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1 INTRODUCTION

1.1 POSITIVE OBLIGATIONS AS A CONCEPT OF INTERNATIONAL HUMAN RIGHTS LAW

1.1.1 The creation of doctrine of positive obligations

Human rights are rights we have by virtue of being human.[1]In the past, they have been categorized into three generations according to their philosophical and historical development. Civil and political rights, so called "fist generation of human rights" resulted from the 18th and 19th century bourgeois revolutions. In accordance with the Western concept of human rights, the States have the obligations to refrain from interference.[2]They developed from the fundamental rights conceptions according to which individual's life, integrity and liberty are to be protected against an overbeating state.[3]Therefore, civil and political rights were originally conceived to protect individuals against the abusive exercise of state authority by their own government during times of peace.[4] Economic, social and cultural rights followed suit in the 20th century, resulting from the socialist revolutions. According to the socialist concept of human rights, the States had the duties to take positive measures to ensure the enjoyment of this so called "second generation human rights". The emergence of the "third generation of human rights" ensued in the late 20th century when collective rights of peoples to self-determination, development and a satisfactory environment have been recognized.[5]The difference between the three generations of rights has been expressed in various

[1]Bantekas I., Oette L., "International human rights, law and practice", Cambridge, 2014, 10

[2]Nowak M., "Introduction to human rights theory", All human rights for all (ed. Nowak M., Januszewski K.M., Hofstätter), Vienna, Graz, 2012, 269

[3]Bantekas I., Oette L., 2014, 314

[4]Krähenmann S., "Positive obligations in human rights law during armed conflicts", Research handbook on human rights and humanitarian law (ed. Kolb R., Gaggioli G.), 2013, Chentelham, 170

[5]Nowak M., 2012, 269

international treaties and even both UN Covenants. Its existence has been championed in the legal commentary as well. The theoretical basis for claims of inherent differences among these rights groups have been set by a famous human rights scholar K. Vasak in the 1970s.[6]

The end the Cold War brought a new perspective on this issue. It was considered that all human rights exist for everyone. The idea of universality of human rights has been expressed in Article 5 of the Vienna Declaration and Programme of Action in 1993. Human rights are seen as universally applicable standards that transcend time, location and culture.[7] In words of M. Nowak, "the principle of universality means that despite certain cultural differences which need to be taken into account when applying and interpreting human rights in different regional, national or local contexts, all types of "generations" of human rights are, in principle, valid for all human beings in all societies."[8] At the same time it was proclaimed that human rights are equal, indivisible and interdependent, which is today practically undisputed[9] and serves the political goal of strengthening all sets of rights.[10]In other words, there is no inherent difference between the three types of human rights and the corresponding State obligations, which derive from them.[11]Moreover, it is argued that human rights are the only universally recognized

[6]Ibidem, 270

[7]In today's legal commentary the universal nature of human rights is widely accepted. However, some authors argue that ideas based on "epistemic" universality are not objective. Namely, they suggest that the very universality of human rights can be seen as an expression of a subjective viewpoint and a reflection of preferences of a particular culture or group of like-minded predominantly Western states. Critics point out that it is illusory to champion the idea of universal rights since rights are informed by and have application in specific societal and cultural contexts. They label imposing an alien concept which resulted from a specific historical development in particular political systems on cultures with different value systems as "culturally inappropriate". Among the critics of the universality of human rights, some authors reject this notion completely while others claim that it is the culture that provides the context in which universal notions of rights have to be interpreted in so to be both meaningful and effective. - Bantekas I., Oette L., 2014, 33-39

[8]Nowak M., 2012, 270

[9]Ibidem, 126

[10]Bantekas I., Oette L., 2014, 74

[11]Nowak M., "Introduction to human rights theory", All human rights for all (ed. Nowak M., Januszewski K.M., Hofstätter), Vienna, Graz, 2012, 270

value system of our times, encompassing civil and political rights as well as economic, social and cultural and collective rights.[12]

The majority of the bodies responsible for overseeing the proper application of the instruments devoted to economic, social and cultural rights (such as the Committee on Economic, Social and Cultural Rights) interpret these rights so that they may entail three kinds of obligation: the "obligation to respect" (which requires the state's organs and agents not to commit violations themselves), the "obligation to protect" (which requires the state to protect the owners of rights against interference by third parties and to punish the perpetrators) and finally the "obligation to implement" or "the obligation to fulfill" (which calls for specific positive measures to give full realization and full effect to the right).[13]It is important to point out that these obligations of States, which have originally been established as a theoretical framework particularly for the "second generation of rights" are in the last few decades recognized for all human rights.[14]

On the other hand, the European Court of Human Rights which predominantly deals with civil and political rights[15]has opted for a slightly different approach. It has divided the obligations of States under the European Convention on Human Rights and Fundamental Freedoms[16] into two categories: negative obligations and positive obligations.

Namely, when the Council of Europe drafted the ECHR in 1950 it was the first regional treaty which guaranteed international protection of human rights[17] and fundamental freedoms defined in it. In order to provide that all the Member states act according the obligation imposed by Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"[18], the Council of Europe was "the first organization to establish a human rights court (…) and

[12] Nowak M., "Human rights from a legal perspective", All human rights for all (ed. Nowak M., Januszewski K.M., Hofstätter), Vienna, Graz, 2012, 21

[13]Akandji-Kombe J.F., Positive obligations under the European Convention on Human Rights, Strasbourg, 2007, 5

[14]Nowak M., 2012, 270

[15] Nowak M., „Introduction to the Human Rights Regime", Leiden, 2003, 160

[16] In further text: ECHR.

[17]Grabenwater C., "The European Convention on Human Rights and its monitoring mechanism", All human rights for all (ed. Nowak M., Januszewski K.M., Hofstätter), Vienna, Graz, 2012, 128

[18] See: Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

to introduce a judicial individual complaints procedure similar to the protection of fundamental rights before domestic courts".[19]This legal remedies system is in legal commentary depicted as the first effective attempt to transfer national systems of human rights protection to the international level.[20]It turned out to be highly successful and a model for other regional and universal systems.[21]

The negative obligations category is comprised of obligations of state not to interfere in the exercise of rights envisaged in the Convention. These obligations are laid down in the text of the ECHR.[22] They are sometimes referred to as its "central value" and "Convention's mantra".[23]

However, as a consequence of the inevitable evolution of societies and gradual change of ethical standards, new situations not envisaged by the drafters of the ECHR emerged before the European Court of Human Rights.[24] In order to respond to the new challenges time has set before this Court[25], it was not sufficient only to use the Vienna Convention

[19] Nowak M., 2003, 160

[20]Ibidem.

[21] Nowak M., 2003, 159

[22] As a rule, the texts of the general human rights treaties on civil and political rights reflect their perceived negative nature by framing the majority of these rights in terms of prohibitions and a duty to respect. - Krähenmann S., 2013, Chentelham, 170

[23] Russel D., „Supplementing the European Convention on Human Rights: legislating for positive obligations", Northern Ireland Legal Quarterly, vol. 61, issue 3, 2010, 282

[24] Challenges for the European Court of Human Rights have been numerous – caseload grew immensely, there was a considerable change in the community of Member States as it subsequently encompassed some former Soviet bloc countries with fragile democracies and the nature of the cases before the Court has also changed. - Mahoney P., "New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership Promoting and Protecting Human Rights in Europe", Penn State International Law Review, 2002, vol. 21, issue 1,104

[25] Starting from early 1990s, the number of decisions and judgments started its steady growth. Around the same time, there was a significant shift in the Court's jurisprudence, as it ever more started to deal with systematic and serious, large scale violations of human rights in various contexts. Not only did it rule in a number of cases of alleged serious violations in the northeastern Turkey, but it also coped with some deep-seated structural problems in new State parties to the ECHR such as Romania, Bulgaria and Poland which constituted human rights breaches. After Ukraine and Russia accepted the Court's jurisdiction at the end of the same decade, there was a constant rise of cases against these states, many of which dealt with serious breaches of the Convention. More recently, several high-profile cases concerning the extraterritorial conduct of armed forces and counter – terrorist measures have been decided on by the Court. The undeniable and significant increase in both the nature and the number of the cases set unprecedented challenges to the ECHR system. - Bantekas I., Oette L., "International human rights, law and practice", Cambridge, 2014, 226

on the Law Treaties [26] as a source of inspiration for the interpretation of the Convention.[27]The teleological principle which has been endorsed as the central element in the interpretation of the ECHR[28] did not seem to provide enough space for judges to provide efficient protection of the Convention rights.

The European Court of Human Rights has therefore adopted creative techniques of interpretation [29], the 'living instrument doctrine' and the 'practical and effective' doctrine. [30]The 'living instrument doctrine' was established in the *Tyrer v. United Kingdom*[31]case in 1978 when the Court for the first time outlined that "the Convention is

[26] In further text: VLCT.

[27]In accordance with the VLCT, the text of a treaty should be interpreted using the teleological principle, i.e. in good faith, according to the ordinary meaning of their terms in context and in the light of their overall object and purpose. –See: Article 31 VLCT (Vienna Convention on the law of treaties (with annex)concluded at Vienna on 23 May 1969), at treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf, joined on 05th December 2017

[28]Greer S., „Constitutionalizing adjucation under the European Convention on Human Rights", Oxford Journal of Legal Studies, 2003, vol.23, no.3, 408

[29]One of the first examples of such interpretation was judgment on merits in the *Belgian Linguistic* case. Here the Court firstly noted that the negative formulation of Article 2 of the Protocol (P1-2) indicates that the Contracting Parties do not recognize such a right to education as would require them to establish at their own expense, or to subsidize, education of any particular type or at any particular level. However, it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by the abovementioned Article. As a "right" does exist, it is secured, by virtue of Article 1 ECHR to everyone within the jurisdiction of a Contracting State. When determining the scope of the "right to education" within the meaning of the first sentence of Article 2 of the Protocol (P1-2) the Court bore in mind the aim of this provision. The Contracting Stateswere not required to establish a general and official educational system but merely to guarantee to persons subject to the jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time. The Court further noted that although the Convention lays down no specific obligations concerning the extent of these means and the manner of their organization or subsidization, the right to education would be meaningless if it did not imply in favor of its beneficiaries, the right to be educated in the national language or in one of the national languages.Finally, the Court concluded that the Convention should be interpreted in an evolutive, dynamic manner. since "the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights, and this, without doubt not only because of the historical context in which the Convention was concluded, but also of the social and technical developments in our age which offer to States considerable possibilities for regulating the exercise of these rights. The Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter." – *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, judgment on 23rd July 1968, para. 3 and 5

[30]Although these techniques are not explicitly included in VLCT, it is often pointed out sthatthe international law principle of treaty interpretation according to the effet utile of the norm in question may be implicitly deduced from the VLCT rule that both object and purpose of a treaty ought to be considered when a norm is being interpreted. - Urbaite L., "Judicial Activism in the Approach of the European Court of Human Rights to Positive Obligations of the State", Baltic Yearbook of International Law, vol. 11, 2011, 223

[31]*Tyrer v. United Kingdom*, application no. 5856/72, judgment on 25th April 1978

a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions"[32], which may also include changing the Court's own interpretation of the ECHR over time.[33]The Court explained it has to be influenced by the developments and commonly accepted standards of the Member States in certain fields.[34] As H.B. Gemalmaz highlighted, by doing so the Court aims to establish whether on the subject matter before it there is an emerging trend which indicates a consensus between member States of the Council of Europe. Since reaching the consensus is one of the objects set forth in the Preamble, the State Party that breaches the consensus will be found in violation of the Convention.[35] By using this comparative method the Court assesses what are the present day conditions when it comes to interpretation of the ECHR and its application in the Court practice.

As the Court pointed out in the famous *Selmouni v. France*[36]case "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."[37]

However, the obligation to bear in mind evolution of human rights and interpret the Convention correspondingly does not end with taking into consideration national legal systems. The European Court also makes reference to international norms and case law.[38] This is in accordance with both the Article 53 ECHR and Article 31/3 VLCT.

The Strasbourg Court also refers to supranational norms and case-law standards.[39]Jurisprudences of such bodies as the International Court of Justice, the

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[32]Ibidem, para. 31

[33]Bantekas I., Oette L., "International human rights, law and practice", Cambridge, 2014, 228

[34]K. Starmer provides examples of such issues as corporal punishment, homosexuality and transsexuals as an illustration of this principle in play. - Starmer K., "European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights", London, 1999

[35]Gemalmaz H.B., „Making Sense of Children Rights: Transforming the Precedents of the European Court of Human Rights Concerning Corporal Punishment of Children", Annales de la Faculté de Droit d'Istanbul, 2007, no. 56, 49

[36]*Selmouni v. France*, application no. 25803/94, judgment on 28th July 1999

[37]*Selmouni v. France*, application no. 25803/94, judgment on 28th July 1999, para. 101

[38]Gemalmaz H.B., 2007, 51

[39]Gemalmaz H.B., 2007, 53

Committee on the Rights of the Child, the Committee against torture, the Committee on Economic, Social and Cultural Rights are being used by the European Court in order to interpret ECHR in a more dynamic way and to adjust its own jurisprudence to the challenges which time has set before it. H.B. Gemalmaz calls this process "jurisprudential standardization" and further assesses that in cases there is a collision between the approach and judgments of the European Court and other supervisory bodies' jurisprudence on a particular subject, and this issue cannot be settled by mere reinterpretation of these opposite jurisprudence, jurisprudential interaction and standardization should meet two requirements: clear establishment and widespread acceptance.[40] If these requirements are met, the European Court will change its jurisprudence, which will be a step closer to the universality of the treaty law on the protection of human rights, as well as to adopting a uniform interpretation of the corpus juris of contemporary international human rights law.[41]

The principle of the effectiveness, on the other hand, is based on the rule that the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective, and not illusory and theoretical. This principle has been defined as "means of giving the provisions of a treaty the fullest weight and effect consisted with the language used and with the rest of the text and in such a way that every part of it can be given meaning".[42]In this context it is interesting to mention S. Greer who depicted the essence of this principle by stating that in accordance with the principle of effective protection of individual rights should be interpreted broadly and exceptions narrowly.[43]

While A. Mowbray labels these techniques of interpretation as "new"[44], other authors see them as specific methods employed by the Court which are consistent with the VCLT approach of interpretation in light of object and purpose. What makes them innovative

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[40]Gemalmaz H.B., 2007, 56

[41]Gemalmaz H.B., 2007, 58-59

[42]Merrils J.G., "The development of international law by the European Court of Human Rights", Manchester, 1993, 103

[43]Greer S., 2003, 408

[44]Mowbray A., "The creativity of the European Court of Human Rights", Human Rights Law Review, vol.50, issue 1, 2005, 59-60

and different is the fact that they are customized in accordance with the specific aim and object of ECHR – effective protection of rights it covers.[45]

The special character of the ECHR has been referred to by the Court in *Soering v. The United Kingdom* case[46], where it was stated that "in interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society".[47]

For these reasons authors such as Rietiker and Christoffersen denote the living instrument and practical and effective methods of interpretation as sub - forms of teleological interpretation.[48]

Applying the abovementioned techniques has led to imposing new positive obligations,[49] requiring the state to uphold the right concerned by positive action.[50]As explained by the authors Kremnitzer and Ghanayim: "In modern law (…) fundamental rights are not limited to negative rights (…) in the sense that a person can demand that the state guarantees his fundamental rights, and the state is obliged not only to respect those rights, but also to actively protect them. The more important a fundamental right, the more comprehensive the protection of that right."[51]In other words, states are now being

[45]Urbaite L., 2011, 228

[46]*Soering v. The United Kingdom*, application no. 14038/88, judgment on 07 July 1989

[47]Ibidem, para. 87

[48]Urbaite L., 2011, 228

[49]Lavrysen L., "No Significant Flaws in the Regulatory Framework: E.S. v. Sweden and the Lowering of Standards in the Positive Obligations Case-Law of the European Court of Human Rights", Human Rights & International Legal Discourse, 2013, vol. 7, issue 1, 160

[50] Almost all positive obligations only require a state to take steps to ensure that a right is upheld, not to achieve a particular result. – De Than C., "Positive Obligations under the ECHR: Towards the Human Rights of Victims and Vulnerable Witnesses?", 2003, The Journal of Criminal Law, 168

[51]Kremnitzer M. and Ghanayim H., Proportionality and the aggressor' s culpability in self-defense, Tulsa Law Reviev (2003 – 2004) 39, 898

required not only to allow individuals to live their lives as they please under condition that harm no one, but also to do things for those individuals which give them a certain quality of life.[52]

Positive obligations were created since the duties imposed by the Convention are significantly wider than the scope of concept of negative obligations, i.e. the obligations to refrain from certain actions.[53] Through the development of the case law of the European Court of Human Rights it became evident that a purely negative approach to the protection of human rights cannot guarantee their effective protection.[54] Although in some cases[55] positive obligations are expressly mentioned in the text[56], in the majority of the cases they evolved as a consequence of judicial interpretation in the accordance with the "practical and effective" principle and the special character of the ECHR as a human rights treaty which collectively enforces human rights. In other words, the 'constitutional model' has proved inadequate to address the sheer scale of the issues that are understood as falling within the scope of human rights concerns.[57]Therefore the judges of the European Court interpreted the Convention in such a way that in accordance with the general obligation to protect and fulfill rights[58]states are not only obliged to refrain from action but also to take action in order to protect rights in ways which enable their

[52] Dickson B., "Positive obligations and the European Court of Human Rights", Northern Ireland Legal Quarterly, 2010, vol. 61, issue 3, 203

[53]Starmer K., „Positive obligations under the Convention", Understanding Human Rights Principles (ed. Jowell J., Cooper J.), Oxford and Portland, 2001, 139

[54]Ibidem.

[55]One of the examples for such an exceptional case is the right to a fair trial, guaranteed by the Article 6 ECHR. Commentators agree that the Contracting States have the obligation of providing the proper infrastructure for guaranteeing the right to a fair trial by and independent and fair tribunal. At the same time, it is assumed that it guarantees existence of some minimum facilities for its exercise such as free legal assistance, interpreter and others.

[56] ECHR requires the provision of resources, inter alia, when it comes to right to education envisaged in Article 2 of Protocol 1 and the duty to hold elections under Article 3 of Protocol 1. - Starmer K., 2001, 139

[57]Evans M.D., "State responsibility and the European Convention on Human Rights: Role and Realm", Issues of state responsibility before International Judicial Institutions (ed. Fitzmaurice M., Sarooshi D.), Oxford and Portland Oregon, 2004, 159

[58]Bantekas I., Oette L., "International human rights, law and practice", Cambridge, 2014, 76

practical realization.[59] That means not only to prevent human rights violations but also to provide necessary redress whenever such violations do occur.[60]

That is how it developed, inter alia, an obligation of Contacting States to adopt an effective legal framework to protect rights envisaged in ECHR[61], duty to prevent breaches of Convention rights, an obligation to provide information and advice relevant to the breach of ECHR rights[62], i.e.to take operational measures under certain conditions in order to protect individuals whose rights are endangered, duty to undertake an investigation when there are allegations on their violations as well as to provide resources and training to prevent Convention rights being violated.[63]This is quite in accordance with the States' obligation to "fulfill" human rights obligations.

However, when developing these obligations the Strasbourg judges had regard to the fair balance that has to be struck between the general interest of the community and the competing legitimate public interests. Striking that fair balance has even been called "the art of human rights" in the legal commentary.[64] Through the European Court of Human Right's practice, some general principles of that balancing of interests have been established. Namely, since positive obligations should not impose an excessive burden upon the states enforcing them, they are to be defined as narrowly as possible and will concern or enable fundamental values encompassed in the ECHR.[65] In other words, the Court maintained that the Convention should not be interpreted in such a manner to

[59]Russel D., "Supplementing the European Convention on Human Rights: Legislating for Positive Obligations ", Northern Ireland Legal Quarterly , 2010, vol. 61, issue 3, 283

[60]Russel D., 2010, 282

[61]In this context, it is important to mention that when creating a legislative framework which constitutes an environment in which all human rights can be enjoyed by everyone to the greatest possible extent, the States must ensure that the principle of progressive realization is respected. This means making sure that all human rights will be exercised in such a way to lead to their ever greater enjoyment by an increased number of people, especially the ones from the most vulnerable groups. In other words, any retrogression in achieved standards of human rights protection in principle constitutes a violation of human rights. – Nowak M., 2012, 273

[62]Starmer K., 2001, 146-147

[63]O' Connel R., "Realising political equality: the European Court of Human Rights and positive obligations in a democracy", Northern Ireland Legal Quarterly, 2010, vol. 61, no. 3, 263

[64] Nowak M., 2012, 273

[65]De Than C., 2003, 169

impose an impossible or disproportionate burden on the authorities.[66] In the case of *Rees v. the United Kingdom*[67] the Court was clear that "The scope of obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources."[68]

In order to achieve this balance and counteract State's arbitrariness and abuse, when it comes to negative obligations the most important tool is the principle [69] of proportionality[70]. This principle limits interference with Convention rights[71] to that which is at least intrusive in pursuit of a legitimate objective.[72]Its role is to prevent abuse by the Contracting States[73] and their arbitrary conduct.[74]Namely in order to assess if this principle has been complied with, the Strasbourg Court has to ascertain whether the measures taken by the State have been related to a legitimate purpose and if they are

[66]*Osman v. the United Kingdom, application no. 87/1997/871/1083, judgment on 28th October 1998, para. 116*

[67]*Rees v. the United Kingdom*, application no. *9532/81*, judgment on 17 October 1986

[68]*Rees v. the United Kingdom*, application no. *9532/81*, judgment on 17 October 1986, para. 37

[69] At this place, we will shortly quote M. Klatt who in a clear and succinct manner explains the difference between the rights and succinct way: "Rights are norms that require something definitely, given that certain conditions for their applications are fulfilled. If a rule is valid and applicable, it is then definitely required to do what it demands. Thus, rules are norms that are either fulfilled or not. By contrast, principles are norms requiring that something be realized to the greatest extent possible, given the factual and legal possibilities. As optimization requirements, principles can be satisfied to varying degrees. Thus, principles demand something prima facie, while rules demand something definitely.". - Klatt M., "Positive obligations under the European Convention on Human Rights", Journal of International law, 2011, 713

[70]Nowak M., 2012, 275

[71]We find it prudent at this place to call attention to the fact that proportionality principle applies both when it comes to negative and positive obligations. According to M. Klatt, assessment if a violation of a negative obligation occurred is assessed by means of range of conditions. The Court takes into consideration legitimate ends, suitability, necessity, and proportionality in its narrow sense.The rules of suitability and necessity concern optimization relative to what is factually possible. Legitimate ends and balancing of competing principles (i.e. proportionality) refer to what is legally possible.This author holds that the most important condition is the proportionality test, which he explains in this way:"The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other". According to this, balancing can be broken down into three steps. The first step is to assess the degree of non-satisfaction of, or detriment to, a first principle. Secondly, one established howimportant is to satisfy the competing principle. Lastly, it is established whether the importance of satisfying the latter principle justifies the detriment to, or non-satisfaction of, the former. - Klatt M 2011, 697-698

[72]Greer S., „Constitutionalizing adjucation under the European Convention on Human Rights", Oxford Journal of Legal Studies, 2003, vol.23, no.3, 409

[73]Nowak M., 2003, 60

[74]Ibidem, 61

capable and suitable for achieving it. Moreover, it should assess if those measures were necessary and most clement ones to take with the abovementioned aim.[75] The proportionality principle will be more thoroughly analyzed in our research.

