence used meets the requirements of subsidiarity and proportionality, not whether the police officer could reasonably have made a different choice or even should have done so.'⁵¹ In June 2024, the Blue Chamber upheld a plea of self-defense by an officer who shot and killed an 18-year-old in Delft. This case reached the court after the victim's relatives successfully lodged a complaint under Article 12 of the Code of Criminal Procedure.⁵² The court ruled that the judge could not 'in hindsight, regardless of the circumstances of the case, substitute his own judgment for that of a police officer acting in the heat of the moment.'⁵³ The Rotterdam District Court adopted the same approach in a case where a police officer was charged with threatening a homeless man with a stun gun after the man shouted 'Fuck the police' at him.⁵⁴ The officer was acquitted, with the judge referring to a 'standard accepted in case law that judges must assess police conduct with the necessary caution and restraint.'⁵⁵

The way in which criminal judges apply the tests of proportionality and subsidiarity in practice does not align with the requirement of strict necessity. Judges have explicitly refrained from examining whether the police officer could reasonably have made a different choice. As a result, they failed to assess the first aspect of the necessity requirement – namely, whether violence was truly necessary or whether it could have been avoided at the moment the police decided to use it, given the conduct of the individual involved.

7. Conclusion

This article examines whether the way in which Dutch legal practice assesses potentially unlawful police violence complies with the requirements of the European Convention on Human Rights (ECHR). These requirements state that the use of force by the police must be absolutely or strictly necessary as a result of the individual's own conduct, and that any investigation into such use of force must be independent. The article demonstrates that Dutch legal practice includes several elements that do not comply with the ECtHR's case law.

An analysis of the policies of the police and the Public Prosecution Service shows that neither body explicitly assesses whether the use of police force was absolutely necessary (Article 2 of the ECHR) or strictly necessary (Article 3 of the ECHR). Such an assessment may occur in practice, but this is

48 Openbaar Ministerie, *Jaarbericht 2021, 2022*; Openbaar Ministerie, *Jaarbericht 2022, 2023*; Openbaar Ministerie, *Jaarbericht 2023, 2024*.

49 Hof Den Haag, 19 June 2019, ECLI:NL:GHDHA:2019:1532, para. 24.

50 Rb. Midden-Nederland, 4 July 2023, ECLI:NL:RBMNE:2023:3245.

51 Rb. Midden-Nederland, 1 December 2023, ECLI:NL:RBMNE:2023:6396.

52 Hof Amsterdam, 31 January 2022, ECLI:NL:GHAMS:2022:207.

53 Rb. Midden-Nederland, 14 June 2024, ECLI:NL:RBMNE:2024:3662.

54 The Blue Chamber declared itself not competent, see Rb. Midden-Nederland, 2 July 2024, ECLI:NL:RBMNE:2024:4005.

55 Rb. Rotterdam, 16 October 2024, ECLI:NL:RBROT:2024:10466.

not documented or verifiable. Further research is therefore needed into how internal police investigations following violence registrations and reports are assessed, as well as into the Public Prosecution Service's decisions to prosecute following (fatal) incidents involving police violence. This policy analysis reveals a structural problem: the police themselves conduct criminal investigations into incidents of police violence whenever the National Criminal Investigation Department does not. This includes cases based on citizens' reports of police violence. Although these investigations are carried out by the Safety, Integrity, and Complaints (VIK) Department and take place under the authority of the Public Prosecution Service, they cannot be considered independent. The reason is that there are hierarchical and institutional links between the officers who used the violence and those responsible for assessing it. Consequently, each of these criminal investigations constitutes a violation of Article 3 of the ECHR.

In case law, it is striking that the Amsterdam Court of Appeal does not explicitly assess cases without fatal consequences in light of Article 3 of the ECHR. When police officers appear before the criminal courts, judges have even explicitly stated that they are reluctant to assess police violence and therefore do not examine whether officers could or should have acted differently. However, the ECHR requires that judges assess whether the use of violence was absolutely necessary (Article 2 of the ECHR) or strictly necessary (Article 3 of the ECHR).

However, assessing police violence solely on the basis of proportionality and subsidiarity is insufficient. The evaluation must be supplemented by a test of absolute necessity (Article 2 of the ECHR) or strict necessity (Article 3 of the ECHR). This requires an assessment of whether the violence could have been avoided at the moment the police decided to employ it, taking into account and weighing it against the citizen's behavior at that specific time.

Discussion

In the judgment concerning the coronavirus protester discussed in the introduction, the court stated that the case law of the ECtHR shows that courts must exercise restraint when assessing the use of force in criminal proceedings. According to the court, this follows from the judgments in *Bubbins v. United Kingdom* and *Armani Da Silva v. United Kingdom*.⁵⁶ The essence of these two judgments is that judges must rely on the genuine beliefs and information available to law enforcement officers at the time they assessed the situation and decided whether or not to use violence. Those assessing the use of violence – such as the police, the Public Prosecution Service, or the courts – must therefore place themselves in the subjective position of the police officer, basing their evaluation on the information available to that officer at the time.⁵⁷ The use of lethal violence may be justified if the officer was honestly convinced at the time that the use of violence was absolutely necessary, even if the officer's perception later proved to be inaccurate.⁵⁸ However, these judgments cannot be interpreted as requiring judicial restraint. It is both possible and necessary to acknowledge the officer's subjective assessment of the situation while simultaneously testing it against the requirement of absolute or strict necessity under the ECHR.

Finally, this article sheds new light on the judgment of the District Court of Midden-Nederland in the case of the coronavirus protester. The criminal investigation in this case was conducted by the police themselves and was therefore not independent. Moreover, the criminal court failed to assess whether the use of violence was strictly necessary, as it did not examine whether the use of violence could have been avoided in light of the protester's behavior. The protester had thrown a jumper cable in the direction of the officers and then ran towards them. The arrest itself was therefore

⁵⁶ Rb. Midden-Nederland, 19 December 2024, ECLI:NL:RBMNE:2024:6928, see the section concerning the case law of the ECtHR.

⁵⁷ ECtHR, 25 May 1999, ECLI:CE:ECHR:2003:1127DEC005019699 (*Bubbins v. United Kingdom*), para. 139.

⁵⁸ ECtHR, 30 March 2016, ECLI:CE:ECHR:2016:0330JUD000587808 (*Armani Da Silva v. United Kingdom*), para. 248.

entirely justifiable. A push caused the demonstrator to fall onto his back, after which the first use of violence immediately followed. The court did not address this initial use of violence in its ruling. This omission leaves room to consider how the court might have ruled had it addressed the issue. It could have found that the violence was used while the man was lying on his back, that he had already discarded the jumper cable and was therefore no longer dangerous, that he did (no longer) use any violence against the police, that his hands were visible and he was not holding a weapon, and that he did not attempt to evade arrest, as he was lying on the ground surrounded by numerous police officers on foot, on horseback, with dogs, and several police vans. The court could have concluded that the use of police violence was not strictly necessary within the meaning of Article 3 of the ECHR, since the protester did not behave in a way that made the use of violence necessary at the moment he was lying on his back after being pushed.