However, the principle most commonly applied when it comes to positive obligations is the one of due diligence. In accordance with this principle, States are obliged to act with "due diligence", which encompasses the duty to take all the measures which can be reasonably taken in the circumstances in order to ensure the rights granted in the Convention.

1.1.2 Definition, legal justification, content and scope of positive obligations

1.1.2.1 Definition of positive obligations

Positive obligations have not been defined by the Court. Their essence has been captured by Judge Martens, who in the case *Gul v. Switzerland*[76] explained that "negative obligations require member States to refrain from action, positive to take action".[77]This is why P. van Dijk simply calls them "obligations for affirmative action".[78]

The category of positive obligations requires national authorities to take the necessary measures to safeguard a right or, more precisely to adopt reasonable and suitable measures to protect the rights of the individual.[79] What is however interesting is that almost all positive obligations require the Contracting State to take action in order to safeguard a right[80], but it is not obliged or expected to achieve a particular result.[81] In

[75]Nowak M., 2012, 275

[76]*Gül v. Switzerland*, application no. 23218/94, judgment on 19th February 1996

[77]*Dissenting opinion of judge Martens, approved by judge Russo* in *Gül v. Switzerland, application no. 23218/94, judgment on 19th February 1996*

[78]Van Dijk P., "'Positive obligations' implied in the European Convention on Human Rights: Are the States still the 'masters' of the Convention?", The role of the nation-statein the 21st century -- human rights, international organisations and foreign policy: essays in honour of Peter Baehr, The Hague, 1998, 17

[79]Akandji-Kombe J.F., 2007, 5

[80]Starmer K., 2001, 139

other words, the duty of state to protect and fulfill human rights is one of means, as preventing particular violations might not be possible.[82]

1.1.2.2 Legal foundations and justification for positive obligations

It is quite often stated in the legal commentary that positive obligations have more usually evolved as a consequence of judicial interpretation[83] than express reference.[84] The doctrine of positive obligations was constructed upon legal ground provided by the Articles 1 and 13 ECHR, which provide for general obligations and emphasize the principle of effectiveness[85], which has in general been most influential to the development of positive obligations.[86] They were developed either by combining the substantive right and the general obligation under Article 1 or simply by interpreting that general obligation to secure the effective safeguarding of ECHR as establishing an obligation not only to refrain from violation of a right but also to take appropriate positive actions to protect it. In this way, as C. De Than points out, "it tends to be the Convention rights themselves which are now seen as the source of, and authority for, positive obligations, with Article 1 becoming of historical significance generally".[87]

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[81] De Than C., 2003, 168

[82] It is interesting in this context to point out the opinion of S. Krähenmann: "The doctrine of positive obligations plays an increasingly important role in the protection of the victims of armed conflict. First, doctrine of positive obligations requires states to take measures to protect their people against the effects of conduct of hostilities, not only when planning their own operations but also toprotect them from the danger of unexploded war remnants and to alleviate the hardship accompanying internal displacement. Second, human rights bodies increasingly require states to account not only for the fate of disappeared persons during armed conflict but more generally to account for the use of force. Finally, the doctrine of positive obligations is instrumental to hold the state accountable for human rights abuses committed by both rebel forces and paramilitary groups. Such a focus on the active prevention of threats to human rights highlights that states ultimately remain responsible for the effective protection of human rights even during times of armed conflict."- Krähenmann S., 2013, 176-177

[83]Russel D., 2010, 283

[84] On the other hand, L. Urbaite reminds that "the complete negligence of the legitimacy of positive obligations would be unsubstantiated as certain provisions explicitly require the State to take certain positive actions" and illustrates that by example of the requirement under Article 2 para. 1 to protect life, as well as to guarantee fair trial under Article 6 and to hold free elections in accordance with Article 3 of Protocol 1 ECHR. - Urbaite L., 2011, 219

[85]Urbaite L., 2011, 219

[86]Urbaite L., 2011, 223

[87] De Than C., 2003, 169

Moreover, premised on the Article 1 ECHR, the Court established an obligation of Contracting States to create a domestic legal framework able to provide the Convention rights to be effectively protected. In addition to that, States are obliged to allocate resources for the prevention of violations of individual rights, as well as to inform and advise individuals about the content, scope and ways of protection of their rights guaranteed by the ECHR.[88]

Article 13, on the other hand, imposes on States the primary responsibility to safeguard the protection of ECHR rights in case they have been violated. This Article demands the States to provide an individual claimant whose human rights have been violated with an effective remedy before a national authority.[89]It is especially relevant in regard of procedural positive obligations as well as a general obligation to foresee proper legal background and appropriate mechanisms of compensation.[90] Based on this Convention Article, the Court established the obligations of the Contracting State to pay compensation to the individual whose rights have been breached, but also for State authorities to execute an effective investigation capable of leading to criminal prosecution[91], as well as to safeguard the victim's sufficient participation in the process.[92]

It is therefore interesting to mention P. Dijk's view that "the main consideration which has led the Court to read into the Convention certain positive obligations, is that Convention is designed to safeguard the individual in a real and practical way as regards those areas which it deals" and that "respect for human rights on the part of the States has to be 'effective respect'."[93] This author also reminds that the Strasbourg Court used this concept to attribute a particular effect in private relations to some of the ECHR provisions. The Court has done so in an indirect way, by establishing that the authorities

[88] Russel D., 2010, 283

[89]Russel D., 2010, 284

[90]Urbaite L., 2011, 222

[91]Russel D., 2010, 284

[92]Urbaite L., 2011, 222

[93]Van Dijk P., 1998, 19

have a private obligation to guarantee respect of the right or freedom involved in relations between private parties.[94]

In academic literature, the construction of positive obligations was also justified by the principle of rule of law, considered built-in due to the binding nature of the ECHR and the prohibition of abuse of rights under Article 17 of the Convention.[95]

Some commentators argue that the Court had effectively set the theoretical basis for the imposition of positive obligations on state authorities by developing an extended notion of state liability under the European Convention on Human Rights and Fundamental Freedoms[96] as well as by widening the definition of "victim" in its case law.[97]

However, the Court has occasionally been criticized by more conservative commentators who claimed that development of positive obligations had in some aspects gone beyond the mere interpretation and became de facto law-making[98], which is not the role of the Court but of the Member States.[99] In other words, there are views according to which the Court is exceeding the limits of legitimate treaty interpretation.[100]As A. Weale explains, if a decision who should be obliged to uphold rights and what actions those obligations comprise of would be left entirely to the Court we would be left with "a large penumbra of uncertainty surrounding individual legal obligations" since the Court "lacks the capacity to deal with cumulative, unintended effects of individual behavior".[101]

[94]Ibidem.

[95]Urbaite L., 2011, 219

[96]In the future references: "the ECHR"

[97]Starmer K., 2001, 146

[98]J. De Meyer assesses that positive obligations effectively change the ECHR without the text of the Convention having to be amended or a new protocol drafted. - Xenos D., „The positive obligations of the state under the European Convention on Human Rights", London and New York, 2012, 214

[99]Urbaite L., 2011, 232

[100]Urbaite L., 2011, 214

[101]Russel D., 2010, 285

In accordance with this, some authors question the legitimacy of this judicial activism of the Court.[102] One of them is D. Russel who deems that the task of determining positive obligation should not be left to courts, but should be a matter of legislative concern.[103]

We tend to agree with other authors who point out that the Court quite early assessed that ECHR is a subject of evolutive interpretation, which is why the Court is not strictly bound by the original intentions of the people who drafted this legal document.[104]The Strasbourg judges considered ECHR to be "a living instrument" and interpreted it in the light of present day conditions. As a result, they acted with special care when recognizing that some obligations exist under the Convention although the original Contracting States were not aware of it.[105]

Moreover, in the legal commentary it is outlined that its legitimacy is justified not only since the positive obligations doctrine has been developed on the basis of general obligations encompassed in the ECHR, but also by the fact that the Member States showed their consent by accepting the compulsory jurisdiction of the same Court which developed this doctrine and keeps doing so further. It is also showcased by the overall execution of the Court's judgments and subsequent and consequent developments of the domestic legal system and jurisprudence. Moreover, it is highlighted that the judicial activism of the European Court is necessary in order to respond to inevitable social evolution. The normative legitimacy of positive obligations lies in the fact that this doctrine promotes the norms which are in accordance with the European standards in human rights protection, which reflect the Member States' common approach in this regard.

Taking that into consideration, we can agree with P. Dijk's view that "precisely because one is dealing here with judge-made law, the domestic and Strasbourg organs should show a prudent restraint and not be over-creative in accepting and shaping positive obligations for the Contracting States and, where appropriate, should leave the authorities a rather wide margin of appreciation in striking a fair balance between the public interests

[102]Urbaite L., 2011, 214

[103]Russel D., 2010, 294

[104]Urbaite L., 2011, 219

[105]Van Dijk P., 1998, 18

at stake and the interests of the individual who claims a certain positive measure. Even though the Convention, as a human rights treaty, has certain specific features which may make it less dependent on the day-to-day will of the Contracting Parties, still it is a treaty and depends on the sovereign will of the States as the 'masters' of the treaty to accept or not to accept a certain obligation."[106]

1.1.2.3 Content and scope of positive obligations under ECHR

There are numerous variations when it comes to the content of positive obligations. It is defined as a comprehensive system of human rights protection which comprises a legislative/regulatory framework, an administrative framework and practical measures for ad hoc application.[107] Therefore, it may comprise of actions of legislative, executive or law enforcement institutions.[108] Based on the substance of the required actions positive duties can be substantive or procedural.[109] When analyzing the expert commentary one can find that "the general content of positive obligations involves the substantive law of the active protection of human rights and the procedural guarantees that implement it in the state's legal order. In many circumstances, in order for the protection of human rights to be effective, a series of independent measures have to be taken in various stages. In that respect, positive obligations are determined as a multilevel structure, whose organization points to the whole system of protection".[110]

According to K. Starmer, duties under ECHR can be roughly divided into 5 categories. First one is the duty to put in place a legal framework which provides effective protection for Convention rights.[111]Due to the limited scope of this research, this duty will not be examined in-depth in it. We will however point out that this duty in many aspects represents the minimum obligation of Contracting States under the Convention.[112] The

[106]Ibidem, 33

[107]Xenos D., 2012, 209

[108]Urbaite L., 2011, 215

[109]Ibidem, 216

[110]Xenos D., 2012, 207

[111]Starmer K., 2001, 146

[112]Starmer K., 2001, 147

States are not required to incorporate the provisions of the ECHR directly into domestic law[113], but are required to establish a practical human rights framework[114] containing effective remedies. The importance of complying with this obligation has been outlined by M.D. Evans who reminds that: "At the end of the day, what matters is not merely 'compliance' with the international obligation, but that the State 'buys into' the value of the 'human right' in question; that it accepts the ethical force of the argument and adopts it as a value within its internal legal order."[115] The States are obliged to criminalize certain acts with the aim of protecting individuals.[116]

On the other hand, the Court in its case-law has not indicated which measures should be taken by the State as an act of compliance with the ECHR. Its role is only to verify if the measures taken by the State were appropriate and if they suffice to guarantee effective enjoyment of the rights envisaged in the ECHR. If the State partially failed to act the Court is to assess to what extent a minimum effort was nevertheless possible.[117]

The Court also has a duty to prevent breaches of Convention rights.[118] This duty differs depending on the right at stake. Fundamental rights, such as Articles 2 and 3, demand special attention. Next to putting in place effective criminal law provisions to deter the commission of offences,[119] it is essential to back it up by law-enforcement machinery for the prevention, suppression and sanctioning of their breaches.

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[113]This is a general rule, but in some cases the breach of ECHR right was deemed so serious by the Court that it has insisted that criminal law sanctions must be put in place. As an illustration, in the case *X and Y v. the Netherlands*, the Court did not agree with the Government's claims of its obligations being fulfilled since the applicants were provided with an option to bring civil proceedings for compensation. The Court was adamant that the protection afforded by the civil law in the case of wrongdoing of this kind (a sixteen-year-old woman with a mental disorder has been sexual assaulted) was insufficient. - Starmer K., 2001, 147

[114]Russel D., 2010, 285

[115]Evans M.D., 2004, 148

[116]Urbaite L., 2011, 216

[117]Urbaite L., 2011, 218

[118]Starmer K., 2001, 146

[119] The importance of appropriate legal system in place, especially when it comes to criminal law, has been explained by C. de Than: "Reform and eventual codification of criminal law and procedure are opportunities to make these rights central to and explicit in the criminal law and criminal justice system. Otherwise yet again the appearance is that the rights of human rights defendants are the only "human rights" in question and that victims and other witnesses deserve only unenforceable and general statements

In some precisely defined cases, state authorities also have a duty to take preventive operational measures to protect individuals whose rights are at risk from criminal acts of other individual.[120] As D. Russel puts it: "In short, if it were possible to know in advance the kind of things that the Court would have to deal with, then it seems reasonable to assume that, in principle at least, domestic legislatures would make attempts to introduce laws and policies that might pre-empt and prevent human rights violations from occurring. In other words, they would voluntarily spell out positive obligations and give them legal effect."[121]

There is also a duty to provide information and advice relevant to a breach of ECHR rights.[122] In a number of cases the Court recognized that the only way for the individuals to protect their ECHR tights is if they have access to relevant information.[123]

States have a duty to respond to breaches of Convention rights.[124] If the rights which were breached are fundamental, such as the right to life, prohibition of torture, inhuman or degrading treatment or punishment, the States have a duty to respond diligently to any breaches. This duty encompasses not only paying of compensation, but also carrying out a thorough and effective investigation[125] as well as existence of criminal persecution mechanisms when needed.[126]This obligation will be more thoroughly examined in the course of this research, since it is undoubtedly interlinked with the obligations of States in cases of excessive use of force by the State officials.

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of intent." - De Than C., "Positive obligations under the European Court of Human Rights: Towards the human rights of victims and vulnerable witnesses?", 2003, Journal of Criminal Law, vol. 67, part 2, 182

[120]*Osman v. the United Kingdom*, application no. 87/1997/871/1083, judgment on 28th October 1998, para.115

[121] Russel D., 2010, 285

[122]Starmer K., 2001, 147

[123]Starmer K., 2001, 147

[124]Starmer K., 2001, 154

[125]Urbaite L., 2011, 216

[126]Starmer K., 2001, 156

Lastly, the Contracting States have an obligation to provide resources to individuals to prevent breaches of their Convention rights.[127] According to the Court's practice, such resources might be free legal assistance or housing.[128]

Keir Starmer's principles can be observed as general requirements that any government would have to comply with in order to uphold the Convention as a text supportive of positive obligations. However, some authors are adamant that these principles have to be applied in a context-sensitive manner.[129]

At the same time, the Court has, as we've already outlined, been quite cautious in the development of positive obligations. In several instances it has refused to establish a positive obligation by reading it into a provision of ECHR, outlining that the Court cannot by the means of an evolutive interpretation[130] derive from these instruments a right that was not included therein at the outset. This particularly applies to the cases when such omission was deliberate.[131] It has also pointed out that the notion of respect is not clear-cut and its requirements will vary from case to case in the light of the diversity of the practices followed and the situations obtaining in the Contracting States.

This formulation, as P. Dijk explains, points to the Court's caution not to take its recognition of positive obligations too far in cases where no common ground exists in the law and practice of Contracting States.[132]The same author therefore concludes: "The Court is prepared to read implied positive obligations in the Convention's provisions if and to extent it deems this necessary for the effectiveness of those provisions, but shows restraint if this 'reading in' would result in creation of a completely new obligation detached from the text of the provision, or in accepting the existence of an obligation the

[127]Ibidem, 147

[128]Ibidem., 2001, 157

[129]Russel D., 2010, 293

[130]In the words of S. Greer, the principle of evolutive, or dynamic interpretation enables out-moded conceptions of how terms in the Convention were originally understood to be abandoned when significant, durable changes the climate of European public opinion have occurred. – Greer S., 2003, 409

[131]Van Dijk P., 1998, 20

[132]Ibidem.

context and scope of which do not (yet) have common ground in the Member States of Council of Europe".[133]

At the same time, being aware of a possible organizational and financial burden introducing certain positive obligations might put on the State, the Court allowed the Contracting States to choose appropriate measures or affirmative action needed to make the right or freedom in question effective.[134] This seems to amount to an obligation for national authorities to strike a fair balance between the general interest of the community and the interest of the individual. Since the criteria for establishing if such balance has been struck are not mentioned in the Convention, it was the role of the Court to formulate them.[135]

K. Starmer concludes that "in many respects positive obligations are the hallmark of the ECHR, and mark it out from other human rights instruments; particularly those drafted before the Second World War."[136] Their growing importance in the jurisprudence of the Strasbourg Court[137] should therefore not be overlooked.

[133]Ibidem, 22.

[134]Van Dijk P., 1998, 22

[135] Interestingly enough, there were attempts in the legal commentary to establish some criteria for balancing of interests. Especially interesting one was introducing a mathematical model in order to depict a structure of balancing. This so called Weight formula has been introduced by Robert Alexyin his postscript to 'A Theory of Constitutional Rights'. This formula takes into consideration the abstract weights of the two principles (i.e. the weight that the principle has relative to other principles, but independently of the circumstances of any concrete case),the intensities of interference with the colliding principles respectively (they are by definition concrete variables, unlike the weights of principles which are abstract), reliability of the empirical and normative premises concerning what the measure means for non-realization of the one principle and the realization of the other principle (it is important to make this difference since the degree of reliability of the empirical and the normative may be different in a particular case). It is, however, important to outline that in spite of the use of numbers, the Weight Formula is by no means an attempt to replace balancing with mere calculation. Among the legal experts it is seen as a formal tool that allows making explicit the inferential structure of subsumption according to the legal syllogism. -Klatt M., 2011, 698-700

[136]Starmer K., 2001, 159

[137]Klatt M., "Positive obligations under the European Convention on Human Rights", Journal of International law, 2011, 692

1.1.2.4 Relationship between positive and negative obligations under ECHR

Majority of legal theorists make clear distinctions between positive and negative obligations. As we already mentioned, the emphasis is placed on the fact that negative obligations require the Contracting States to refrain from action and thereby not violate rights of individuals while positive duties in contrast call for action on the side of State and its agents. Negative obligations are depicted as a guarantee of human rights being effectively framed as a safeguard against arbitrary government and its unjustified introduction of different obstacles which would prevent an individual from exercising his/her rights.[138] They are phrased in a negative way, prohibiting the States to interfere with the rights of an individual in an arbitrary and disproportionate way.[139]

In the legal commentary some additional criteria for establishing a distinctive nature of positive obligations which are characterized as "the active protection of human rights" from negative obligations which are depicted as "the direct interference by the state or the process of its possible justification".[140] Firstly, they arise in relation to paragraph 1 of the ECHR rights and these provisions are relevant to the active protection of human rights. Secondly, it is the element of knowledge of the need of human rights protection that can establish the involvement of the state in the wide range of circumstances in which the states are required to actively protect the human rights. The existence of this objective element is a condition for positive obligations to be applied and proves a manageable scope of the state's responsibility.[141]

However, these two groups of obligations share some common points. In the famous case *Powell and Rayner v. The United Kingdom*[142]it was pointed out that in both positive and negative obligations context „the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the

[138]Russel D., 2010, 282

[139]Urbaite L., 2011, 214

[140]Xenos D., „The positive obligations of the state under the European Convention on Human Rights", London and New York, 2012, 206

[141]Ibidem, 206-207

[142]*Powell and Rayner v. The United Kingdom*, application No. 3/1989/163/219, judgment on 21st February 1990

competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention."[143]

The European Court of Human Rights[144]has also repeatedly[145] stated that "the boundaries between the State's positive and negative obligations (…) do not lend themselves to precise definition. The applicable principle is, nonetheless, similar.In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation".[146]

Moreover, in some cases the Court maintained there was no necessity to analyze the case from the standpoint of positive or negative obligations[147] as its role was to examine whether a fair balance was struck between the competing public and private interests.[148] D.Xenos goes so far to even claim that in most of its case-law the Court has not made a clear distinction between positive and negative obligations of the state. This author adds that "this situation is exacerbated by the growing tendency to label every measure of human rights compliance as a positive obligation."[149]

S. Krähenmann outlines that in many cases both negative and positive obligations are inextricably linked and illustrates this claim by an example of duty to plan law enforcement operations in such a way that minimizes the risk for both the target and innocent bystanders. In her view, this duty can be observed both as a general assessment of the proportionality of the use of force but also as a separate positive obligation of State authorities and agents.[150] We fully support this author´s view.[151]

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[143]Ibidem, para. 41

[144] In the future references: "the European Court", "the Strasbourg Court" and "the Court".

[145]Klatt M., "Positive obligations under the European Convention on Human Rights", Journal of International law, 2011, 694

[146]*Keegan v. Ireland*, application no. 16969/90, judgment on 26th May 1994, para. 49

[147]For a critical view of this approach see: Klatt M., 2011, 694

[148]Urbaite L., 2011, 218

[149]Xenos D., „The positive obligations of the state under the European Convention on Human Rights", London and New York, 2012, 205

[150]Krähenmann S., 2013, Chentelham, 170

1.2 THE IMPORTANCE OF ARTICLES 2 AND 3 IN THE CONTEXT OF POSITIVE OBLIGATIONS AND STATE RESPONSIBILITY FOR BREACHES OF HUMAN RIGHTS BY ITS AGENTS

Despite the fact the world is slowly developing towards one big global society, the system we live in is still a system in which national governments exercise state sovereignty over their territories and people living there.[152] This is why in his analysis M.D. Evans rightly points out that "the entire enterprise of protecting human rights is recognition of 'state responsibility' understood in the layman's sense of reflecting the belief that States are to be held accountable for the manner in which they treat those over whom they exercise power".[153] State responsibility essentially lies in the core of the idea of human rights. Their protection and fulfillment is considered to be the most important obligation and responsibility of States, on which they build their legitimacy and sovereignty.[154] Moreover, from a human rights perspective, the language of responsibility of the State has been used to broaden the scope of substantive legal obligations.[155]Therefore it is very important to assess if and under which circumstances states are responsible for their agents' action, or lack thereof, when it comes to protection of human rights.

In the legal commentary, it has been pointed out that "the acts shall be considered an act of that State under international law when: the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of that State,

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[151] On the other hand, authors such as B. Dickson and W. Hohfeld take a completely different approach. In their view, dichotomy of positive and negative obligations is false, since all rights have correlative obligations, which are both positive and negative. These authors claim that negative obligations can easily be restated as positive, and vice versa. - Dickson B., "Positive obligations and the European Court of Human Rights", Northern Ireland Legal Quarterly, 2010, vol. 61, issue 3, 203

[152]Nowak M., 2012, 272

[153]Evans M.D., 2004, 139

[154]Nowak M., 2012, 272

[155]Evans M.D., 2004, 140

and whenever its character as an organ of the central government or a territorial unit of that State."[156]

There is a number of reasons for choosing to focus our research on the rights guaranteed under ECHR, but they all come down to this Convention being, as authors E. Cannizzaro and F. De Vittor describe it, "probably the most integrated system of human rights protection established so far and one which can serve as a model for the development of a more comprehensive system of protection."[157] It has long been established as an international regulator of human rights standards[158] and it has had a profound impact on the development of international and national human rights law.[159] Furthermore, since the State parties have outsourced parts of their substantive constitutions to it, the ECHR is often depicted as a "complimentary constitution", "constitutional instrument of European public order" or, even more simply, "the European constitution of human rights".[160] Furthermore, at the national level not only has ECHR been directly incorporated in the Contracting states, but also the jurisprudence of the European Court had an effect on a number of rights. Namely, it compelled states to make whole series of legislative and institutional changes and to reform the administration of justice.[161]

The reasons why we chose to focus on how the Court has developed the doctrine of positive obligations under these particular Convention Articles are equally numerous. Article 2 ECHR actively protects one of the most important rights – right to life. It is practically undisputed that among all the rights provided by the European Convention on Human Rights, the right to life is one of the most fundamental. As M. Nowak depicts it, without this right other human rights "seem meaningless".[162]This right is been labeled as

[156]Conforti B., "Exploring the Strasbourg case law: Reflections on State responsibility for the breach of positive obligations", Issues of State Responsibility before International Judicial Institutions, 2004, vol.7, 137

[157]Cannizzaro E., De Vittor F., "Proportionality in the European Convention on Human Rights" Research Handbook on Human Rights and Humanitarian Law (ed. Kolb R., Gaggioli G.), 2013, Chentelham, 125

[158]Xenos D., 2012, 1205

[159]Bantekas I., Oette L., 2014, 231

[160]Grabenwater C., "The European Convention on Human Rights and its monitoring mechanism", All human rights for all (ed. Nowak M., Januszewski K.M., Hofstätter), Vienna, Graz, 2012, 130

[161]Bantekas I., Oette L., 2014, 232

[162]Nowak M., "Right to life", All human rights for all (ed. Nowak M., Januszewski K.M., Hofstätter), Vienna, Graz, 2012, 311

indispensable, since its exercise is precondition to enjoying any other Convention right.[163] The consequences of its violation are irreversible and the negative impact on individuals undisputed.[164]Right to life is non – derogable, which means that states are not allowed to interfere with it even in situations that are highly exceptional.[165]However, this right is not absolute.[166] Paragraph 2 of Article 2 ECHR envisages the conditions under which its deprivation is not considered as inflicted in contravention of this Article. Inter alia, the force used must be no more than absolutely necessary.

Article 3 ECHR is dedicated to prohibition of torture, inhuman or degrading treatment. Torture is one of the most brutal human rights violations since it represents a direct attack on the core of human dignity.[167]The ill-treatment in question must attain a minimum level of severity in order to fall within the scope of this Convention Article i.e. to reach the high threshold of negative impact which involves bodily injury or intense physical or mental suffering.[168] If this threshold has been reached in the particular case the Court evaluates by taking into account various parameters which have been established in its case-law. Contrary to the original opinion expressed in the *Ireland v. the United Kingdom*[169] judgment, the criteria used to distinguish torture from cruel or inhuman treatment is not how severe the inflicted pain is, but the intention of the ones inflicting it, as well as its purpose and the powerlessness of the victim.[170]On the other hand, cruel or inhuman treatment exists if severe pain or suffering has been inflicted by or with the acquiescence of a public official on a person, but either intention, purpose and powerlessness criteria have not been fulfilled. Degrading treatment or punishment does not have to reach the same amount of pain or suffering but requires a particularly

[163]Weekes R., "Focus on ECHR, Article 2", Judicial Review, 2005, vol. 10, issue 1, 19

[164]Xenos D., 2012, 161

[165]Bantekas I., Oette L., 2014, 75

[166]Nowak M., 2012, 274

[167] Nowak M., "Prohibition of torture", All human rights for all, (ed. Nowak M., Januszewski K.M., Hofstätter), Vienna, Graz, 2012, 346

[168]Xenos D., 2012, 162

[169]*Ireland v. the United Kingdom*, application no. 5310/71, judgment on 18th January 1978

[170]Nowak M., 2012, 348

humiliating treatment.[171]Prohibition of torture is an absolute right, which means that its restriction can under no conditions be justified.[172]Due to that fact it is often pointed out it that prohibition of torture is one of the few rights constituting the "hard core" of human rights.[173]Taking into consideration its unqualified and non-derogable nature, S. Greer even considers this to be one of the human rights principles, or imperatives, rather than rights.[174]

Why are we focusing on these specific rights in our research? As D.Xenos points out, in the light of inevitable clash of rights, the determination may need a hierarchy of interests to guide the organization of human rights protection. This author finds that the idea of hierarchy is evident in the Court's frequent labeling of the right to life and prohibition of torture and inhuman and degrading behavior as "the most fundamental provisions in the Convention".[175]Namely they have found their place in a small group of human rights which have become a part of the customary international law and have acquired the status of ius cogens.[176]He also refers to the idea that some rights are more important than others being increasingly advocated in scholarly commentary.[177]

On the other hand, these human rights are very often violated and more often than not, the ones violating it are state agents, despite their duty to recognize, respect and ensure the rights established by the Convention. Without the duty to investigate such cases under Article 2 ECHR, it could be easily imagined that such cases would have been „swept under the rug" and that the state would not be interested in identifying and prosecuting its agents who have used lethal force even under circumstances in which that was not absolutely necessary and justified.

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[171]Ibidem, 349

[172]Ibidem, 274

[173] Next to the prohibition of torture among the rights constituting the "hard core" of human rights are prohibition of slavery or retroactive penal laws and, to some extent, the rights to life, personal liberty, right to a fair trial and freedom of religion. - Nowak M., 2012, 274

[174]Greer S., 2003, 415-416

[175]Xenos D., 2012, 135

[176]Nowak M., 2012, 24

[177]Xenos D., 2012, 135

It is this stark contradiction between the law enforcement officials' role in preserving the rule of law and thereby being the expected warrants of the State complying with its ECHR obligations on one hand and the fact that they are very often breaching them on the other, as well as the fact that despite its undisputed overall significance this area is still relatively uncharted, that makes this part of the Court's jurisprudence worth being examined in more detail and subjected to an in-depth analysis.Since the agents of State are the ones primarily in charge of protecting the right to life, it makes the violations perpetrated by them even more worthy of our attention and scrutiny.

Moreover, since alleged violations of human rights by law enforcement officials are mainly dealt with under Articles 2 and 3 ECHR, a point can be made that the Court's jurisprudence related to these two Articles could directly shape both the counter-terrorism legislation and the practices of the law enforcement agencies in the Member States. This is why the Court's case law in this regard should be thoroughly examined and analyzed.

1.3 MAIN RESEARCH QUESTIONS

This research aims to answer a number of questions related to development of the doctrine of positive obligation under Articles 2 and 3 in cases of excessive use of force by law enforcement officials. Such questions are: upon what jurisprudential foundations have these obligations been constructed? What methodology was used by the Court in order to determine their existence, scope and breach? How did they evolve and what are the reasons for it? What are their precise contents, express and implied?

When answering these questions, this research aims to point out the way the European Court of Human Rights balanced the demand of showing judicial creativity in order to respond the present – day demands[178] and respect for the role of Member States in determining the scope of rights which European Convention on Human Rights guarantees

[178]Some authors such as L.Urbaite, P. Mahoney and D. Popovićuse the term "judicial activism" to denote "creativity of the judiciary in interpreting the text of laws and departing from the precedents in order to serve the needs of the contemporary society". - Urbaite L., 2011, 225; Mahoney P., "Judicial activism and judicial self-restraint in the European Court of Human Rights: Two sides of the same coin", 1990, Human Rights Law Journal, 57; Popović D., "Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights", Creighton Law Review, 2009, vol. 42, issue 3, 361

in cases of excessive use of force by law enforcement officials in the light of Article 2 of the ECHR. In other words, it answers the question if the contemporary Court has been cautious in developing and applying this obligation[179] and if yes, for which reasons.[180]

Namely, although human right treaties rarely mention duties of Member States, it is important to explore them since it helps to dissect the right into the related obligations of States, which results in getting a more comprehensive idea of the composition of right in question.[181]

This is why, as we've already outlined, the Court introduced left a broad margin of appreciation to the States when it comes to the measures and actions for making the Convention rights and freedoms effective. The Court pointed out in the *Abdulaziz, Cabales and Balkandali v. The United Kingdom*[182] that "especially as far as those positive obligations are concerned, the notion of "respect" is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals".[183] In other words, the States are required to strike the fair balance between the general interest of a community and the interests of an individual. However, since the ECHR does not encompass criteria for assessment whether the fair balance has been struck in the concrete case,[184] it was the task

[179]Caution in interpretation and deference to lawmakers is in legal theory called "judicial restraint". - Urbaite L., 2011, 225

[180]The Court's cautious approach to dynamic interpretation of ECHR has been explained as an expression of necessity that the Court does not transgress its legitimate role of interpretation and turn into a policy-maker. - Ibidem, 225

[181]Mowbray A., "The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights", Oxford – Portland, 2004, 2-3

[182]*Abdulaziz, Cabales and Balkandali v. The United Kingdom*, application nos. 9214/80, 9473/81, 9474/81, judgment on 28th May 1985

[183]Ibidem, para. 67

[184] D. Xenos offers an explanation for this phenomenon. Namely, the Court has regularly reiterated that legitimate aims of state's interference as listed in paragraph 2 of some Convention rights can be of a certain relevance in striking this balance. In his view, this results in the judicial examination being concentrated on ad hoc balances for which the state has a margin of appreciation. This again results in difficulties in defining the European minimum standard that guides both the right holders and the state when it comes to the rights and obligations they have in future instances. - Xenos D., „The positive obligations of the state under the European Convention on Human Rights", London and New York, 2012, 206

of the Court to formulate them.[185] The way this has been done will be assessed in this research by analyzing the corresponding case-law.

1.4 THE METHODS USED FOR THIS RESEARCH

The methods used for this research will be the classical methods of qualitative science inquiry, i.e. legal analysis. By presenting a case by case analysis of the leading judgments by the European Court of Human Rights (which will include a short description of the case facts, citations of key passages from the judgments concerned and, when appropriate, dissenting or separate opinions) as well as standpoints and comments by the renowned human rights specialists and finally comments on the judgment by the author as well as ending conclusions, this paper aims to showcase the establishment of the duty to investigate under Article 2 ECHR, its further development and important turns in the Court's jurisprudence regarding this obligation. By observing and analyzing the Court's practice and its implementation in Member States we can also draw conclusions of possible further development of these obligations and their influence on national legal systems.

[185]The Court first examines and determines which concrete interest is underlying the exercise of each competing right and then to balance these various interests against each other. - Cannizzaro E., De Vittor F., 2013, 138

1.5 THE REASONS FOR SPECIFIC STRUCTURE OF THIS THESIS

It can hardly be disputed that among many positive obligations that arise under Articles 2 and 3 ECHR not all are equally relevant for the topic of this research. Although it would be interesting and useful to provide an in-depth analysis of all of them, the author had to limit the scope of this research to the obligations which are most specifically linked to duties of the Contracting State when it comes to its agent using lethal force in context of possible breaches of Articles 2 and 3.

Despite the fact that under Article 2 ECHR there is a number of other important obligations[186] the duties we will focus on in our research are duties related to planning and execution of law enforcement operation and the duty to investigate alleged violations of right to life by law enforcement officials. Namely, these duties are most tightly linked to the use of disproportionate force by the State agents and their violation results in breach of Convention.

Similar reasons apply when it comes to focusing on the duty to investigate under Article 3 ECHR (out of all the positive obligations which the Court has previously established, such as the obligation of State to take reasonable steps to prevent torture, inhuman or degrading treatment or punishment regardless of the perpetrator as well as to criminalize serious acts of violence and set an effective and enforceable system of legal sanctions as a deterrent against it)[187]. This duty has not been a subject of excessive analysis and commentary and it is closely interlinked with establishing the responsibility of state agents when it comes to excessive use of force as a possible breach of Article 3.

Moreover, the issue of proportionality of use of force by state officials will be examined through commentary of case-law in this respect. Chronological approach is chosen due to its transparency and it is combined with the country-specific approach because it paints a general picture of certain Contracting States' practices when it comes to their officials using disproportionate force and thereby breaching the European Convention.

[186]This obligation does not comprise only of having legal regulation and enforceable crimes relating to breaches of right to life and prohibition of torture, but also establishing an effective system of criminal justice. - De Than C., 2003, 170-171

[187]Ibidem, 176 - 177

2 CHAPTER 1 – PLANNING AND CONTROL AND PRINCIPLE OF PROPORTIONALITY

2.1 EARLY JURISPRUDENCE: THE EUROPEAN COMMISSION'S VIEW ON PROPORTIONALITY ISSUES RELATED TO USE OF FORCE BY LAW ENFORCEMENT OFFICIALS

2.1.1 The establishment of the proportionality principle relating to right to life - *Stewart v. The United Kingdom* case

2.1.1.1 The facts of the Stewart v. The United Kingdom case and main disputed questions

The proportionality of force used by law enforcement officials was revised in the case of *Stewart v. The United Kingdom*[188]. Namely, in October 1976 applicant's 13-years-old son was killed by a plastic baton round ("bullet") which was fired by a member of the British army in Northern Ireland. On 7th December 1977 an inquest was held in the city of Belfast and it ended in open verdict being returned.

The applicant subsequently started the proceedings against the Ministry of Defense in the Belfast Recorders Court. That Court found in May 1979 that there was riot in progress and that the lives of the patrol were endangered and that firing the plastic baton rounds was justified. The applicant's appeal to the High Court in March 2002 has been dismissed.[189]

[188] *Stewart v. The United Kingdom*, application no. 10044/82, decision on 10th July 1984

[189] hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-73738%22]}, joined on 9th March 2017

In its application to the European Court of Human Rights that the Government of the United Kingdom has violated Article 2 ECHR by the authorization and widespread use of baton round as the method of crowd control despite it being precarious and deadly. It was held that Commission's view that unintentional killing cannot give grounds for a claim under Article 2 ECHR should be revised. It was pointed out that "if a Government sanctions the use of deadly weapons, in circumstances which give rise to the high probability or near certainty that fatalities will occur from their use, a serious issue arises under Article 2. By its authorization and widespread use of this weapon the respondent Government has put at risk the lives of everyone the baton rounds may strike."[190]

The applicant also claimed that the force used by the Government officials was not absolutely necessary either for purpose of defending an army patrol from unlawful violence or for the purpose of quelling a riot. She also alleged that the events which have taken place at the material time did not constitute a riot within the meaning of the Convention.

The Government maintained that Article 2 can be applied only in the cases of intentional deprivation of life[191] and therefore cannot be invoked when it comes to accidents or negligent behavior. Alternatively, they claimed that the soldier used the force which was no more than absolutely necessary within the meaning of Article 2 paragraph 2 (a) and 2 (c). The Government deemed that the shooting of the plastic bullet was absolutely necessary in "defense of any person from unlawful violence" or "in action lawfully taken for the purpose of quelling a riot". Not only was there at the time riot in progress and the army members were in danger of being seriously injured, but also the soldier who shot the bullet in stake had been struck by a missile at the moment of firing. Therefore his aim was disturbed.[192]

[190]Ibidem.

[191]Despite not addressing this question specifically in the case of *X v. Belgium* (application no. 2758/66, Yearbook 12, pp. 174), it does appear from its finding in this case that in its early jurisprudence the Commission limited application of Article 2 to the cases of intentional killings. However, the Commission subsequently interpreted the Convention in a more broad way. - *Stewart v. The United Kingdom*, application no. 10044/82, decision on 10th July 1984, para. 14

[192]Ibidem, para. 7

2.1.1.2 The Commissions take on the application of Article 2 in cases of unintentional deprivations of life

Since the Article 2 constitutes one of the most important rights in the Convention, which is also non–derogable, the Commission outlined that the circumstances in which the taking of life by a public authority might be permitted must be limited, exhaustive and narrowly interpreted. However, it also noted that while situation covered by the second sentence of the first paragraph refers to intentional killing, in the three situations envisaged in the second paragraph of Article 2 ECHR it is not explicitly mentioned whether the provisions cover only intentional, unintentional or both types of deprivation of life.

Furthermore, the Commission in this case confirmed its previously established interpretation by which the concept of everyone's life being protected by law enjoins the state not only to refrain from intentionally taking life but also to take appropriate steps to safeguard it,[193] as such interpretation "flows from the wording and structure of Article 2. In particular, the exceptions enumerated in paragraph 2 indicate that this provision is not concerned exclusively with intentional killing. Any other interpretation would hardly be consistent with the object and purpose of the Convention or with a strict interpretation of the general obligation to protect right to life."[194] The aim of paragraph 2 in its entirety is not to provide a list of circumstances under which it is allowed to intentionally kill an individual, but to define situations in which it is permitted to use force which may result in deprivation of life as its unintended consequence. In order to be justified, the use of force must be "absolutely necessary" in defense of any person from unlawful violence, in order to affect a lawful arrest or to prevent the escape of a person lawfully detained or in action lawfully taken for the purpose of quelling a riot or insurrection.[195]

[193] *Association X. v. the United Kingdom*, application no. 7154/75, judgment on 12th July 1978, para. 32

[194] *Stewart v. The United Kingdom*, application no. 10044/82, decision on 10th July 1984, para.15

[195] Ibidem.

2.1.1.3 The way Commission has interpreted the concept of use of force which is "absolutely necessary" and proportionality criteria in its assessment thereof

The Commission also reminded of the Commission's and Court's jurisprudence when it comes to interpreting the "absolutely necessary" standard. In the *Handyside v. the United Kingdom*[196] it was established that this term is synonymous with "indispensable"[197], while in the cases *The Sunday Times v. the United Kingdom*[198] and *Dudgeon v. the United Kingdom*[199] the Court considered that the term "necessary" implies the pressing social need in the context of Articles 10 paragraph 2[200] and Article 8 paragraph 2.[201] Following the same logic, in the *Stewart v. the United Kingdom* case the Commission also noted that the word "necessary" in Article 2 paragraph 2 by the adverb "absolutely" points to the application of a stricter and a more compelling test of necessity.[202]

Moreover in *The Sunday Times case* it was précised that "the test of necessity includes an assessment as to whether the interference with the Convention right was proportionate to the legitimate aim pursued".[203] Therefore the crucial link between the necessity and proportionality was established. In the *Stewart v. the United Kingdom* case the Commission confirmed that in accordance with the Article 2 paragraph 2 the use of force is allowed for the purposes enumerated in subparagraphs (a), (b) and (c) under the condition that the force used was strictly proportionate to the achievement of the purpose permitted. It also laid out the criteria which need to be taken into consideration when establishing if the condition of proportionality has been complied with: the nature of the

[196] *Handyside v. the United Kingdom*, application no. 5493/72, judgment on 7th December 1976

[197] Ibidem, para. 16

[198] *The Sunday Times v. the United Kingdom*, application no. 6538/74, judgment on 26th April 1979

[199] *Dudgeon v. the United Kingdom*, application no. 7525/76, judgment on 22nd October 1981

[200] *The Sunday Times v. the United Kingdom*, application no. 6538/74, judgment on 26th April 1979, para. 59

[201] *Dudgeon v. the United Kingdom*, application no. 7525/76, judgment on 22nd October 1981, para. 51

[202] *Stewart v. The United Kingdom*, application no. 10044/82, decision on 10th July 1984, para.18

[203] *The Sunday Times v. the United Kingdom*, application no. 6538/74, judgment on 26th April 1979, para. 62

aim pursued, the dangers to life and limb inherent in the situation and the degree of risk that the force employed may result in the loss of life.[204]

The main question the Commission had to establish if in this concrete case the force used was for the aim permissible under Article 2 paragraph 2, i.e. if the force used was absolutely necessary in action lawfully taken for the purpose of quelling a riot or insurrection. Since the legal definition of the term "riot" differs in the law and practice of different Member states to the Convention, the concept is autonomous and therefore can be subject to interpretation by the Commission and the European Court of Human Rights. In the present case, the Commission found that 150 people gathered and throwing missiles at a soldier patrol to the point they risked serious injury undoubtedly constitute a riot. Moreover, the action taken was legal under the laws of Northern Ireland. Both of these facts point out that the aim pursued falls under the subparagraph (c).[205]

When examining whether the force used for purpose of quelling a riot was "absolutely necessary" within the meaning of paragraph 2 the Commission questioned the proportionality of the use of the plastic baton round to the aim pursued. The Commission assessed if the force used was proportionate having regard to the situation the soldiers have been confronted with, the degree of force they have responded with and the risk that the use of force would result in the deprivation of life.[206] Another important factor in the Commission's view was that events took place in Northern Ireland in which many lives were lost due to a continuous public disturbance and frequent rioting. In that context it was significant that the Convention specifically envisages, in sub-paragraph (c), the right of the authorities to take action to quell a riot without imposing any requirement of retreat or avoiding action in the face of mounting violence.

While admitting that use of the plastic baton round in Northern Ireland was highly controversial since it is a dangerous weapon which can led to serious injuries and death, particularly if it strikes the head, the Commission found that the number of casualties,

[204]*Stewart v. The United Kingdom*, application no. 10044/82, decision on 10th July 1984, para.19

[205]Ibidem, para. 25

[206]Ibidem, para. 26

compared with the number of baton rounds discharged, shows that the weapon is less dangerous than alleged.[207]

Since in the present case the group of soldiers was attacked by a hostile and violent crowd of 150 persons who were throwing stones and other missiles at them, and taking into consideration that the soldier's aim was disturbed at the moment of discharge when he was struck by several missiles, the Commission concluded that the death of Brian Stewart resulted from the use of force which was no more than "absolutely necessary" in action lawfully taken for the purpose of quelling a riot within the meaning of Article 2 paragraph 2.[208]

From this case, we can see that the Commission first examined if the events taking place constituted a riot and if the actions taken were lawful. The number of people gathered and their violent behavior played an important role in its assessment that what was happening did constitute a riot and the law clearly allowed the soldiers to use force. When that was established, the Commission went on to assess if the force used satisfied the proportionality criteria.

The Court also took into consideration danger to life and limb that the soldiers found themselves in as well as the statistically small number of casualties occurring when plastic bullets are used. That, together with the fact that the soldier has hit the boy by accident and his aim had been disturbed have all been the factors which the Commission based its decision on, thereby establishing a criteria for the future jurisprudence in this respect.

[207]Ibidem, para. 28

[208]Ibidem, para. 29 – 30

2.1.2 Further development of the Commission's jurisprudence in respect of Article 2 paragraph 2 ECHR: case Wolfgram v. Germany

The standard established in the *Stewart v. the United Kingdom* case was reaffirmed in *Wolfgram v. Germany*.[209] In October 1981 the applicants' son was arrested in Munich as a member of a five-people-group on their way to commit armed robbery. The arrest was based on secret information concerning the specific circumstances of the intended bank robbery, the types of arms and intention to use them. Other plans of arrest were rejected due to the danger for third persons. While the police was performing an arrest of this group with serious criminal intent, at least one of the group members did not comply with instructions to raise their hands. Then one of the group members activated a hand grenade with an obvious intent to kill policemen. In response, the police opened fire and seriously injured applicants' son and one other group member. The ambulance has been called immediately after the incident and it arrived ten minutes later. However, the applicant and his shot accomplice died in the hospital one hour later.

The police found three sub-machine guns, one sawn off shotgun, one revolver, seven hand grenades and a substantial amount of ammunition in the car and beside them. That has confirmed the information of intended robbery.

The applicants alleged that police in this case has breached Article 2 paragraph 2 since they did not deem that shooting of their son was absolutely necessary neither to affect a lawful arrest nor to defend the policemen from unlawful violence. They also submitted that the action was not organized in a proper manner since no ambulance and medical treatment were immediately ready during the operation.

The Commission in this case confirmed the previously established criteria when assessing the proportionality of use of force: the nature of the aim pursued, the dangers to life and limb inherent in the situation, the degree of the risk that the force employed might result in loss of life as well as all the relevant circumstances surrounding the loss of life.

[209] *Wolfgram v. Germany*, application no. 11254/84, Commission's decision on 6th October 1986

As in the Stewart case, the Commission first examined if the police acted in effect a lawful arrest of the members of the group and to defend themselves from the unlawful violence. It established that the police was informed before the incident that the group has serious criminal aims (to commit an armed robbery) and was well-equipped to pursue them (which was confirmed by subsequent discovery of numerous dangerous weapons in their car and on them). Moreover, the group members resisted arrest and did not follow the police instructions in its course, while the police members fired from their guns only after one of the group members had detonated a hand grenade. Taking all this into consideration, the Commission came to a conclusion that the police took action in order to effect a lawful arrest and defend themselves from unlawful violence, in accordance with Article 2 paragraph 2 ECHR. In that light, it found that the force used by the police was absolutely necessary within the meaning of same Article.[210]

As for the planning and control of the operation, the Commission noted that the arrest was planned in such a way to avoid risks for third persons and that the ambulance was alarmed in advance and came to the scene only a short while after the shooting took place. Therefore the Commission concluded that in that respect Article 2 paragraph 2 has not been violated in that respect either. We can notice that the Commission did not examine this question in much detail, unlike the European Court in its later case law.

This case was important for several reasons. It confirmed the Commission's previous views on the issues of proportionality and the importance of not merely reviewing the actions of state agents, but also having regard to all relevant circumstances of the case. When assessing if the force used was absolutely necessary and strictly proportionate, it is essential to consider the purpose of the law enforcement officials' actions, danger to human life or physical integrity as well as risk of causing casualties by using force.[211]

[210]Bedri Eryilmaz M., "Arrest and detention powers in English and Turkish law and practice in the light of the European convention on human rights", The Hague, 1999, 249

[211]Aldea A., "Considerations over the right to life and the use of firearms within ECHR legislation and Romanian jurisprudence", Juridical research, 2011, vol. 26, 313

2.2 MCCANN CASE – THE PRECEDENT WHEN IT COMES TO THE POSITIVE OBLIGATIONS UNDER ARTICLE 2 ECHR

2.2.1 Facts of the McCann and Others v. the United Kingdom case

The case that undoubtedly set a foundation for development of positive obligations under Article 2 of the European Convention on Human Rights was the case of *McCann and others v. the United Kingdom*[212]. Since it is a landmark case, we will present the facts of it in more detail. Namely, from at least the beginning of the year 1988 the United Kingdom, Spanish and Gibraltar authorities had the information that the Provisional IRA[213]was planning a terrorist attack on Gibraltar.[214] An advisory group consisting of members of the Army, police, Special branch and Security service officers was formed to advise and assist the Gibraltar police.

In the "Operational order of the Commissioner of the Police" it was clearly stated that the intention of operation was to protect life, foil the attempt, arrest the offenders and provide secure and safe custody of the prisoners. According to the "Military rules of engagement" military forces were to assist the Gibraltar police to arrest the IRA active service unit should the police request it. The rules also specified that soldiers are permitted to use force only when requested to do so by the senior police officer(s) designated by the Gibraltar Police Commissioner or if it is necessary in order to protect life. There were also strict rules about the circumstances in which it was allowed to open fire and to fire without a warning.

[212]*McCann and others v. the United Kingdom*, application No.18984/91, judgment on 27th September 1995

[213]Irish Republican Army - "IRA".

[214]More specifically, from the intelligence received and from observations made by the Gibraltar police that the target the attack was to take place in the assembly area south of Ince's Hall where the Royal Anglian Regiment usually assembled to carry out the changing of the guard every Tuesday at 11.00 hours. – Ibidem, para. 13

On 4th of March 1988there was a reported sighting of an IRA 'active service unit' in Malaga in Spain. The next day members of the IRA unite were identified. It was assessed that they will carry out an attack by means of a car bomb, most likely detonated by a remote control device. The plan was to arrest the members of the unit after they had brought the car into Gibraltar, in order to provide enough evidence for subsequent trial. It was stated that the suspects are dangerous, armed and would likely use their weapons or detonate the bomb if confronted. One of the suspects, Savage, was first seen in Gibraltar in the afternoon of 6 March 1988 parking awhite Renault in the assembly area under observation. Several witnesses stated seeing McCann, Savage and Farrell, the three previously identified members of the terrorist unit, staring towards the spot where the previously mentioned car was parked. After all three had moved away from the assembly, a bomb disposal expert conducted a cursory visual examination and reported that in his opinion it as a possible car bomb. It was then decided that the three suspects should be arrested by the soldiers of the SAS[215]on suspicion of conspiracy to murder.[216] Police Commissioner therefore handed over the control of the operation to their commanding officer.

Savage split away from other two suspects. One group of soldiers followed him; another group did so with the other two suspects. Realizing that they are being followed, the pair and Savage made some movements which allegedly made the soldiers think that they were trying to detonate remote control device. In order to prevent that from happening, the soldiers shot them at close range. After the shooting, weapons or detonator devices were found neither on the bodies of the three suspects nor in the Farrell's handbag. It was also determined that the car which had been parked by Savage did not contain any explosive device or bomb. However, in the Farrell's handbag a set of keys was found which led the police to another car, hidden in Marbella. That car was found to contain an explosive device with two set timers.

[215]Special Air Service. – Ibidem, para. 141

[216] The Commissioner of Police signed the beforehand prepared form requesting the military to intercept and apprehend the suspects, specifying that the military option may include the use of lethal force for the preservation of life. - *McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 54

After exhausting the domestic remedies[217] with no success[218] the applicants lodged their application with the Commission on 14th August 1991, complaining that the killings of Daniel McCann, Mairead Farrell and Sean Savage by members of the SAS constituted a violation of Article 2 of ECHR. By eleven votes to six, on 4 March 1994 the Commission expressed the opinion that there had been no violation of Article 2 ECHR.

2.2.2 The application of Article 2 paragraph 2 ECHR by the European Court of Human Rights in the McCann case

2.2.2.1 The Court's view on the application of Article 2 in cases of accidental deprivation of life by the law enforcement officials

The first question the Court answered in the McCann case was if the provisions of Article 2 paragraph 2 can be applied only to cases of intentional killing. In the Court's view, "the exceptions delineated in paragraph 2 indicate that this provision extends to, but is not concerned exclusively with, intentional killing.[219] Namely, as the Commission has

[217]An inquest by the Gibraltar Coroner into the killings was opened on 6th September 1988. It was presided over by the Coroner who sat with a jury chosen from the local population. Evidence was heard from 79 witnesses. Among the witnesses there were the soldiers, police officers and surveillance personnel involved in the operation as well as pathologists, forensic scientists and experts on explosive devices. – Ibidem, para. 106

[218] On the last day of September 1988, the jury returned verdicts of lawful killing. Dissatisfied with these verdicts, the applicants commenced actions in the High Court of Justice in Northern Ireland against the Ministry of Defense on 1st March 1990. The Secretary of State for Foreign Affairs responded by issuing certificates excluding proceedings against the Crown. The applicants were not successful in seeking a leave to apply for judicial review to challenge the legality of the certificates, which led to the actions being finally struck off the list on 4 October 1991.

[219]Over the time, the practice of the Commission and the Court in this respect changed.In the case of *X v. Belgium* (application No.2758/66, Yearbook 12, pp. 174), Article 2 was seen as not comprehending unintentional killing. However, in the case of *Association X. v. the United Kingdom* (application No.7154/75, judgment on 12th July 1978) the Commission broadened its interpretation. Namely, they found that the first sentence of Article 2 imposes a broader obligation on the state than that contained in the second sentence and that the concept of everyone having protected their life under the law, obliges the state not only to refrain from *intentional* taking of lives, but also to *safeguard* life. In the*Stewart v.The United*

previously pointed out, *the text of Article 2, read as a whole,* demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but *describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life*."[220]The Court continued to explain that, *however, the use of force must be nomore than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c)*.[221]

In other words, if the action by the law enforcement officials was lawfully taken for one of the enumerated purposes and if as a result a person loses his/her life, this does not contravene the Convention if the condition of absolute necessity of use of force had been fulfilled.[222] It is of no importance if the loss of life was an intended or accidental consequence of use of force.

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*Kingdom*case, the Commission accepted the latter interpretation, stating that any other interpretation would hardly be consistent with the object and purpose of the Convention or with the strict interpretation of the general obligation to protect the right to life. - *Stewart v. The United Kingdom*, application no.10044/82, decision on 10th July 1984, para. 14 – 15

[220]*McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 148

[221]According to the paragraph 2 of the Article 2 ECHR, deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary in defense of any person from unlawful violence, in order to effect a lawful arrest or to prevent the escape of a person lawfully detained or in action lawfully taken for the purpose of quelling a riot or insurrection.

[222]Bedri Eryilmaz M., 1999, 248

2.2.2.2 The Court's interpretation of the term "absolutely necessary" in Article 2 paragraph 2 ECHR in the McCann and others v. the United Kingdom case

2.2.2.2.1 General observations made by the Court about the implied content of the legal standard "absolutely necessary use of force"

The Court clearly stated in its judgment that the use of the term "absolutely necessary" in Article 2 paragraph 2 indicates that employed test of necessity[223] must be *stricter and more compelling* from the one applicable when determining whether State action is "necessary in a democratic society"[224] under paragraph 2 of Articles 8 to 11 of the Convention. That means that the force used must be *strictly proportionate* to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2[225].

The Court also noted that deprivations of life have to be subjected to the most careful scrutiny, particularly where deliberate lethal force is used. Not only the actions of the agents of the State who actually administer the force have to be examined, but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.[226]

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[223]One of the interlocking principles which underpin the Convention is the principle of necessity. Namely, the ECHR implicitly obliges the law enforcement officials to take positive steps to ensure that fundamental rights and freedoms the Convention enshrines are observed. Therefore, they can interfere with these rights and freedoms only when it is strictly necessary to do so in order to solve a particular threat or problem. – Palmer P., "Human Rights and British Policing", Police Journal, vol. 73, Issue 1 , 2000, 57

[224]The Commission held that "necessary" implies a "pressing social need" and that the "necessity test" includes an assessment as to whether the interference with the Convention rights was proportionate to the legitimate aim pursued. - Van Dijk P., Van Hoof F., Van Rijn A., Zwaak L., "Theory and practice of the European Convention on Human Rights", Antwerpen – Oxford, 2006, 396

[225]*McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 149

[226]Ibidem, para. 150

As for the compatibility of national law[227] and practice with Article 2 standards, it was Court's view that the Convention does not oblige Contracting Parties to incorporate its provisions into national law.[228]It is noted that Article 2 of the Gibraltar Constitution is similar to Article 2 of the Convention. Nevertheless, there is an exception concerning the standard of justification for the use of force which results in the deprivation of life - "reasonably justifiable" in the Gibraltar Constitution as opposed to "absolutely necessary" in paragraph 2 of Article 2 ECHR. Although the Convention standard appears to be stricter than the relevant national standard, the Court assessed that the difference between the two standards is not sufficiently great that a violation of Article 2 para. 1 could be found on this ground alone.[229] In other words, the substance of right was indeed protected by the domestic law.

This Court's assessment has brought us one step closer to defining which force is "absolutely necessary" – this standard obviously implies a stricter and more compelling necessity than reasonably justifiable use of force. However, in its substance, the difference is not too great. The best way to describe it might be that absolutely necessary force is always reasonably justifiable while the use of reasonably justifiable force is not at all times absolutely necessary.

[227]The Court examined Article 2 of the Gibraltar Constitution, the relevant domestic case-law, and two documents annexed to the operational order of the Commissioner of Police: "Firearms - rules of engagement" and a guide to police officers in the use of firearms.

[228]"Neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention. Although there is thus no obligation to incorporate the Convention into domestic law, by virtue of Article 1 of the Convention the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States." - *James and Others v. the United Kingdom*, application No.8793/79, judgment of 21 February 1986, para. 84

[229]*Mc Can and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 155

2.2.2.2.2 The application of proportionality principle on the facts of the McCann and Others v. the United Kingdom case

What the Court has set an actual precedent for was the ruling that training and instruction of the agents of the State as well as the need for operational control, in the context of the present case, raise issues under Article 2 paragraph 2 ECHR concerning the proportionality of the State's response to the perceived threat of a terrorist attack. Therefore, it was up to Court to answer the question whether the facts as established by the Commission[230] disclose a violation of Article 2 (art. 2) of the Convention, i.e. was the force used "absolutely necessary".[231]

2.2.2.2.2.1 Training and instruction of state agents, planning, conduct and control of an operation as a part of assessment of possible violation of Article 2 ECHR in the McCann case

In this case the applicants contested the quality of law on the ground, claiming that it did not require the State agents to be trained in accordance with the strict standards of Article 2 paragraph 2 ECHR.[232] However, in the Court's opinion the rules of engagement issued

[230]Having regard to the submissions of both the applicants and the Government, who did not seek to contest the facts as they have been found by the Commission before the Court, as well as to the inquest proceedings, the Court has found that the establishment of the facts and findings on the points previously made by the Commission represents accurate and reliable account of the facts underlying the present case. – Ibidem, para.169

[231]Although in the Gibraltar inquest the jury had the benefit of listening to the witnesses at first hand and to draw conclusions of the probative value of their testimony, its finding was limited to a decision of lawful killing. Moreover, the standard applied for this assessment was whether the killings by the soldiers were "reasonably justified", which is not the same as the standard provisioned by the ECHR. – Ibidem.

[232]Xenos D., „The positive obligations of the state under the European Convention on Human Rights", London and New York, 2012, 124

to the soldiers and the police provide a series of rules governing the use of force carefully reflect both the national standard and the substance of the Convention standard.[233]

As for the applicants' allegations that the killing of the three suspects was premeditated, the Court found there was not enough evidence to support such claims. Namely, the applicants suggested that a plot to kill could be achieved by hints and innuendoes, together with choosing a military unit like the SAS which was trained to neutralize a target by shooting to kill and supplying its members with false information of the sort that was actually given top them, thereby making the lethal outcome highly likely.[234]The Government submitted that in the jury's verdicts of lawful killing it was found as facts that there was no plot to kill the three terrorists and that the operation in Gibraltar had not been conceived or mounted with this aim in view. The jury also concluded that Soldiers A, B, C and D had not deliberately set out to kill the terrorists, whether acting on express orders or as a result of being given "a nod and a wink".[235]

The European Court found no convincing evidence to reach the conclusion of existence of a premeditated plan as it was alleged by the applicants. It is not established that there was an execution plot at the highest level of command in the Ministry of Defense or in the Government, or that soldiers had been encouraged, instructed or had decided on their own initiative to kill the suspects even if there was no justification for the use of lethal force, thereby disobeying the arrest instructions they had received. The Court also found no evidence that authorities implicitly encouraged or gave certain hints and made innuendoes to soldiers to execute the three suspects.[236]

It was also noted that the belief that the car contained a bomb cannot be described as not plausible or completely unfounded. The intelligence information, the known profiles of the three terrorists, all of whom had a background in explosives, and Mr Savage being seen to "fiddle" with something before leaving the car were valid reason to believe in that scenario.[237]

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[233]Ibidem, para 156

[234]Ibidem, para. 174

[235]Ibidem, para. 177

[236]Ibidem, para. 179 – 180

[237]Ibidem, para. 181

The Court further explained that the decision to let the suspect enter Gibraltar was in the Court's view in accordance with the Advisory Group's arrest policy that they should not be apprehended until all of them were present in Gibraltar and sufficient evidence of a bombing mission was obtained to secure their convictions. Furthermore, the use of the SAS, in itself, did not amount to evidence of killing of the suspects being premeditated. It is only natural to use a special unit which has received specialist training in combating terrorism in the case of receiving a warning of an impending terrorist attack. For all these reasons, the Court rejected as unsubstantiated the applicants' allegations of killings being plotted or the product of a tacit agreement amongst those involved in the operation.[238]

Equally significant question the Court had the task of answering was referring to adequacy of the way the operation was planned and conducted,[239] i.e. whether the authorities planned and controlled the anti-terrorist operation so as to minimize, to the greatest extent possible, recourse to lethal force.[240]And, when giving the information and

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[238]Ibidem, 182-184

[239]Applicants insisted that the liability of the Government for all aspects of the operation must be questioned as well. It was pointed out that some suspicions and dubious assessments were presented as facts to soldiers who had been trained to shoot at the slightest hint of a threat and to continue doing so until the target is eliminated. Applicants claimed that the killings are a result of incompetence and negligence in the planning and conduct of the anti-terrorist operation, and that the Government did not maintain a proper balance between the need to meet the threat posed and the right to life of the suspects.
On the other hand, the Government submitted that the actions of the soldiers were absolutely necessary in defense of persons from unlawful violence within the meaning of Article 2 paragraph 2 of the Convention. The Court was reminded that the soldiers in question had to make a split-second decision with lives of many people in stake. Once the suspects were intercepted, they made some suspicious movement which made the soldiers believe that they were about to detonate a bomb by pressing a button. That left them no other choice but to open fire. Moreover, it was subsequently proven that the three deceased were an IRA active service unit which had the control of a large quantity of explosives subsequently found in Spain and that their plan indeed was to plant a car bomb in Gibraltar. The risk to the lives of those in Gibraltar was, therefore, both real and extremely serious. The Government further submitted that in examining the planning of the anti-terrorist operation intelligence assessments are necessarily based on incomplete information. At the same time, experience showed that the IRA were not only exceptionally ruthless and skilled in counter-surveillance techniques but was also constantly and rapidly developing new technology. Therefore the authorities must have counted with the possibility of the terrorists being equipped with ever more sophisticated or more easily concealable radio-controlled devices. In addition to that, the consequences of underestimating the threat posed by the active service unit could have been catastrophic, with many casualties and injured people.[239] That is why the Government claimed that the intelligence made reasonable assessments in the course of the operation. -*Mc Can and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 186 – 189

[240]*Mc Can and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para.193

instructions to the soldiers - which, in effect, rendered inevitable the use of lethal force - did they adequately took into consideration the right to life of the three suspects?[241]

In that context, one of the most criticized decisions made by the authorities was not to arrest the three suspects at the border immediately on their arrival in Gibraltar, especially since they were believed to be on a bombing mission. In this respect, the Court observed that the danger to the population of Gibraltar in not preventing suspects' entry must be considered to outweigh the possible consequences of having insufficient evidence to warrant their detention and trial. That led to the conclusion that there was a serious miscalculation by those responsible for controlling the operation. "As a result", assessed the Court, "the scene was set in which the fatal shooting, given the intelligence assessments which had been made, was a foreseeable possibility if not a likelihood."[242]Therefore the decision not to stop the suspects from entering Gibraltar was a highly significant one due its impact on the final outcome in this case.

The Court also noted that all of the crucial assumptions made at the briefing on 5th March, apart from the terrorists' intentions to carry out an attack, turned out to be erroneous.[243] However, at the same time they represented possible hypotheses which were based on unknown facts and limited intelligence information.[244]

The use of lethal force was made almost unavoidable for several reasons. There were not sufficient allowances being made for alternative possibilities. The existence of a car bomb[245] which, according to the assessments, could be detonated at the press of a

[241]Ibidem, para. 201

[242]Ibidem, para. 205

[243]For instance, it was considered likely that the attack would be by way of a large car bomb, and the possibility of terrorists using a blocking car was discarded. Other assessments were that the bomb would be detonated by a radio-control device; that the detonation could be effected by the pressing of a button; that the suspects would be armed and likely to use their arms if confronted, as well as they would likely detonate the bomb if challenged. – Ibidem, para. 206

[244]Ibidem, 207

[245] The Soldier G, who was not an expert in radio communications or explosives, after a cursory external examination of the car, made an assessment that there was a "suspect car bomb", based on his observation that the car aerial was out of place. This assessment was not definite identification, yet it was conveyed to the soldiers as such. – Ibidem, para.209

button[246] together with a series of working hypotheses were conveyed to Soldiers A, B, C and D as certainties.

At the same time, no provision for a margin of error was made. The soldiers employed in the operation were trained to shoot to kill and it had been discussed with them that there was an increased chance that in the present case they would have to do so since there would be less time where there was a "button" device.

The reason why opting for this way of planning and conducting an operation was highly disputed was that, as the Court rightly observed, "against this background, the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill."[247]

Furthermore, the Court assessed that the reflex action of the soldiers in this vital respect "lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects"[248], and is not in accordance[249]with the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention.[250]

All the above mentioned suggests *a lack of appropriate care by the authorities in the control and organization of the arrest operation*.

Having regard to the all the above stated, the Court was not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely

[246]As the experts in theinquest testified, it was an oversimplification to describe the detonation device as a "button job", without the qualifications of which the competent authorities must have been aware. – Ibidem, para. 208

[247]*McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 211

[248]Ibidem, para. 212

[249]The Court even uses words "stands in marked contrast". - Ibidem.

[250]From this formulation, however, we can see that the context of terrorism was not completely ignored, but priority was attached to the Article 2 and not to the context. Referring to this, N. Aolain explained that "the case signaled an equality approach, whereby the status of the victims, in this case as terrorists, was not a means to lessen the value of the right to life to them per se." - C. Campbell, "Wars on terror and vicarious hegemons: the UK, international law and Northern Ireland conflict", International and Comparative Law Quarterly, Vol. 54, Issue 2, 2005, 345

necessary in defense of persons from unlawful violence within the meaning of Article 2 paragraph 2 of the Convention. By a tight majority of ten votes to nine, the European Court on Human Rights has found that there has been a violation of Article 2 of the Convention.[251]

Some of the judges of the European Court of Human Rights, like judge Pikis, commended this innovative approach of the Court: "The recent decision of the Court in the case of *McCann and Others v. the United Kingdom* puts to the duty of the State to protect the life of the individual on a higher pedestal than hitherto. An operation that carries with it danger to life must be planned and controlled in a way eliminating every foreseeable element of unnecessary risk to life on account of the use of force. The duty of the State when confronting a challenge to social order involving risk to life is not discharged by confining its reaction to the use of force proportionate to the risk involved. The State has the added duty of planning as well as controlling the operation so as to limit the circumstances in which force is used and, if the use of force is unavoidable, to minimize its effects."[252]

One must notice that although the applicants' language of positive duty[253] was not expressly adopted, the way in which the authorities operated and controlled the anti – terrorist operation in the present case was scrutinized in order to make assessment on whether the United Kingdom complied as a Member State to its obligations under the Article 2[254].

[251]This stands in contrast with Commission's view that not only could the shooting of the suspects be regarded as absolutely necessary in order to defend others from unlawful violence, but also "the planning and execution of the operation by the authorities did not disclose any deliberate design or lack of proper care which might have rendered the use of lethal force disproportionate to the aim of saving lives" - *McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 191

[252]*Dissenting opinion of judge Pikis* in case of Andronicou and Constantinou v. Cyprus, application no. 25052/94, judgment on 9th October 1997

[253]The reasoning behind the Court's development of the positive obligations concept is nicely explained by B. Dickson: "Rather than merely requiring the Council of Europe states to refrain from interfering with individuals' rights, the Court is frequently insisting that those states take direct action to protect those rights. States are no longer just being told to allow individuals to live their lives as they please provided they cause no harm to others; they are being required to do things for those individuals that give them a certain quality of life."- Dickson B., 2010, 203

[254]Mowbray A., 2004, 9

2.2.2.2.2.2 Actions of soldiers and their proportionality to the aim of protecting people against unlawful violence within the meaning of Article 2 paragraph 2 ECHR in the McCann case

The Court noted that the supervisor have informed the soldiers who carried out the shooting (A, B, C and D) of existence of a car bomb in place which could be detonated by any of the three suspects by means of a radio-control device which might have been concealed on the suspects' persons. Soldiers also received information that the bomb in question could be activated by pressing a button. It was also conveyed that the suspects were likely to be armed and to resist arrest and would even likely detonate the bomb if challenged, which would inevitably result in heavy loss of life and serious injuries.[255] In other words, information fed to the soldiers painted a vivid picture of impediment danger for life of a number of people, which can be caused by notorious terrorists who are prone to impulsive reactions and have shown a cruel disregard for other people's lives in the past.

When it comes to the shootings, they were result of suspects making what was perceived as sudden threatening moves with one of both of their hands, which led soldiers to believe they are about to detonate the bomb. The evidence showed that Mr McCann and Ms Farrell were shot as they fell to the ground but not as they lay on it, while Mr Savage was shot until he hit the ground and probably in the instant as or after he had hit the ground. Ms Farrell was hit by eight bullets, Mr McCann by five and Mr Savage by sixteen. Soldiers testified that they shot to kill and continued to fire at the suspects until they were undoubtedly physically incapable of detonating a bomb. It was subsequently established that the suspects were unarmed, there was no detonator device on their persons and no bomb in the car has been found.[256]

As to the question whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence, the Court accepted that the soldiers honestly believed, in the light of the information that they had been given, that it was

[255]*McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 195

[256]Ibidem, para. 196-199

absolutely necessary to shoot the suspects in order to prevent them from detonating a bomb. They acted in accordance to the orders received by their superiors and in order to save many innocent lives. The Court therefore considered that "*the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken.*" The Court also concluded that "to hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others."[257]

Legal experts commended the European Court of Human Rights for recognizing "State agents' human imperfection and the difficult operational circumstances in which they re(act)[258]." This judgment was in accordance with the principle of fair balance[259] and helped evolution of this principle of Court's interpretation of the European Convention.

2.2.2.2.2.3 Dissenting opinions in the McCann and others v. the United Kingdom case and the legal grounds they were based on

However, a rather tight majority by which the Court reached its decision in this case showed that there was no unity of judicial opinion in this case. The nine dissenting judges issued a *Joint dissenting opinion* in which they fundamentally disagreed with the

[257]*Mc Can and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 200

[258]Skinner S., "Death in Genoa: The G8 Summit Shooting and the Right to Life", European Journal of Crime, Criminal Law and Criminal Justice, vol. 11, issue 3, 2003, 248

[259]At this place, we'll shortly remind the reader that the principle of fair balance is present in the case law of both original and the present time Court. In *Soering v. the United Kingdom,* the Court has found that "a search for the fair balance between the demands of general interest of the community and the requirements of the protection of the individual's fundamental rights" is inherent in the whole of the Convention. The Court used this principle as basis in assessment of proportionality of respondent States' interferences with the Convention rights of the applicants and for determining when States are subject to implied positive obligations under the Convention. Nevertheless, a certain critique of the Court for adopting this principle does exist. It is mostly based on the fact that it positions the Court in the middle of internal political affairs of Member States. However, the Court allows national states a certain margin of appreciation. See: Mowbray A., "A study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights", Human Rights Law Review, vol.10, issue 2, 2010, 289-318

evaluation made by the majority of the control and organization of the anti – terrorist operation[260], which lead to finding a violation. They pointed out that the Court should "resist the temptations offered by the benefit of hindsight"[261]when evaluating the way in which the operation was organized and controlled, bearing in mind that the authorities had to plan and make decisions on the basis of incomplete information.

In addition to that dissenting judges reminded that the suspects had a tactical advantage because the authorities had to act within the constraints of the law, while the suspects not only regarded the members of the security forces as legitimate targets but also incidental death or injury to civilians as of little consequence.[262]

Thirdly, they maintained that the Court's evaluation should take full account of the prior information received by the authorities about IRA intentions to mount a major terrorist attack in Gibraltar by an active service unit of three individual, which was confirmed by a subsequent discoveryof a car containing a large amount of explosive and four detonators, with a radio-controlled system. In the view of the dissenting judges, in this light the decision that members of the SAS take part in the operation in response to the request of the Gibraltar Commissioner of Police for military assistance was wholly justifiable. The assessments made at the detailed operational briefing on 5 March 1988, in the circumstances as known at the time, were reasonable and the operational order of the Gibraltar Commissioner of Police, drawn up on the same day, inter alia, expressly proscribed the use of more force than necessary.

As regards the particular criticisms of the conduct of the operation which are made in the judgment, foremost among them is the questioning of the decision not to prevent the three suspects from entering Gibraltar, in the *Joint dissenting opinion* it is concluded that although it would have been possible for authoritiesto arrest the suspects at the border, it would have not been practicable,sincein that stage there might not be sufficient evidence

[260]Mowbray A., 2004, 8

[261]*Joint dissenting opinion of judges Ryssdal, Bernhardt, ThórVilhjálmsson, Gölcüklü, Palm, Pekkanen, Sir John Freeland, Baka and Jambrek* in case of McCannand others v. United Kingdom, application No.18984/91, judgment on 27th September 1995, para 8

[262]Since the purpose of the suspects' presence in Gibraltar was the furtherance of a criminal enterprise which could have resulted in the loss of many innocent lives, the dissenting judges considered that the suspects had chosen to place themselves in a situation where there was a grave danger of an irreconcilable conflict between the authorities' obligation to protect the lives of suspects and their obligation to protect the lives of others. – Ibidem, para 9.

to warrant their detention and trial. Therefore, in their opinion, it was not "a serious miscalculation" for the authorities to defer the arrest[263].

The nine judges also disagreed with the part of judgment containing the list of "key assessments" made by the authorities which are said to have turned out, in the event, to be erroneous, although they are accepted as all being possible hypotheses in a situation where the true facts were unknown and the authorities were operating on the basis of limited intelligence information, and gave arguments for their, opposing views.[264]

It is interesting to discuss the dissenting judges' opinion on the assessment made in the judgment that the use of lethal force was made "almost unavoidable" by the failings of the authorities in the following respects: conveyance to Soldiers A, B, C and D of a series of working hypotheses which were vitiated by the absence of sufficient allowances for alternative possibilities and "the definite reporting of a car bomb which could be detonated at the press of a button".[265]

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[263]Ibidem, para 11.

[264]They have pointed out that there was nothing unreasonable in the assessment at the operational briefing that the car which would be brought into Gibraltar was unlikely to be a "blocking" car, especially since, according to intelligence information, reconnaissance missions had been undertaken many times before. It is pointed out in the Joint dissenting opinion that in these circumstances for the authorities to have proceeded otherwise than on the basis of a worst-case scenario would have been to show a reckless failure of concern for public safety. Dissenting judges also criticized the assessment of the majority that "it might have been thought unlikely that they would have been prepared to explode the bomb, thereby killing many civilians, as Mr McCann and Ms Farrell strolled towards the border area since this would have increased the risk of detection and capture". In their view, the question is rather whether the authorities could safely have operated on the assumption that the suspects would be unlikely to explode the bomb when they became aware that they had been detected and were faced with the prospect of arrest, even if for the time being moving in the direction of the border. Namely, previous experience of IRA activities have led to conclusion that the killing of many civilians itself would not be a sufficient deterrent for the suspects, neither would they, when confronted, have preferred no explosion at all to an explosion causing civilian casualties. The judges also noted that, in the light of past experience, it would have been most unwise to discount the possibility of technological advance in this field by the IRA. Therefore, in the present case, there was a likelihood of suspects using a transmitter set up to enable detonation to be caused by pressing a single button .Furthermore, in the joint dissenting opinion it was pointed out that regardless of the manner the assessment made by Soldier G that there was a "suspect car bomb" was conveyed to the soldiers - as a possibility or a definite conclusion - the sheer existence of the risk to the people of Gibraltar and the nature of that risk would have been enough to justifiably prompt the response which followed. When it comes to expertize of soldier G, despite of the brevity of his inspection of the car, it was enough to enable him to conclude, that it was to be regarded as a suspect car bomb. Especially if both the unusual appearance of the car aerial in relation to the age of the car together and the knowledge that the IRA had in the past used cars with aerials specially fitted are taken into consideration. In addition to that, it is important to add that the authorities were not acting solely on the basis of Soldier G's assessment. - *Joint dissenting opinion of judges Ryssdal, Bernhardt, ThórVilhjálmsson, Gölcüklü, Palm, Pekkanen, Sir John Freeland, Baka and Jambrek* in case of Mc Cann and others v. United Kingdom, application No.18984/91, judgment on 27th September 1995, para. 12 – 18.

[265]Ibidem, para.19.

Namely, in their view, this conclusion does not take sufficient account of the part played by chance in the eventual outcome[266]. The implication that the authorities did not exercise sufficient care in evaluating the information at their disposal before transmitting it to soldiers "whose use of firearms automatically involved shooting to kill" appears to be based on no more than "the failure to make provision for a margin of error".[267]

As for the conclusion expressed in the judgment that reflex action of the soldiers in this vital respect lacks the degree of caution which is to be expected from law-enforcement personnel in a democratic society and that this failure by the authorities also suggests a lack of appropriate care in the control and organization of the arrest operation, the dissenting judges remind that in the present case soldiers genuinely believed that the suspects might be about to detonate a bomb by pressing a button. In that situation, to shoot merely to wound would have been a highly dangerous course because in that way a suspect might still be capable of pressing a button if determined to do so.

In the Joint opinion it is also pointed out that soldiers were trained to respond to a threat such as that which was thought to be posed by the suspects in this case by opening fire with the intent to immobilize and that the way to achieve that was to shoot to kill. Evidence showed that a precondition to be accepted for the SAS is displayed discretion and thoughtfulness. In addition to that, in the great majority of cases in the past SAS members had successfully arrested terrorists.

That is why the dissenting judges reached the following conclusion: “We are far from persuaded that the Court has any sufficient basis for concluding, in the face of the evidence at the inquest and the extent of experience in dealing with terrorist activities which the relevant training reflects, that some different and preferable form of training should have been given and that the action of the soldiers in this case *lacks the degree of caution in the use of firearms to be expected of law-enforcement personnel in a*

[266]In the Joint dissenting opinion, it is explained: “Had it not been for the movements which were made by McCann and Farrell as Soldiers A and B closed on them and which may have been prompted by the completely coincidental sounding of a police car siren, there is every possibility that they would have been seized and arrested without a shot being fired; and had it not been for Savage's actions as Soldiers C and D closed on him, which may have been prompted by the sound of gunfire from the McCann and Farrell incident, there is every possibility that he, too, would have been seized and arrested without resort to shooting”. – Ibidem, para. 20

[267]*Joint dissenting opinion of judges Ryssdal, Bernhardt, ThórVilhjálmsson, Gölcüklü, Palm, Pekkanen, Sir John Freeland, Baka and Jambrek* in case of Mc Cann and others v. United Kingdom, application No.18984/91, judgment on 27th September 1995, para. 21.

democratic society".[268] They firmly disagreed with the notion that the standard of care enjoined upon the soldiers was inadequate.

In the *Joint dissenting opinion* it is also concluded that no failings have been shown in the way the authorities organized and controlled the operation which could justify a conclusion that force used against the suspects was not proportional to the purpose of defending innocent persons from unlawful violence. Therefore, in this case the lethal force used did not exceed what was, in the circumstances as known at the time, "absolutely necessary" for that purpose and did not amount to a breach by the United Kingdom of its obligations under the Convention.

Nevertheless, the Court's decision in this case has not only divided the judge panel, but also the legal experts. While most of the authors agree that "the British authorities were bound by their obligation to respect the right to life of the suspects, to exercise the greatest of care evaluating the information at their disposal before transmitting it to the soldiers whose use of firearms automatically involved shooting to kill"[269] there are also the ones who heavily criticize this judgment. Reasons they name are pretty much in line with opinions and arguments expressed in the Joint dissenting opinion.

We can agree with A. Mowbray's assessment that the case of *Mc Cann and others v. United Kingdom* represents the foundation of the Courts willingness to scrutinize the care taken by Member States relevant authorities in implementing security forces operations.[270]

[268]Ibidem, para. 24

[269]Risius G., "Impact of judicial decisions on armed forces", Military Law and War review, vol.39, issue 1 - 4 (2000), 350

[270]Mowbray A., , 2004, 9

2.3 FURTHER DEVELOPMENT OF THE COURT'S JURISPRUDENCE IN REGARD OF EXAMINING POSSIBLE VIOLATIONS OF RIGHT TO LIFE BY EXCESSIVE USE OF FORCE BY LAW ENFORCEMENT OFFICIALS: THE ANDRONICOU V. CONSTANTINOU CASE

2.3.1 The evaluation of planning and control of the rescue operation from the standpoint of the standards demanded under Article 2 of the Convention in the Andronicou and Constantinou case

Two years later, in the *Andronicou and Constantinou v. Cyprus*[271] case, the Court broadened the scope of its evaluation of adequacy of the planning and control of security forces operations to the violent situations in which there were no terrorists involved. In this case, son of one of the applicants, Lefteris Andronicou, abducted the daughter of the second applicant, Elsie Constantinou, who he has been romantically involved with. After negotiations, which lasted for several hours proved futile, the chief of police allowed the Police Special Forces (MMAD) to take over. The Special Forces' officers were informed that the kidnapper was armed with a double barreled hunting gun and were instructed to fire only in case that the life of the hostage or their lives were in danger.

The operation started couple of minutes before midnight[272]. Lefteris shot one time at the MMAD officers and wounded one and the fired one shot at Elsie Constantinou. The Special Forces opened fire and killed Lefteris Andronicou. Elsi Constantinou was also shot[273] and since no ambulance was present she had to be transported hospital in a police

[271] Application No. 25052/94, judgment on 9th October 1997

[272]Lefteris Andronicou's intransigence in the face of negotiations, his threatening tone as well as the young woman's shouts for help persuaded the authorities that he intended to kill her and commit suicide at midnight. Lefteris Andronicou had already beat Elsie and one hour before midnight she was screaming that he was going to kill her.- *Andronicou and Constantinou v. Cyprus*, application No. 25052/94, judgment on 9th October 1997, para. 184

[273]In the shooting, at least 25 bullets hit Lefteris and Elsie was shot by two police bullets. - Mowbray A., "The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights", Oxford – Portland, 2004, 9

car. After undergoing four and a half hours surgery, ElsiConstantinou died of her wounds on the same morning.

The main question the Court was to answer was about the adequacy of the way the negotiations were run and the operation was planned, controlled and conducted. The applicants claimed that there was a lack of coordination in negotiations between the authorities and MrAndronicouas well as deficiency both in terms of leadership and strategy.[274]

The applicants alleged that the failure by the police to conduct the negotiations in an appropriate manner "allowed an essentially domestic quarrel to develop into a crisis and led to the decision to mount a rescue operation based on the use of officers of the MMAD to the exclusion of alternative options entailing less risk to life."[275]

They also claimed that decision to deploy the MMAD officers who were trained to shoot to kill if fired at was a fundamental error in the planning and control phase of the rescue operation. The authorities' conclusion that Lefteris Andronicou had formed the definite intention to kill his fiancée at midnight and then commit suicide and he might have other weapons next to the shotgun was not correct. However the authorities did not attempt to confirm these beliefs despite the lack of concrete indications that they were indeed well-founded.[276]As a result of the failure of the authorities to exercise all due care in evaluating the information at their disposal the MMAD officers entered the flat psychologically prepared to be confronted by an armed person about to kill his hostage. According to the applicants, another fundamental mistake was equipping the raiding team with machine guns and sending them into a badly-lit and rather small room without

[274] Namely, the police officer who conducted had no experience of handling such incidents. At the same time, trained negotiators who were present were never used. The authorities failed to secure the assistance of a psychologist and the police negotiator was left with the task to grasp Mr Andronicou's frame of mind and intentions based on the conversations which he and others had with him and on Elsie Constantinou's cries for assistance. A dedicated telephone line between the police negotiator and Lefteris Andronicou was not provided which resulted in the line being busy at times. The negotiations were conducted against the background of a crowd of onlookers. Despite Andronicou's repeated requests, there was a strong police presence around the flat. - Ibidem, para. 185

[275]Ibidem.

[276] There was no categorical statement by Lefteris Andronicou that he would kill Elsie Constantinou at midnight. Also, he was never seen to be in possession of any weapon apart from the shotgun. – Ibidem, pata. 176

giving them any clear instructions on how to react in the event that Lefteris Andronicou might be holding on to Elsie Constantinou.[277]

The Government responded that the police continuously reviewed development of the situation at the scene of the incident. Moreover, an experienced police officer conducted the negotiations in the best possible manner in the circumstances and was able to build up a relationship with Lefteris Andronicou. It had also been justified to enlist the help of the people close to him in the negotiations since their possible influence could not be disregarded.[278]

It was only after the negotiations failed and when it became clear that Lefteris Andronicou intended to kill Elsie Constantinou's and then to commit suicide that the decision to use the MMAD officers was made. The Government also asserted that MMAD was not a unit specially and exclusively trained for use in anti-terrorist or wartime operations. In fact the rescue operation was planned in such a way as to avoid the use of weapons and with the protection of human life in mind.[279] The MMAD officers were informed Lefteris Andronicou might be in possession of other weapons apart from a shotgun since such option could not reasonably be excluded. They were also given clear instructions to use only strictly proportionate force and to fire only if the young woman's life or their own lives were in danger. For these reasons the Government claimed that all due care had been taken in the planning and control of the rescue operation.[280]

In making an assessment of the planning and control phase of the operation from the standpoint of Article 2 of the Convention, the Court had particular regard to the context in which the incident occurred and to the way in which the situation developed over the course of the day.[281]

The Court outlined that "the authorities clearly understood that they were dealing with a young couple and not with hardened criminals or terrorists" and "never lost sight of the

[277]Ibidem.

[278]Ibidem, para. 178

[279]The Government pointed out that it was the concern to avoid injury to the couple that led to the decision to use tear gas rather than stun grenades. – Ibidem.

[280]Ibidem, para. 178 – 179

[281]Ibidem, para. 182

fact that the incident had its origins in a "lovers' quarrel"[282]. They tried to end the incident through persuasion and dialogue right up to the last possible moment and decided to deploy MMAD officers only as last resort. That was the reason why the Court maintained that the negotiations were in general conducted in a reasonable manner.[283]

As the situation progressively developed and became more dangerous, the authorities became aware that some critical decisions will have to be taken. They were convinced that Lefteris Andronicou has intended to kill both Elsie and himself based on lack of flexibility during the negotiations, his threatening tone and the young woman's shouts for help. The Court found that based on all this, such a conclusion and fear of a tragic outcome at midnight have been "reasonable" and have in other words not shown neglect in assessing the situation.[284]

Court therefore considered that, given the nature of the operation, which was contemplated, authorities' decision to use the MMAD officers was justified.[285] It was discussed at the highest possible level[286] and only implemented when the negotiations failed in view of a reasonably held belief that the young woman's life was in imminent danger. The officers deployed were issued with clear instructions as to when to use their weapons and were told to use only proportionate force. Despite their effort to avoid any harm to the couple, the authorities acted reasonably by alerting the officers to the dangers which awaited them and warning them of a possibility that Lefteris Andronicouwas armed with more weapons than only a shotgun.[287]

The Court also commented on the decision to arm the officers with machine guns. Namely, since Lefteris Andronicou was armed with a double-barreled shotgun and there was a possibility of him having other weapons, the Court held that "the authorities had to

[282]Ibidem, para. 183

[283]Ibidem.

[284]Ibidem, para.184

[285] This conclusion was very different from what the Commission previously assessed. In the Commission's view,"the decision to deploy the MMAD officers to deal with a domestic quarrel was a fundamental flaw in the planning and control of the operation", especially when the fact that they were trained to shoot to kill when they perceived themselves to be in danger is taken into consideration. - Ibidem, para.180

[286]This refers both to the police chain of command and to ministerial level. – para. 185

[287]Ibidem.

anticipate all possible eventualities".[288]In addition to that, machine guns were fitted with flashlights which would enable the officers to be more efficient in identifying the precise location of the young woman in a dark room filled with tear gas and at the same time leave their hands free to control their weapons in the event of coming under fire.

Having regard to the above considerations, the Court reached the conclusion that *it has not been shown that the rescue operation was not planned and organized in a way which minimized to the greatest extent possible any risk to the lives of the couple.*[289]

2.3.2 The administration of force and its permissibility under Article 2 Paragraph 2 ECHR in the Andronicou and Constantinou case

The applicants maintained that the force used by members of MMAD was more than absolutely necessary for the purposes of either rescuing the hostage and arresting Lefteris Andronicou or saving her life and their own lives. In their view, by directing machine-gun fire at the Lefteris' waist upwards in a badly lit and confined space the officers were running a very high risk of killing his hostage which they ended up doing. The applicants also contended that neither officer exercised the degree of caution in the use of firearms required of law-enforcement officers in a democratic society. The soldiers' belief that Andronicou presented a threat to Elsie Constantinou's life or to their own lives was unjustified, mistaken and ill-founded belief, and that belief resulted in him being intentionally killed.[290]

The Government maintained that the force administered by officers was strictly proportionate to the aim of rescuing Elsie Constantinou and defending their own lives.

[288]Ibidem.

[289]The Commission, however, reached the opposite conclusion, and criticized the fact that special forces were deployed, that they were equipped with machine guns, warned that LefterisAndronicou might be holding other weapons and sent into a small, badly lit room to effect the operation. In the Commission's view, that directly exposed the couple to an obvious risk of injury or death.

[290]Ibidem, para. 187

Namely, the Government pointed out that Lefteris Andronicou fired at the officer and that officer no .2 acted on a well-founded belief that Officer no. 1 had been killed and Officer no. 3seriously wounded. Also, as Lefteris Andronicou moved, he used Elsie Constantinou as a human shield. The Government concluded by reminding that the use of lethal force has never been planned but resulted directly from the fact that Lefteris Andronicou opened fire at the MMAD officers, leaving them with no alternative but to fire back. It also asked the Court not to make its assessment with the benefit of the hindsight.[291]

When it comes to the force administered, the Court assessed that "the officers' use of lethal force in the circumstances was the direct result of Lefteris Andronicou's violent reaction to the storming of the flat"[292]. He shot both at the officers and Elsie. Consequently, MMAD officers were forced to take split-second decisions to avert the real and immediate danger which he presented for them and for the girl held hostage.

Standard of honest belief was reinforced in this case, as the Court accepted that Special Forces officers "honestly believed that… it was necessary to kill him in order to save the life of Elsie Constantinou and their own lives and to fire at him repeatedly in order to remove any risk that he might reach for a weapon."[293] The Court, similarly as in the McCann case, showed understanding for the difficult position in which the MMAD officers were and outlined that "it cannot with detached reflection substitute its own assessment of the situation for that of the officers who were required to react in the heat of the moment in what is for them a unique and unprecedented operation to save life."[294]In the Court's view, the officers were entitled to open fire and to take all measures which they *honestly and reasonably believed were necessary* to eliminate any risk to their lives or the life of woman held hostage.[295]

The Court considered that the use of lethal force in the circumstances did not exceed what was "absolutely necessary" for the purposes of defending the lives of Elsie Constantinou

[291]Ibidem, para.188

[292]Ibidem, para.191

[293]Ibidem, para. 192

[294]Ibidem.

[295] The Court also took notice of the fact that out of the shots fired, only two of the officers' bullets actually struck her, although the accuracy of the officers' fire was impaired through Lefteris Andronicou exposed her to risk by clinging on to her.That also showcased that the officers had regard to her life and have taken all the measures necessary to preserve it, at the same time not exposing their own at risk.– Ibidem.

and of the officers and did not amount to a breach by the respondent State of their obligations under Article 2 § 2 (a) of the Convention.[296]

2.3.3 Dissenting opinions in the Andronicou and Constantinou case

This ruling was critiqued even by some judges from the panel. In his Dissenting opinion Judge Pikis accepted the Commission's view that in this case the factthat State authorities did not eliminate avoidable risks to the lives of others in the planning and control of an operation with inherent danger to their lives constitutes a breach of Article 2. He fundamentally disagreed with the majority's view, stating that not enough consideration was given to the fact that LefterisAndronicou was not a terrorist or a hardened criminal. In his view, the decision to use MMAD officers was bound to have disastrous consequences. He called their use of force "unrestrained" and pointed out that the two officers who fired twenty-nine shots in directing their fire "do not appear to have discriminated between Lefteris Andronicou, whom they perceived as posing a threat to their lives, and Elsie Constantinou, whom they were entrusted with rescuing."

Although this judge did accept that such reaction was in large measure the result of their training, he agreed with the principle established in the previous, McCann case: "The fact that the use of lethal force is… the result of reflex action is neither an excuse nor a justification for acts incompatible with the duty under Article 2 of the Convention; not even when dealing with dangerous terrorists."[297]

Judge Jungwiert in his *Partly concurring, partly dissenting opinion* gave the following definition: *the concept of "absolutely necessary" must be understood as meaning that there is no other possible course of action.*[298] This very simple definition seems to us to be quite on spot and, in our opinion, depicts perfectly the essence of this legal standard.

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[296] Again, the Commission took a different view. It pointed out that the recourse to lethal force in the circumstances and the deaths which resulted were inevitably linked to the authorities' decision to entrust the MMAD officers with the implementation of the rescue operation. Also, the Commission considered that the number of bullets fired by the two officers indicated *a response which lacked the degree of caution in the use of firearms to be expected from law-enforcement personnel in a democratic society* and that the force they used made deaths of Andronicou and Constantinou almost inevitable. - Ibidem, para.190

[297] *Dissenting opinion of judge Pikis* in case of Andronicou and Constantinou v. Cyprus, application no. 25052/94, judgment on 9th October 1997

[298] *Partly concurring, partly dissenting opinion of judge Jungwiert*in case of Andronicou and Constantinou v. Cyprus, application No. 25052/94, judgment on 9th October 1997

In the *Andronicou* case he found that there was *a serious and unnecessary disproportion* between the means used and the situation that had to be faced, both in the rescue plan and the armed intervention. In his opinion, the fact that MMAD squads were sent in a small room, armed with machine guns, that they continued to fire even after Lefteris collapsed, that medical experts agreed that Elsie would have survived if she had sustained only the injuries caused by Lefteris Andronicou's gun all show lack of organization and proper equipment.

In his *Partly concurring, partly dissenting opinion*, judge Pekannen raised similar points, especially concerning the deployment of the special forces and the arms they were equipped with. However, unlike the other judges, he maintained that the negotiations were not carried out effectively and in a proper manner.[299] Similar views and arguments can be found in the *Partly concurring, partly dissenting opinion* of judge Palm.

What we found to be very interesting is that judge Pekannen firmly disagreed with the majority of judges who accepted the hypothesis that the action of the officers was based "on an honest belief which was perceived, for good reasons, to be valid at the time but subsequently turned out to be mistaken. He explained his criticism: "Accepting such reasoning would presuppose overlooking that the officers were simply carrying out the orders of their superiors. Their choice of the means to be used and the approach to adopt was already very limited once the operation had been launched, and they may bear only a very limited responsibility. The full responsibility rests with those who planned and directed the operation and also with those who organize and oversee police work in general."[300]

Among the law experts, the Court's decision in this particular case was disputed as well. Some legal theorists expressed the opinion that "the majority in *Andronicou* appear to have been willing to discount a number of significant defects in the planning and

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[299] The leadership of the operation was assigned to a relatively young policeman who had no previous experience of handling such a situation; Lefteris Andronicou had an open telephone line and did not talk exclusively with the police; there was no coordination of the messages given to him; there was a strong police presence around the flat despite the fact that Lefteris stressed several times he is afraid of the police and there was a large number of bystanders near the flat as well. - *Partly concurring, partly dissenting opinion of judge Pekannen* in case ofAndronicou and Constantinou *v. Cyprus*, application No. 25052/94, judgment on 9th October 1997

[300] *Partly concurring, partly dissenting opinion of judge Jungwiert*in case of *Andronicou and Constantinou v. Cyprus*, application No. 25052/94, judgment on 9th October 1997

implementation of the rescue mission"[301], such as lack of medical team and equipment at the place of events.

However, it is our view that, taking all the aforementioned circumstances into consideration, as well as the necessity not to place too heavy of a burden on the law enforcement officers, the Court made the right decision in this case.

2.4 CASES AGAINST THE TURKEY AND THE PROPORTIONALITY OF FORCE USED BY THE STATE OFFICIALS IN THE LIGHT OF ARTICLE 2 ECHR

Turkey became a party to the Convention in 1954 and it has accepted the right of individual petition in 1987. In the Kurdish-populated south-east part of the country there was a military dictatorship and conflict, which has led to systematic problems and numerous human rights breaches. In the 1990s a number of lawyers, academics and NGOs brought cases to the European Court of Human Rights in order to make a public record of the violations that took place, as well as to lead Turkey's hand to identify and prosecute the ones who committed them, make sure they are held accountable, as well as to provide appropriate reparation to the victims and reform its legal system as well as its administration of justice.[302]

The number of these cases was very high. They showcased that there have been numerous and serious violations of human rights in this Turkish region, and that there have been certain shortcomings in the country's legal system.[303]

[301]Mowbray A., 2004,11

[302]Bantekas I., Oette L., 2014, 233

[303]Ibidem.

2.4.1 Güleç v. Turkey

In *Güleç v. Turkey*[304], two people were killed in incidents occurring on 4 March 1991 in Turkey. One of them was 15-year old high school pupil Ahmet Güleç. Twelve other people were wounded. After the incidents, the security forces collected the spent cartridges and confiscated 13 rifles whose owners were prosecuted. However, the Diyarbakır National Security Court acquitted them in the light of evidence that they had not taken part in the events concerned.

There was a dispute about the facts of the case between the Government who claimed that Ahmed was hit by a bullet fired by armed demonstrators who were shooting at the gendarmes, and the applicant, who alleged that his son was killed by the security forces, who fired on the unarmed demonstrators.[305]

When elaborating on whether the force used by gendarmes was proportionate and "absolutely necessary", the Court first took notice that the demonstration got rather violent,[306] so the security forces were forced to call for reinforcements. It also assessed that the testimonies of several witnesses, together with the fact that nearly all demonstrators were hit in the legs, which would be consistent with ricochet wounds from downward trajectory, prove that shots have been fired at the crowd from the turret of an armored vehicle. Therefore, the Court reminded that *although the use of force may be justified in the present case under paragraph 2 (c) of Article 2, a balance must be struck between the aim pursued and the means employed to achieve it*.[307]

The Court criticized the fact that gendarmes did not have necessary equipment to deal with the demonstrants (truncheons, riot shields, water cannon, rubber bullets or tear gas) but were instead armed with very powerful weapons. In the court's view, this was even less acceptable since a state of emergency has been declared in that whole region. For all

[304]*Güleç v. Turkey*, application no. 54/1997/838/1044, judgment on 27th July 1998

[305]The Commission in a large majority (31 votes to one) found that there had been a breach of Article 2 of the Convention and referred the Case to the European Court of Human rights.

[306] Both moveable and immoveable property in the town got damaged and some gendarmes were injured.

[307]*Güleç v. Turkey*, application no. 54/1997/838/1044, judgment on 27th July 1998, para. 71

the reasons stated above, the Court unanimously held that in the circumstances of this case the force used to disperse the demonstrators, which caused the death of Ahmet Güleç, was not absolutely necessary within the meaning of Article 2.[308]

2.4.2 Ergi v. Turkey

Only one day later, a judgment in the case *Ergi v. Turkey*[309] was passed. In this case, the applicant's sister was killed in what the applicant maintained to be a retaliatory operation by the security forces against the village and a government considered as a clash of terrorists and security forces. The Court agreed with the Commission's view that "the responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they *fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimizing, incidental loss of civilian life*."[310] This was a very important turn in the Court's jurisprudence.

In the light of the authorities of the respondent State failing to present direct evidence on how was the ambush operation planned and conducted, the Court found that it can reasonably be concluded that insufficient precautions had been taken to protect the lives of the civilian population. Namely, based on the evidence, the Court held that it is *probable* that the bullet which killed Havva Ergi had been fired from the south or south-east[311]. There was evidence that the security forces had been present in the south of the village, which put the lives of the civilians at a real risk through being exposed to cross-fire between the security forces and the PKK.[312] Having regard to the above

[308] *Güleç v. Turkey*, application no. 54/1997/838/1044, judgment on 27th July 1998, para. 73

[309] *Ergi v. Turkey*, application no.66/1997/850/1057, judgment on 28th July 1998

[310] *Ergi v. Turkey*, application no.66/1997/850/1057, judgment on 28th July 1998, para.79

[311] In other words, it was not established beyond reasonable doubt that the bullet which killed the victim had been fired by the security forces. - Van Dijk P., Van Hoof F., Van Rijn A., Zwaak L., "Theory and practice of the European Convention on Human Rights", Antwerpen – Oxford, 2006, 372

[312] The Court agreed with the Commission in this respect. The Commission also pointed out that its ability to make an assessment of how the operation had been planned and executed had been limited due to the lack of information provided by the Government. According to the gendarmerie officers' testimonies, the

considerations, the Court found that there were many flaws in the way the security forces' operation has been planned and conducted. Therefore, Turkish authorities failed to protect right to life of the applicant's sister.[313]

A. Mowbray attributes great significance to this case, because it showcases the evolution of the positive obligation on states to exercise appropriate care in the planning and control of their security forces' operations. In his words: "the judgment clearly elaborates the need for domestic authorities, when planning these operations, to have regard to the dangers posed to innocent bystanders from both security personnel and the suspected terrorists/criminals against whom the operation is directed. The authorities must develop and implement plans which take all feasible precautions with a view of avoiding and, in any event, to minimizing, incidental loss of civilian life. These are stringent requirements but given the importance of the right to life and the professionalism which can rightly be expected of security forces operating in democratic European states they are essential attributes of this positive obligation."[314]

ambush was organized in the north-west of the village. The distance between the village and the ambush was not specified. However, there was evidence that security forces had been present in the south, which had placed the villagers at considerable risk of being caught in cross-fire between security forces and any PKK terrorists who had approached from the north or north-east. In the Commission's view: "Even if it might be assumed that the security forces would have responded with due care for the civilian population in returning fire against terrorists caught in the approaches to the village, it could not be assumed that the terrorists would have responded with such restraint." However, there were no indications that any steps or precautions had been taken to protect the villagers from being caught up in the conflict. - *Ergi v. Turkey*, application no.66/1997/850/1057, judgment on 28th July 1998, para. 80

[313] This judgment was reached unanimously.

[314] Mowbray A., 2004, 13

2.4.3 Öğur v. Turkey

In the *Öğur v. Turkey*[315]case the applicant's son, Musa Ogur, who worked at the mine as a night-watchman, was killed at about 6.30 a.m. as he was about to come off duty. The incident took place in December 1990in the province of Siirt, where a state of emergency was in force during an armed operation that security forces carried out at a site belonging to a mining company. While the Government claimed that he was a member of PKK that got killed after attacking the members of security forces, the eye witnesses not belonging to those forces claimed there was no attack and he was killed as he went out of the shelter alone since his movement have been perceived as threatening or that he is trying to escape. The public prosecutor's office in its report also made no mention of the alleged attack by the victim. Furthermore, the physical evidence (there were no cartridges or cartridge cases on or around the body) supported such version of the events. Therefore the Court concluded that there was insufficient evidence to establish that the members of the security forces came under attack.[316]

Moreover, there was no sufficient evidence that security forces have given loud verbal warnings to the victim, which they were officially instructed to do.[317]

As to the Government's claim that the applicant's son has been struck by a warning shot which has hit him in the neck as he was running away, the Court pointed out that warning shots are fired in the air and the gun is thereby held vertical in order to prevent the suspect getting shot. In the case such as this, where the visibility has been poor, it was even more essential to fire a warning shot that way. The Court noted that it is therefore difficult to imagine that a genuine warning shot could have struck the victim in the neck. Furthermore, since the members of the security force have taken up positions around fifty meters apart from each other, the fact they were not linked by radio must necessarily have made it difficult to transmit orders and control the operations.

[315]*Öğur v. Turkey*, application no. 21594/93, judgment on 20th May 1999

[316]Ibidem, para. 81

[317]Ibidem, para. 82

Having regard to all of the above stated, the Court concluded that even if we would accept that the applicant's son has been killed by a bullet fired as a warning shot, "the firing of that shot was badly executed, *to the point of constituting gross negligence*, whether the victim was running away or not".[318]

Based on all the deficiencies noted in the planning and the execution of operation in question, the Court found that the use of force against the applicant's son was neither proportionate nor absolutely necessary in defense of any person from unlawful violence or to arrest the victim. Turkey violated its obligations under Article 2 ECHR in this case.

2.4.4 Gül v. Turkey

The Court also took an interesting stand in the *Gül v. Turkey* case[319]. The state of facts in this case was following: after the police was informed over the phone about alleged whereabouts of three PKK terrorists, special operations team of twelve officers arrived in the small town of Bozova with the aim to locate and arrest the terrorists. The team members were briefed by their leader and according to their recollections they had been given a strong indication that PKK terrorists would be likely to be present at the address. No details were given concerning the other people who lived in that apartment block and they received no instructions about the use of their weapons or the tactics to be used to gain entry to the apartment if there was resistance.[320]

Around 1 o'clock special operations team came to the doors of the apartment of the applicant's son, Mehmet Gül. Although the following course of events was disputed,[321]

[318]Ibidem, para. 83

[319]*Gül v. Turkey*, application no. 22676/93, judgment on 14th December 2000

[320]*Gül v. Turkey*, application no. 22676/93, judgment on 14th December 2000, para. 16

[321] The Commission did not find plausible claims of the three special team officers, who alleged that after one of them had knocked on the door shouting to open up, Mehmet Gül had opened the door, fired a shot through the door with a pistol and then closed the door again. The Commission also found their claims of having opened fire on the door in order to force it open and accidentally inflicted multiple wounds on Mehmet Gül who was behind the door. The Commission found their testimony lacking in reliability and

the Commission assessed that the officers knocked on the door and when Mehmed approached to open, the sound of the key turning in the lock sounded like a gun being cocked. While he was still unlocking the door, the officers started firing through it. Mehmed was wounded multiple times. As he turned away from the door, a bullet struck him in the back inflicting a fatal injury, from which he died in the hospital on the same night.

In response to the applicant's argument that the facts surrounding the shooting clearly disclosed that the police officers themselves deliberately intended to kill the person who was behind the door, the Court clearly stated it "*does not find it necessary to determine whether the police officers had formulated the intention of killing or acted with reckless disregard for the life* of the person behind the door", *but is satisfied that the police officers used a disproportionate degree of force* in the circumstances.[322]

Although the Court once again recalled that the use of force in pursuit of one of the aims permitted by paragraph 2 of the Article 2 ECHR may be justified if it is based on an honest belief which is perceived for good reasons to be valid, but in the subsequent turn of the event this belief is proved to be mistaken, in this case it held there were no reasons to form such belief. However, in the Court's words "the firing of at least 50-55 shots at the door *was not justified by any reasonable belief of the officers that their lives were at risk* from the occupants of the flat. Nor could the firing be justified by any consideration of the need to secure entry to the flat as it placed in danger the lives of anyone in close proximity to the door."[323] The Court agreed with the Commission's finding that in these circumstances, especially since Mehmet Gül lived in his flat with his wife and children, the force used was grossly disproportionate and cannot be regarded as "absolutely necessary" for the purpose of defending life.[324]

This case is also specific because the Court, due to the Commission's inability to make many findings of fact as to the planning of the operation due to the lack of reliable

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credibility, contrary to the evidence of FilizGül and Mustafa Gül, who were immediate witnesses of events, which the Court found to be consistent, credible and convincing. - Ibidem, para. 22

[322]Ibidem, para. 80

[323]*Gül v. Turkey*, application no. 22676/93, judgment on 14th December 2000, para. 82

[324] It is interesting that the Court itself stressed that no comparison can be made with the *Andronicou* case, where there was a shooting at the man in his flat, but a man who had a hostage, was known to possess a gun and fired twice, both at the Special Forces' officers and at the hostage. – Ibidem.

evidence, was not persuaded that any separate issue concerning this aspect of the operation can usefully be identified and therefore made no separate finding of violation as regards this aspect of the case.

2.4.5 The impact of the Strasbourg Court's judgments concerning Turkey

The cases against Turkey in front of the Strasbourg Court have addressed various issues, diverse in their nature. The impact of these judgments has varied as well, depending on the issue concerned. The special trait of the cases dealing with human rights violations in the south-east of Turkey was definitely the fact that the official bodies challenged the evidence provided, the witness accounts as well as the assignment of the victim status.[325]

Due to its aspirations to become an EU Member State, Turkey had strong incentives to comply with the Strasbourg Court's judgments. Not only has it paid considerable amounts in monetary compensations, but it also reformed its legislation. Inter alia, it has removed immunity of the officials.[326]

However, the prosecution rates of state officials have remained low. Turkey has also never officially acknowledged the breaches of human rights law.[327] According to legal experts such as B. Cali, the reason for the lack of a bigger progress in this respect is that the ruling elites in Turkey have not taken a human rights perspective when analyzing the Court's decisions, but have predominantly seen them as "taking sides" in the conflict and a sign of support to the terrorist against the Turkish state.[328]

[325]Bantekas I., Oette L., 2014, 235

[326]Ibidem, 233

[327]Ibidem, 235

[328]Ibidem, 234

2.5 ANALYSIS OF THE NORTHERN IRELAND CASES IN THE LIGHT OF APPLICATION OF "ABSOLUTELY NECESSARY USE OF FORCE" STANDARD UNDER ARTICLE 2 PARAGRAPH 2 ECHR

The United Kingdom has ratified the Convention in 1951. However, it was more than a century later, in 1998, that the subjects became entitled under national law to have recourse to the European Court.

2.5.1 Kelly and Others v. The United Kingdom

After obtaining information that there was likely to be a terrorist attack on local station of the Royal Ulster Constabulary[329] in County Armagh on 8 May 1987, twenty four soldiers and three RUC officers arrived at the station in the early hours of that day, and were positioned in six locations surrounding the station. The soldiers received information that a blue Hiace van had been hijacked and a digger stolen and filled with explosive. Between 7.15 and 7.30 p.m., the blue van came from the Loughgall direction and parked outside the station. From the van emerged a man and started to shoot at the RUC station. Soldiers returned fire without warning. At least four more men went out of the van and started firing at the station, so the conflict escalated. During the exchange of fire, one IRA member drove the digger through the front gate of the station. Having seen that, one of the soldiers fired a short burst at the driver, which stopped the digger. Shortly after, there was a strong explosion, which caused serious damage to the station. Two constables were injured. At the same time, three soldiers moved towards the front of the station and continued to fire at the men near the van and once they took cove, in the vehicle itself, until any movement stopped. At that point soldiers approached the van and in its back they saw two men and a number of weapons. A sudden movement from one of them

[329] In further text: the RUC.

made soldiers to fire a round into him, believing that he is reaching for one of the weapons.

Soldiers positioned in other areas also fired at the gunmen once they had begun to shoot at the RUC station. One of the soldiers fired at a man in a blue boiler suit who was crossing the road in a crouched manner. Another soldier fired two bursts from a rifle to the man who was hiding behind a wall and after being called to stand up moved quickly, holding an item in his hand. However, near the body no weapon was found. Automatic fire was also opened on a white Citroen car right which was first parked behind the van and the digger, and after shooting started but before the bomb went off began to reverse towards the soldiers. Almost immediately after the front seat passenger got out of the car despite a warning not to move, he was hit by gunfire from one of the soldiers fell to the ground. After establishing that he was still alive, soldiers moved him onto the pavement and treated his wounds. However, the driver of the car was dead at the wheel of the car.

Soldiers also fired two shots at the person lying in the driveway, on his back. The man was still moving and had something metallic in his clenched right hand. One of the soldiers perceived that man as a threat so he fired at him twice. However, after the examination of the body, it turned out that the thing the man was holding was an ordinary cigarette lighter. In total, 9 men were killed, one of which was not connected with IRA, and two of which were members of IRA, but unarmed.

After bringing the case to the local authorities[330], the applicants filed a complaint to the European Court of Human Rights, submitting that the death of their relatives was the result of the unnecessary and disproportionate use of force by SAS soldiers.[331]

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[330] After the incident, there was a police investigation, followed by a four-day inquest opened on 30 May 1995 in public before a Coroner and a jury of 10 members. On the same day of the inquest, counsel for the six families sought for the statements of prospective witnesses to be made available to them at the commencement of the proceedings together with the maps and photographs. The Coroner made available the maps and photographs but did not permit counsel to see witness statements until the witness was giving evidence. The counsel's request for adjournment in order to seek judicial review of this decision was refused twice. Therefore, on 31 May 1995, following consultation with the families, counsel withdrew from the hearing to seek a judicial review. The hearing of the inquest proceeded without representation for any of the nine families. The Coroner heard 45 witnesses, both civilian and from the police, while the soldiers did not appear but their statements were lodged. On 2 June 1995 the inquiry concluded that all nine men had died from serious and multiple gunshot wounds. As for the judicial review of the Coroner's decisions, in his judgment of 24 May 1996, the High Court refused to quash the Coroner's decisions or the jury verdict.

[331]Their argument was that in this case the planning and conduct of the operation were such as to suggest that its object was to kill all those involved or that it was negligent as to whether deaths would occur. They referred to the aggressive security response applied by authorities, as well as the fact that although the security forces had known of the operation beforehand, no steps were taken to arrest or intercept the IRA

The Court has noted that civil proceedings offered the possibility of obtaining a determination of the issues of lawfulness of the use of force, including its proportionality, as well as providing the possibility of compensation.[332] Consequently, those applicants who did not take or pursue civil proceedings regarding the alleged unlawfulness of the deaths of their relatives have failed to make use of the available domestic remedies, which again precluded the Court from examining their complaints of a substantive violation of Article 2 due to the alleged excessive use of force or negligence in the planning or control of the operation.

However, when it came to Bridget Hughes, the only applicant that did brought civil proceedings for aggravated damages in respect of her husband Antony, the Court therefore found that in settling her claims in civil proceedings and in accepting and receiving compensation, the applicant has effectively renounced further use of these remedies. Namely, since the Court was not presented with enough evidence that the state of domestic law per se fails to comply with the Convention standards,it was not convinced of existence of an administrative practice rendering civil procedures ineffective as a remedy for her complaints, nor that there was no alternative to applicant but to accept the settlement offered by the authorities. The applicant failed to show that the civil courts offered no prospect of obtaining a finding of liability in her favor. In these circumstances, she may no longer claim to be a victim of a violation of the Convention as regards the alleged excessive or disproportionate force used in killing her husband.[333]

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members before, or during the incident. In the applicants' view the operation was run as „an ambush intended to kill those walking into it". Security forces employed a heavy concentration of fire which also placed civilians at risk, especially since there was no attempt to stop civilian cars from entering the location of the ambush. The applicants illustrated their claim that the operation could not be regarded as employing minimum or proportionate force with the following facts: 600 bullets were recovered out of a possible 2585 used, ammunition employed was a mixture of ball tracer and armor piercing, three of the dead men were unarmed, the soldiers acted to neutralize any perceived threat, at least one man (Seamus Donnelly) had been shot at close range while on the ground. - *Kelly and others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, paragraph 83

[332] The applicants have stated that it was not worthwhile to embark on such proceedings as the practice of the State in offering settlements prevented any admissions of liability being issued by the courts, which was what they wanted rather than money as such.However, in the previous case of *Caraher v. the United Kingdom*, (application no. 24520/94, decision on 11th January 2000), where the applicant accepted a settlement of her action in respect of the killing of her husband by two soldiers, the Court did not find that the civil proceedings had been shown to be ineffective as a means of redress for the applicant's complaints. In *Kelly and others v. UK* case nothing in the submissions of the applicants persuaded the Court to reach another conclusion.

[333]*Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001,para.107

2.5.2 McKerr v. the United Kingdom case

The Strasbourg Court reached a very similar conclusion in the *McKerr v. the United Kingdom* case.[334] In November 1982 police officers had fired more than 190 shots at a car driven by Gervaise McKerr. McKerr and his two passengers, all unarmed, had been killed in that attack. His wife and subsequently his son filed a complaint to the European Court of Human Rights, arguing that the force used by the police officers has not been proportionate or absolutely necessary.

In the Court's view, it is an undisputed fact that Gervaise McKerr was not armed when was shot and killed by police officers. Therefore judges examined this case in the light of second paragraph of Article 2 ECHR, which requires any such action to pursue one of the purposes set out in it and to be absolutely necessary for that purpose. The most important factual question to be assessed by the Court in this case was whether the officers acted on the basis of an honest belief perceived for good reasons to be valid at the time but which turned out subsequently to be mistaken, namely, that they were at risk from Gervaise McKerr or the other men in the car. When determining this issue the Court should take into consideration various factual issues.[335]

However, since all the above-mentioned matters were at the time pending examination in civil proceedings in the United Kingdom, the Court considered that it would be inappropriate and contrary to its subsidiary role under the Convention to attempt to establish the facts of this case by embarking on a fact-finding exercise of its own by summoning witnesses. Such an exercise would duplicate the proceedings before the civil courts which are better placed and equipped as fact-finding tribunals.[336]Moreover, the

[334]*McKerr v. The United Kingdom*, application no. 28883/95, judgment on 4th May 2001

[335]among others, the possibility that ricochets gave the impression of gun flashes from the car, the view which the officers had of the men in the car, the basis on which they considered that they were at risk and whether there was any possibility of attempting an arrest. It would also be essential to evaluate if the various eyewitness' testimonies can be accepted as credible and reliable. - Ibidem, para. 117

[336]The European Commission of Human Rights has previously embarked on fact-finding missions in Turkish cases where there were proceedings pending against the alleged security-force perpetrators of unlawful killings. However, the proceedings in question were criminal and they had terminated, at first instance at least, by the time the Court examined the applications. Moreover, in those cases, it was an essential part of the applicants' allegations that the defects in the investigation were such as to render those

Court found no concrete factors which could deprive the civil courts of their ability to establish the facts and determine the lawfulness or otherwise of GervaiseMcKerr's death, while at the same time there would be difficulties in the Strasbourg Court doing the same based on the documents presented.

Furthermore,theCourt pointed out its lack of preparation to conduct, on the basis largely of statistical information and selective evidence, an analysis of incidents over the past thirty years with a view to establishing whether they disclose a practice by security forces of using disproportionate force. In the judgment it is therefore concluded that this would go far beyond the scope of the application in question.

2.5.3 Hugh Jordan v. The United Kingdom case.

In *Hugh Jordan v. The United Kingdom case*[337] the applicant claimed that shooting of his son by a police officer was unjustifiable and that the force used was not absolutely necessary. The applicant's son was driving a car at which, after a pursuit, the RUC offices fired several shots. It was subsequently established that he was unarmed at the time of the shooting.

In this case the Court gave the same explanation as in the McKerr case: although the force used falls squarely within the ambit of Article 2, it is necessary to determine if the security officers acted because they honestly believed, based on what they at the time thought were valid reasons that they were at risk from Pearse Jordan in the circumstances of the case.[338] As these matters were at the time pending examination in two domestic civil proceedings brought by the applicant, the Court gave the same arguments for not

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criminal proceedings ineffective. In the McKerr v. the United Kingdom the situation was completely different. – Ibidem.

[337] *Hugh Jordan v. The United Kingdom*, application no. 24746/94, judgment on 4th May 2001

[338] In order to answer this question, a number of factual questions would have to be answered: was Sergeant A's view blocked by any vehicle as alleged, did Sergeant A give a warning shout, whether Pearse Jordan was facing him or whether in fact his backwas already turned at the moment when Sergeant A decided to open fire.In addition to that, the credibility and reliability of the various witnesses would have to be assessed, especially since there is a clash between the evidence of the police officers at the scene and statements given by civilian eyewitnesses. – Ibidem, para. 110

attempting to establish the facts of this case by embarking on a fact finding exercise of its own as in the McKerr case, calling upon its subsidiary role under the Convention and the fact that in this case, unlike in the previously examined cases against Turkey where the Court has assumed the fact finding role, the proceedings were not terminated in the first instance and were not criminal procedures. It was also pointed out that the Court established no elements which would deprive the civil courts of their ability to establish the facts and determine the lawfulness or otherwise of Pearse Jordan's death.[339]

Moreover, the Strasbourg Court contested the reliability of documents and materials presented to it, in the light of basing a possible judgment on them. It also stated it is not sufficiently prepared and equipped to conduct an analysis of incidents over the past thirty years with a view to establishing whether they disclose a practice by security forces of using disproportionate force.

2.6 THE CHECHENYA CASES IN THE LIGHT OF ARTICLE 2 ECHR AND PROPORTIONALITY OF USE OF FORCE

Quite expectedly, the conflict in Chechnya resulted in a number of applications before the European Court of Human Rights. A number of individuals and lawyers have decided to take their cases to the Strasbourg Court, accusing the Russian state officials of committing serious human rights violations while conducting counter-terrorism operations.[340] This was a clear sign that domestic actors see the Strasbourg system as an extension of the Russian one, which might provide them with an additional remedy and help them bring about the changes needed in the domestic legal and judicial system.[341]

[339]Ibidem, para. 112

[340]Bantekas I., Oette L., 2014, 235

[341]Ibidem, 236

2.6.1 Isayeva, Yusupova and Bazayeva v. Russia

Isayeva, Yusupova and Bazayeva v. Russia[342]the applicants alleged that they Russian military planes indiscriminate bombed a civilian convoy on 29 October 1999 near Grozny and killed the first applicant's two children.[343] In the same attack, the first and the second applicants were wounded[344], while the third applicant's cars and possessions were destroyed. The applicants alleged, inter alia, a violation of Article 2 of the Convention. They claimed that the way in which the operation had been planned, controlled and executed constituted a violation of their own right to life and the right to life of their relatives. In their view, the authorities intentionally violated their right to life. They supported this allegation by two basic pillars: the authorities must have been informed of the massive civilian presence on that road on 29 October 1999 and the aircraft flew for a while at low altitude above the convoy before dropping bombs on it.[345]

The applicants also pointed out that by using military aviation and S-24 missiles with a large radius of destruction, the respondent State did not confirm to the "strict proportionality" test, established in the Court's practice. Therefore, in the applicants view, "the degree of force used was manifestly disproportionate to whatever aim the military were trying to achieve, even had it been used in self-defense."[346]

The Government, on the other hand, alleged that the pilots did not and could not have seen the convoy and they did not set out to cause civilian victims. It maintained that both the attack and its consequences were legitimate under Article 2 § 2 (a) since the pilots used absolutely necessary force in order to protect themselves from unlawful violence. Namely, since members of illegal armed formations opened fire, that represented a

[342]*Isayeva, Yusupova and Bazayeva v. Russia*, application nos. 57947/00, 57948/00 and 57949/00, judgment on 24th February 2005

[343] The first applicant's children, Ilona and Said-MagomedIsayev and her sister-in-law AsmaMagomedova died from shell-wounds. Kisa Asiyeva, who was in the minivan with the first applicant's family, was also killed. – Ibidem, para. 19

[344] The first applicant's right arm was hit by a fragment of a shell. The second applicant got hit by shells in the neck, arm and hip. – Ibidem, para. 19-20

[345]Ibidem, para. 155

[346]Ibidem, para. 156

danger both for the pilots and the civilians. Therefore the use of air power was justified as the only mean available to stop these illegal and dangerous actions from the ground.[347]

Taking notice that the facts of the case have been disputed[348] and there was a significant lack of information provided about the case,[349] the Court recalled its jurisprudence and confirmed the standard of *proof "beyond reasonable doubt" in its assessment of evidence. "Such proof"* according to the Court *"may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.[350] In this context, the conduct of the parties when evidence is being obtained has to be taken into account*."[351]

Due to the lack of evidence to support it, the Court retained certain doubts as to whether to accept the Government's claim that the aim the operation was to protect persons from unlawful violence within the meaning of Article 2 § 2 (a) of the Convention. However, given the context of the conflict in Chechnya at the relevant time, the Court accepted the assumption that if there was an attack from illegal insurgents the air strike would have been a legitimate response to such attack.

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[347]Ibidem, para. 160

[348] The applicants claimed that the planes started firing rockets and bombs at the civilian convoy completely unprovoked. They submitted transcripts to the Court of interviews with other witnesses of the attack. In their testimonies these witnesses described the bombing and confirmed that after the strikes they saw numerous burned and damaged cars, including at least one Kamaz truck filled with civilians and at least one bus. According to their testimonies, the attack resulted in dozens of people, civilians, getting killed or wounded.
The applicants submitted that they saw only civilians in the convoy, and that they did not see anyone from the convoy attempting to attack the planes. (see para. 18-24 and para. 101 of the judgment)
According to the Government, on the way back to Grozny the civilian convoy was joined by a Kamaz truck which was carrying rebel Chechen fighters. At that time counter-terrorist operations in that district were run by the military authorities. Two military planes included in these operations were attacked from a Kamaz truck with large-calibre infantry fire-arms. The pilots reported the attack to the command headquarters, and were granted permission to use combat weapons. In two separate attacks the planes destroyed both Kamaz trucks. On that occasion, according to the Government, 16 civilians got killed, 11 wounded and 14 vehicles were damaged.
The Government further submitted that "the pilots had not foreseen and could not have foreseen the harm to the civilian vehicles, which appeared on the road only after the rockets had been fired", and that the fighters were deliberately using the convoy as a human shield. (see para. 25-31 of the judgment)

[349]Ibidem, para. 175 -176

[350]Avşar v. Turkey, application no. 25657/94, judgment on 10th July 2001, para.282

[351]*Isayeva, Yusupova and Bazayeva v. Russia*, application nos. 57947/00, 57948/00 and 57949/00, judgment on 24th February 2005, para.172

However, the Government did not provide convincing evidence to support such claims. The two pilots' statements as well as the one of the air traffic controller have been taken over a year after the attack. They are incomplete, almost identical in wording and quite short. Their subsequent statements differ when it comes to the circumstances of the attack at the planes from the trucks, the height from which they opened fire at the first truck and the presence of other vehicles on the road. That made the credibility of their statements questionable.

The Government did not submit any other evidence which could make the attack legitimate.[352]The alleged damage to the planes has not been substantiated by any documents. It was only mentioned in the report made over four years after the events in question. No witness mentioned the Kamaz trucks from which the planes were allegedly attacked, nor that any armed persons were part of the convoy. The investigation of the site found no remains of a Kamaz truck whatsoever. In other words, there is no evidence supporting the Government submissions about the pilots being attacked by the armed men in the truck.

Moreover, the Court did not consider that the actions taken were no more than absolutely necessary for achieving the alleged defensive purpose. Namely, the authorities who were planning military operations on 29 October 1999 anywhere near the Rostov-Baku highway should have been aware of a huge colon of refugees in that area returning from the administrative border between Chechnya and Ingushetia[353]and alerted of the need for extreme caution as regards the use of lethal force.[354]However, there were several shortcomings in the way the operation was planned and conducted.

[352]The Court in this context gave examples of documents profiling the exact nature of the pilots' mission and evaluating of the perceived threats and constraints, an account of the pilots' debriefing upon return, mission reports or relevant explanations which they presumably had to submit concerning the discharged missiles and the results of their attack, a description or names of the fighters presumably killed in the attack. – Ibidem, para. 180

[353]Administrative border personnel as well as the military at the roadblock were in direct contact with people from the convoy on the day of the attack and the day before. It was a senior military officer at the roadblock who ordered the refugees to clear the road and to return to Grozny. This order came at round 11 a.m. It was the same senior officer who gave the civilians in the convoy assurances of security. – Ibidem, para. 184 - 186

[354]Ibidem, para.186

Firstly, the air controller was given the mission order[355] for 29 October 1999 on the previous evening; neither he nor the pilots had been informed of the announcements of a "safe passage" and the massive presence of refugees on the road, moving towards Grozny.[356] As an exception from the standard procedure, a forward air controller was absent – consequently in order to receive permission to use weapons the pilots had to communicate with a controller at the control center, who could not see the road and could not be involved in any independent evaluation of the targets. The Court assessed that "this lack of information had placed the civilians on the road at a very high risk of being perceived as suitable targets by the military pilots".[357]

Moreover, the Court noted that several vehicles in the convoy were directly hit by the explosions.[358] The attacks from air lasted for several hours, during which time the pilots made several passes over the road, descending and ascending from 200 to 2000 meters under conditions of good visibility.[359] During the attack twelve S-24 non-guided air-to-ground missiles were fired,[360] causing several explosions on a relatively short stretch of the road filled with vehicles. All these facts clearly show that the weapons used were extremely powerful and that everyone on the road at that time was in mortal danger. Although the exact number of people killed was not established, the Court estimated it was significantly higher than the Government admits.

Thirdly, the Court considered that the proportionality of the response to the alleged attack is directly connected with the Government failing to invoke the provisions of domestic legislation at any level which would govern the use of force by the army or security forces in situations such as the present one.[361]

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[355]According to his testimony, the mission was to prevent movement of heavy vehicles towards Grozny in order to cut supplies to the insurgents defending the city. – Ibidem, para. 187

[356]Ibidem.

[357]*Isayeva, Yusupova and Bazayeva v. Russia*, application nos. 57947/00, 57948/00 and 57949/00, judgment on 24th February 2005, para.188

[358]Ibidem, para. 193

[359]Ibidem, para. 194

[360] On explosion, each missile creates several thousand pieces of shrapnel and its impact radius exceeds 300 meters. – Ibidem, para. 195

[361]Ibidem, para. 198

Taking everything stated above into consideration, the Court concluded that "even assuming that that the military were pursuing a legitimate aim …the Court does not accept that the operation… was planned and executed with the requisite care for the lives of the civilian population"[362] and found that there has been a breach of Article 2 ECHR.

2.6.2 Isayeva v. Russia case

The *Isayeva v. Russia* case[363] also took place in Chechnya. Namely, at the end of January 2000 federal military commanders planned and executed a special operation, making the fighters believe that a safe exit would be possible out of Grozny towards the mountains in the south of the republic. Following that information, at night on 29 January 2000 the fighters left the besieged city and moved south. However, once they had left the city they were caught in minefields and the artillery and air force bombarded them along the route. In an attempt to hide, a significant group of Chechen fighters unexpectedly entered the village of Katyr-Yurt early on the morning of 4 February 2000.[364]This village has previously been declared a safe zone. In the early hours on the same day, the bombing suddenly started, so the applicant and her family hid in the cellar of their house. When the attack stopped, at about 3 p.m., the applicant, her family and neighbors, entered a Gazel minibus and drove, heading out of the village. While they were on the road, the planes reappeared, descended and bombed cars on the road.[365] Among many others, the applicant's 23-year-old son died.[366]

[362]*Isayeva, Yusupova and Bazayeva v. Russia*, application nos. 57947/00, 57948/00 and 57949/00, judgment on 24th February 2005, para.199

[363]*Isayeva v. Russia*, application no. 57950/00, judgment on 24th February 2005

[364]The applicant claimed that villagers did not expect the arrival of the fighters in the village, nor were they warned in advance of the ensuing fighting or about safe exit routes. - *Isayeva v. Russia*, application no. 57950/00, judgment on 24th February 2005, para.15

[365]Ibidem, para.17

[366]The applicant claimed that around 150 people lost their lives. Next to the applicant's son, Zelimkhan Isayev who was hit by shrapnel and died within a few minutes, the applicant's three nieces were killed and three other persons in the vehicle were wounded. The applicant's nephew, Zaur Batayev, was wounded on that day and became handicapped as a result. – Ibidem, para.18

The applicant the way in which the military operation in Katyr-Yurt had been planned, controlled and executed in her view constituted a violation of Article 2. She alleged that the bombardment was indiscriminate and that the weapons used have been heavy, indiscriminate and in no way appropriate for the declared aim of "identity checks". Moreover, not only was no safe passage provided for the civilians, but they were also forced to leave the village under fire and were detained at the roadblock. Therefore, the use of force in this case was neither absolutely necessary nor strictly proportionate to the aims prescribed by Article 2 ECHR.

The Government painted a totally different story: they claimed that a big group of Chechen fighters forcefully entered the village, that they captured it and used its villagers as a human shield. When a detachment of Ministry of the Interior's special forces entered the village, they have been so fiercely attacked by the Chechen terrorists they were forced to retreat. After the fighters declined an opportunity to surrender, the authorities offered safe passage to the residents of Katyr-Yurt. After the majority of residents had left, air force and the artillery attacked the village, aiming at target chosen based on incoming intelligence information. However, fighters forced some residents to stay in Katyr-Yurt which led to a total of 46 civilians being killed and 53 were wounded.[367] Among them was the applicant's son and relatives.

The Government maintained that both the attack and its consequences were legitimate under Article 2 § 2 (a). The use of lethal force was necessary and proportionate to protect both the servicemen and civilians from illegal actions of the fighters. At the same time, they were protecting the general interests of society and the state. This threat could not have been eliminated by other means and the actions by the operation's command corps had been proportionate. The Government claimed that the authorities informed the civilians that there will be an assault and that they therefore need to leave the village. However, despite the federal forces' attempts to provide a safe exit for civilians, the fighters provoked fire from the federal forces, using the residents as a "human shield".

The Court echoed its previous jurisprudence by pointing out that "the State's responsibility is not confined to circumstances where there is significant evidence that misdirected fire from agents of the state has killed a civilian. It may also be engaged

[367] According to the data provided by the Government total of 53 federal servicemen were killed and over 200 were wounded during the assault on Katyr-Yurt. The Government also submitted that, as a result of the military operation, over 180 fighters were killed and over 240 injured. – Ibidem, para. 27

where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimizing, incidental loss of civilian life".[368] It also reaffirmed that it assesses the evidence by using the standard of proof "beyond reasonable doubt" which may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un-rebutted presumptions of fact. Moreover, in this context, the conduct of the parties when evidence is being obtained has to be taken into account.[369]

The Court has shown certain understanding for the complex security situation in Chechnya at the relevant time. The Court even accepted that it called for exceptional measures by the State, but nevertheless reminded that "a balance must be achieved between the aim pursued and the means employed to achieve it".[370]

The Court believed that the authorities were informed of the fighters' arrival in Katyr-Yurt, but failed to warn the villagers although that omission exposed them to danger. Moreover, it expressed conviction that the military operation in Katyr-Yurtwas planned some time in advance. It described vividly the lack of consideration for human life in this process: "The Court regards it as evident that when the military considered the deployment of aviation equipped with heavy combat weapons within the boundaries of a populated area, they also should have considered the dangers that such methods invariably entail. There is however no evidence to conclude that such considerations played a significant place in the planning. In his statement Major-General Nedobitko mentioned that the operational plan referred to the presence of refugees. This mere reference cannot substitute for comprehensive evaluation of the limits of and constraints on the use of indiscriminate weapons within a populated area…*There is no evidence that at the planning stage of the operation any serious calculations were made about the evacuation of civilians, such as ensuring that they were informed of the attack beforehand, how long such an evacuation would take, what routes evacuees were supposed to take, what kind of precautions were in place to ensure safety, what steps were to be taken to assist the vulnerable and infirm*."[371]

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[368]Ibidem, para. 176

[369]Ibidem, para. 177

[370]Ibidem, para.181

[371]Ibidem, para. 189

The Court also evaluated the fact that once the fighters in a great number entered the village, the authorities attacked the entire village with bombs and other non-guided heavy combat weapons: "The Court considers that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with *the degree of caution expected from a law-enforcement body in a democratic society*… Even when faced with a situation where… the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, *the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents*." [372]

Moreover, although the authorities did make the declaration of safe corridor to the residents, they did so only after several hours of bombardment by the military, when the residents' lives were already put at great risk. The military roadblocks at the exits from the village have been established to enable the military to control the exodus in order to separate fighters from civilians. The civilians were allowed to use only one exit, despite their great numbers. The masses of people who used a break in bombing to escape did not make any difference to the authorities who not only did not enable them safe passage, but also continued the attacks with undiminished intensity. There is no evidence of the air-controllers and military pilots being informed on the existence of a humanitarian corridor, obligation to respect it nor that there were departing civilians in the streets. Moreover, there were reports on several incidents where residents have been attacked as they tried to run away from city areas in which the military fought the fighters.

Documents contained in the military report did not support the Government's claims that the actions of the operational command corps were legitimate and proportionate to the situation. It was not proven that the commanding officers organized and carried out the exodus of the population and that the evacuation was prevented by the fighters. Also, there was no support to the Government's claims that the commanding officers chose a localized method of fire.

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[372] *Isayeva v. Russia*, application no. 57950/00, judgment on 24th February 2005, para.191

After taking everything stated into consideration and the evidence provided, the Court did not consider that the operation was planned and conducted in such a way as to avoid or minimize, to the greatest extent possible, harm to civilians, which constituted a breach of obligations of the respondent State under Article 2 ECHR.

2.6.3 Khashiev and Akayeva v. Russia

Another example of alleged disproportionate use of force by the Russian military in Chechnya is the well-known case of *Khashiev and Akayeva v. Russia*[373]. In this case the applicants were former residents of Grozny. They left the city in the late 1999 due to the hostilities. The first applicant's brother Khamid, his sister Lidiya and her two sons, Rizvan and Anzor stayed in Grozny to in order to keep an eye on their houses and property. The second applicant's brother remained in Grozny for the same reasons.

It was in December 1999 that the Russian federal army started an operation to take control of Grozny. Fighting stopped in end of January 2000, when the military took the central parts of the city. The applicants submitted that by 20 January 2000 the Russian federal forces controlled their district and there were some accounts that they were in control of the district as from 27 December 1999. The Government on the other hand claimed that the troops at that time faced scattered resistance from the Chechen fighters ("boyeviki").[374]

The applicants got the information about their relatives' death at the end of January 2000. On 25 January 2000 the first applicant, his other sister and a neighbor travelled to Grozny to get additional information. At the first applicant's house they found three bodies lying in the courtyard. These bodies were the first applicant's sister and nephew as well as the second applicant's brother. On the bodies they noticed gunshot wounds and other

[373] *Khashiev and Akayeva v. Russia*, applications nos. 57942/00 and 57945/00, judgment on 24th February 2005

[374] Ibidem, para. 16

marks.[375]The first applicant submitted that the body of his sister had 19 stab wounds, someone broke her arms and legs and teeth were missing. His nephew's body had multiple stab and gunshot wounds. They also found identity documents on the bodies. Three days later, the first and second applicant collected the bodies. The second applicant noticed numerous gunshot and stab wounds and traces of beatings and torture on the bodies. She noticed seven gunshot wounds to her brother's skull, heart and abdominal area. The left side of his face was bruised and his collar-bone was broken.[376] However, due to the state of shock none of the applicants had made the photos of the wounds. The applicant's relatives were buried on 29th January 2000.

In early February 2000 the second applicant travelled to Grozny. Form an eyewitness she found out that her brother was last seen alive on the evening of 19th January 2000.

On 10 February 2000 the first applicant together with his daughter and sister found three bodies lying between nearby garages. These were the bodies of the first applicant's brother, his second nephew and their neighbor. Before having the bodies buried, the first applicant took photographs of them. His brother's body was mutilated and half of his skull was smashed. Someone also cut off some of his fingers. A great number of gunshots mutilated his nephew's body.[377]On the same day officers of the Nazran Department of the Interior examined the three bodies. According to their report, a number of wounds were found on their head, body and extremities.[378]

The applicants claimed that they provided ample evidence to be established *beyond reasonable doubt* that federal soldiers intentionally killed their relatives. In their view, the evidence provided was sufficiently strong, clear and concordant to satisfy the established evidentiary standard.[379] Namely, the eyewitnesses reported seeing federal servicemen detaining the first applicant's brother and nephew on 19th January 2000. Subsequently they discovered the bodies of their relatives with visible bullet wounds and signs of beatings. Moreover, they claimed that there was overwhelming and compelling evidence

[375] Ibidem, para. 19

[376] Ibidem, para. 20

[377] Ibidem, para. 25

[378] Ibidem, para. 26

[379] Ibidem, para. 126

that acts of torture and extra-judicial killings by soldiers were widespread in Grozny in the early 2000.

On the other hand, the Government maintained there were some unresolved issues surrounding the circumstances of the applicants' relatives' deaths and that there can be several alternative explanations for their occurrence, among others there is a possibility their relatives were participants in the armed resistance to the federal troops and that they were killed in a clash with them. The Government also submitted that in the course of a criminal investigation the applicant's arguments were duly checked but were not supported by the evidence.

In this case the Court, inter alia, reiterated its previous stance that in cases where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The standard of proof "beyond reasonable doubt" obeyed when assessing the evidence and the burden of proof may rests on the authorities to provide a satisfactory and convincing explanation for the deaths.

The Court also reminded that in this context, the conduct of the parties when evidence is being obtained has to be taken into account.[380]Therefore it draws inferences from the fact that the Government produced only two thirds of the investigation file, with less than persuading explanation that the rest of the documents were not relevant to the case.

Since there was no dispute about the fact that the applicants' relative's deaths occurred in circumstances falling outside the exceptions set out in the second paragraph of Article 2, the Court's main task was to establish whether the Government their deaths could be attributed to the Government.

The Court referred to the behavior of domestic authorities, who investigated the case as one of "mass murder" of civilians. Despite remaining incomplete, the investigation pointed to the killings as having been committed by military servicemen by the '205th brigade', possibly as an act of revenge. Such conclusions have been supported by various reports by human rights groups and documents by international organizations. In this context the Court found essential a verdict by the Nazran District Court in which it was

[380] Ibidem, para. 134

established that military forces killed the first applicant's relatives and he was awarded damages against the State. The District Court explained that at the material time the federal forces controlled the Staropromyslovskiy district of Grozny and only its servicemen could have conducted identity checks. Since it was established that the first applicant's relatives had been killed during an identity check the Court found that the federal servicemen must have been the perpetrators. At the same time, since the body of the second applicant's brother had been found together with those of the first applicant's relatives the Court assumed that he had been killed in the same circumstances.

Having taken everything into consideration, the Court found that the deaths of the applicants' can be attributed to the State since the killings have been committed by the members of federal forces. Since the Russian state did not offer any explanation how the applicants' relatives died, nor has provided any ground of justification for the use lethal force by their agents the Court attributed these deaths to the respondent State. It has concluded that there has been a violation of Article 2 on that account.

2.6.4 The impact Strasbourg jurisprudence has had on Russian legal and judicial system

Russia has complied with its obligations under the ECHR quite well. It has paid just satisfaction in each case as ordered by the Strasbourg Court. Moreover, it reformed its penitentiary system. European Court's case-law has been examined and analyzed by legal scientists and practitioners alike and has even found its place in the law textbooks and commentaries.[381] This is a clear sign that this jurisprudence has undeniably become a part of the legal system of Russia.

[381]Bantekas I., Oette L., 2014, 237

The Court's decisions in the cases regarding the Chechnya conflict have, according to the legal commentary, given the Chechen people the necessary answers on what happened from 1999 onwards.[382]

2.7 PROPORTIONALITY OF LAW ENFORCEMENT OFFICIALS' USE OF FORCE WHICH AMOUNTS TO LETHAL IN THE CASES WHERE THE VICTIM SURVIVED

The question which arose with time was is there a violation of Article 2 ECHR if the force used by the enforcement officials amounts to the lethal, but in the particular case it has not resulted in death.

2.7.1 Osman v. the United Kingdom – a precedent case in the possibility of breach of Article 2 in the event that the force used was not lethal, but amounted to it

The Court dealt for the first time with the question of use of lethal force when one of the victims survived in a highly controversial *Osman v. the United Kingdom* case.[383] Namely, in this case the applicant Ahmed Osman was wounded and his father was shot by Ahmet's former teacher Paget-Lewis. The applicants complained that, despite being informed about a series of clear warning signs that Paget-Lewis was a serious threat to the physical safety to their family, the authorities failed to assume proper measures i.e. to take adequate and appropriate steps to protect them from the assaulter.

[382] Ibidem.

[383] *Osman v. the United Kingdom*, application no. 87/1997/871/1083, judgment on 28th October 1998

While the Commission assessed that "the circumstances of the case did not disclose any fundamental disregard by the police of the duties imposed by law in respect of the protection of life"[384], the Court reminded that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. In its view, Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.[385] However, the proportionality principle has to be applied in such cases and "bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities".[386]

Although this case at the first glance may not seem as relevant to our topic, since the lethal force was not used by law enforcement officials, this judgment is worth examining for several reasons.

Firstly, it reaffirms the necessity of interpreting the Convention as a living instrument as well as making its safeguards practical and effective.[387] Moreover, the Court denied acceptance of the Government's claim that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to *gross negligence or willful disregard of the duty to protect life*. The Court deemed that such a rigid standard would not be compatible with the requirements of Article 1 of the Convention nor the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms guaranteed by the ECHR. Therefore, it suffices that an applicant shows that the authorities failed to-do all

[384]Ibidem, para 111

[385]Ibidem, para 115-116

[386]Ibidem, para 116

[387] In the para. 15 of the judgment the Court reiterates that "It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions." In other words, it points out the necessity to give a broader interpretation to the Convention and adjust the interpretation of ECHR to the need for evolution of states' obligations under this Convention.

that could be *reasonably expected* of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.[388] The wording "reasonably expected" chosen by the Court as well as the additional statement that its meaning will be accessed according to the circumstances of the case in question, showcases the Court being careful not to burden the authorities excessively when imposing positive obligations under ECHR.

This standard has subsequently been applied in a number of cases in front of the European Court of Human Rights.

2.7.2 Pivotal case when law enforcement officials used force which amounts to lethal in the light of Article 2 ECHR: Ilhan v. Turkey

When it comes to the force used by the law enforcement officials, the pivotal case was I*lhan v. Turkey*.[389] Based on the information that the İlhan family and İbrahim Karahan cooperated with the PKK, the gendarmerie set to arrest them. Fearing they will be beaten, Abdüllatif İlhan and İbrahim Karahan ran away but they were found hiding in the bushes. Karahan was beaten and kicked by the gendarmes who afterwards surrounded Ilhan, kicked him and struck him on the hip with the barrel of a G3 rifle which tore his skin all the way down. He was also struck on the right side of the head with a rifle butt. He lost consciousness and had very little recollection of what happened a week after. The gendarmes doused him in the nearby river to revive him. Afterwards they brought both men before the operation commander. Ilhan's head was visibly injured and was bleeding, his left eye was bruised and he was limping, showing an injury to the left leg. There were also noticeable irregularities in his manner of speaking when Şeref Çakmak questioned him at this time. He was not provided with medical assistance nor given warm clothes. Since Ilhan was not able to walk, he was carried by Karahan to the next village where a

[388]Ibidem, para. 115

[389]*Ilhan v. Turkey*, application no. 22277/93, judgment on 27th June 2000

donkey was obtained to carry him to the police station. There Ilhan was given only cursory first-aid treatment and the doctor had discounted visible signs of distress, without taking any precautionary steps in respect of an evident trauma to the head. Only after Ilhan's condition worsened rapidly and evidently, some thirty-six hours after their apprehension, both he and Karahan were admitted for treatment at Mardin State Hospital. His condition was described by the doctors as life-threatening. He was transferred to another hospital where he was treated. Six months after being discharged from the hospital, he suffered from a 60% loss of function on the left side and recent scans of his brain showed an area of brain atrophy. However, according to the Commission's findings, the delay in treatment had not been shown to have appreciably worsened the long-term effects of the head injury.

In this case it was confirmed that the text of Article 2 also covers the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The Court reaffirmed the "absolutely necessary "standard and stated that the force used must be strictly proportionate to the achievement of the permitted aims.[390]

Most importantly, the Court assessed that the fact that the force used against Abdüllatif İlhan was not in the event lethal does not exclude an examination of the applicant's complaints under Article 2.[391] It went on to establish that only in exceptional circumstances physical ill-treatment by State officials which does not result in death may disclose a breach of Article 2 of the Convention and that "the degree and type of force used and the unequivocal intention or aim behind the use of force may, among other factors, be relevant in assessing whether in a particular case the State agents' actions in inflicting injury short of death must be regarded as incompatible with the object and purpose of Article 2 of the Convention."[392]

[390]Ibidem, para. 74

[391]In this assessment, the Court called upon its previous practice since in three previous cases the Court has examined complaints under this provision where the alleged victim had not died as a result of the impugned conduct. Those cases were *Osman v. the United Kingdom* (application no. 87/1997/871/1083, judgment on 28th October 1998), *Yaşa v. Turkey* (application no. 63/1997/847/1054, judgment on 2nd September 1998) and *L.C.B. v. the United Kingdom* (application no. 23413/94, judgment on 9th June 1998). All three cases concerned the positive obligation on the State to protect the life of the individual from third parties or from the risk of illness under the first sentence of Article 2 para. 1 ECHR.

[392]*Ilhan v. Turkey*, application no. 22277/93, judgment on 27th June 2000, para. 76

The cases in question must be exceptional, as in the majority of cases where the police or soldiers assaulted or ill-treated the applicant, the complaints will be examined rather under Article 3 of the Convention.[393]

The Court recalls that Abdüllatif İlhan suffered brain damage following at least one blow to the head with a rifle butt inflicted by gendarmes who had been ordered to apprehend him during an operation and who kicked and beat him when they found him hiding in some bushes. Two contemporaneous medical reports identified the head injury as being of a life-threatening character. This has left him with a long-term loss of function. The seriousness of his injury is therefore not in doubt.

However, the Court found that in the circumstances of this case the use of force applied by the gendarmes when they apprehended İlhan was not of such a nature or degree as to breach Article 2 of the Convention. Therefore, there has been no violation of Article 2 of the Convention concerning the infliction of injuries on Abdüllatif İlhan.

2.7.3 The attempted murder by police authorities: breach of Article 2 ECHR? Case of Makaratzis v. Greece

In 2004, the Court passed an important judgment for further it broadened the scope of application of the positive obligations doctrine. The question which was posed to the Court in this case was *if the victim survived attack which, because of the lethal force used, amounted to attempted murder, should the Court accept its allegations that there has been a breach of Article 2 ECHR?*

In the evening of 13 September 1995 the police tried to stop the applicant, who had driven through a red traffic light in the centre of Athens. Since the applicant accelerated, he was chased by several police officers in cars and on motorcycles. During the pursuit, the applicant's car collided with several other vehicles, thereby injuring two drivers. After the applicant had broken through five police roadblocks, the police officers started firing

[393]Ibidem.

at his car. The applicant alleged that the police were firing at the car's cab, whereas the Government maintained that they were aiming at the tires. Eventually, the applicant stopped at a petrol station, but did not get out. The police officers continued firing.[394] Finally, a police officer who managed to break into the car arrested the applicant. The applicant was immediately driven to hospital, where he remained for nine days due to seriousness of his wounds.[395]The applicant's mental health has deteriorated considerably since the incident as well.

The first question which the Court had to give an answer to was*: can article 2 of the ECHR be applied to this case*? The Court has found that the fact that the force used against the applicant was not in the event lethal does not exclude in principle an examination of the applicant's complaints under Article 2.[396]

The Court made notice of its previous jurisprudence, where it has already recognized that there may be a positive obligation on the State under the first sentence of Article 2 § 1 to protect the life of the individual from third parties or from the risk of life-endangering illness. However, *the case-law establishes that it is only in exceptional circumstances that physical ill-treatment by State agents which does not result in death may disclose a violation of Article 2 of the Convention.*[397]The Court reiterated that, among other factors, in assessing whether in a particular case the State agents' actions in inflicting injury short of death are such as to bring the facts within the scope of the safeguard afforded by Article 2 of the Convention, *the degree and type of force used and the intention or aim behind the use of force* maybe relevant.[398]

[394] The applicant alleged that the policemen knelt down and fired at him, whereas the Government maintained that they were firing in the air, in particular because there were petrol pumps in danger of exploding. - *Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004, para.12

[395] He was injured on the right arm, the right foot, the left buttock and the right side of the chest. One bullet was removed from his foot and another one is still inside his buttock. – Ibidem.

[396]Moreover. it reminded that complaints under this provision where the alleged victim had not died as a result of the impugned conduct have already been examined by the Court. - Ibidem, para. 49

[397]Ibidem, para.51

[398]According to the established case-law, in almost all cases where a person is assaulted or ill-treated by the police or soldiers, their complaints will rather fall to be examined under Article 3 of the Convention. – Ibidem

Therefore, the primary task of the Court was to determine *whether the force used against the applicant in the present case was potentially lethal* and how did the officials' conduct impact his physical integrity but also the interest the right to life is intended to protect.[399]

It is common ground that the applicant was chased by a large number of police officers who made repeated use of revolvers, pistols and submachine guns. In the Court's assessment, it was clear that the police used their weapons in order to stop the applicant's car and effect his arrest, this being one of the instances contemplated by the second paragraph of Article 2 when the resort to lethal, or potentially lethal, force may be legitimate[400]. Moreover, the Court accepted the submission made by the Government's that the police did not intend to kill the applicant. However, in the view of the findings of the ballistic report of sixteen bullet holes in the car, out of which three holes on the car's front windscreen were caused by bullets which came through the rear window, followed by the undisputed severity of the applicant's wounds, the Court observed that the fact that the latter was not killed was "fortuitous"[401].

In the light of the above circumstances, and in particular the degree and type of force used, the Court concluded that, irrespective of whether or not the police actually intended to kill him, the applicant was the victim of conduct which, by its very nature, put his life at risk, even though, in the event, he survived. Therefore, in the instant case Article 2 can be applied[402].

The Court made a very important distinction between the cases when Article 2 should be applied and the cases which call for application of Article 3. Namely, when giving reasons for this case effectively falling under the scope of Article 2, it noted that "as far as the ill-treatment proscribed by Article 3 is concerned, *at no time could there be*

[399]Ibidem, para. 52

[400]In *Wolfgram v. Germany* (Commission's decision on 6th October 1986) and *Kelly v. UK*, state killings resulted from attempts to effect a lawful arrest or to prevent the escape of a person lawfully detained. In the first case, the reason for Commission's assessment was that police was trying to arrest several heavily armed robbers and did not open fire until one of the suspects had detonated a hand grenade. In the second one, the Commission found that police officers' opening fire at several car thieves trying to drive their way through a roadblock was justified, since the shooting was "for the purpose of apprehending the occupants of stolen car… in order to prevent them from carrying out terrorist activities" - Ruys T., "License to kill? State sponsored assassination under international law", Leuven, 2005,8

[401]*Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004, para.54

[402]Ibidem, para.55

inferred from the police officers' conduct an intention to inflict pain, suffering, humiliation or debasement on him"[403] since there was no proof to support the applicant's allegation that the police officers shot his foot after removing him from his car. In this way, the Court set a standard for differentiating these two groups of cases that focuses on intention behind the use of force which amounts to lethal.

The Court also made reference to the fact that at the relevant time the legislation regulating the use of force by the police dated from the Second Word War when Greece was occupied by German armed forces. Consequently, the German law did not contain any other provisions regulating the use of weapons during police actions. Accept to the presidential decree authorizing the use of firearms in the circumstances set forth in the 1943 statute "only when absolutely necessary and when all less extreme methods have been exhausted", no other guidelines on planning and control of police operations existed.[404] In the Court's view, Greek legal framework was not sufficient to provide *the level of protection "by law" of the right to life that is required in present-day democratic societies in Europe*.[405] D. Xenos maintains that by finding a violation of Article 2 ECHR on the quality of law without having to assess the particular merits of the case or the necessity of the interference the Strasbourg Court reached "full circle in favor of the applicant's submission that had been rejected in *McCann and others*".[406] In his view, we can clearly understand the strictness of this approach if we take into consideration that unlike in the *McCann* case in this case there were individuals were in immediate danger from the applicant's behavior could be identified, the applicant was not killed during the lethal operation and there was not enough time for that operation to be planned.[407]

The Court also found that in the circumstances the police could reasonably have considered that there was a need to resort to the use of their weapons in order to stop the car and neutralize the threat posed by its driver. Therefore, even though it was subsequently discovered that the applicant was unarmed and that he was not a terrorist, the Court accepted that the use of force against him was based on an honest belief which

[403]Ibidem, para. 53

[404]Van Dijk P., Van Hoof F., Van Rijn A., Zwaak L., 2006, 402

[405]*Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004, para.62

[406]Xenos D., 2012, 124

[407]Ibidem.

was perceived, for good reasons, to be valid at the time.[408] However, it was "struck by the chaotic way in which the firearms were actually used by the police in the circumstances".[409]

The Court took full notice of the fact that applicant was injured during an unplanned operation which gave rise to developments to which the police were called upon to react without prior preparation. It also reminded that "bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible burden on the authorities".[410]

However, it considered that the degeneration of the situation was largely due to the fact that at that time neither the individual police officers nor the chase, seen as a collective police operation, had the benefit of the appropriate structure which should have been provided by the domestic law and practice. Since the system in place did not afford to law-enforcement officials clear guidelines and criteria governing the use of force in peacetime, it could not be avoided that the police officers who chased and eventually arrested the applicant should have enjoyed a greater autonomy of action and have been left with more opportunities to take unconsidered initiatives than would probably have been the case had they had the benefit of proper training and instructions.[411]

Having regard to all the above, the Court maintained that Greece has violated positive obligation under the first sentence of Article 2 § 1 to put in place an adequate legislative and administrative framework and failed to do all that could be reasonably expected to afford to citizens the level of safeguards required and to avoid real and immediate risk to life which they knew was liable to arise in hot-pursuit police operations.

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[408] *Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004, para. 66

[409] An unspecified number of police officers fired a hail of shots at the applicant's car with revolvers, pistols and submachine guns. Sixteen gunshot impacts were found on the car, some of them attesting to a horizontal or even upward trajectory, and not a downward one as one would expect if only the tyres of the vehicle were being shot at by the pursuing police. Three holes and a mark had damaged the car's windscreen and the rear window glass was broken and had fallen in. – Ibidem, para. 67

[410] *Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004, para.69

[411] Ibidem, para.70

Such decision was very well accepted by legal experts in the field, who outlined that "case law from the European Court on Human Rights shows how difficult it is to establish a breach of Article 2 on the basis of an individual agent's actions alone. That is why the Court has interpreted Article 2 widely, to ensure vertical protection of the citizen – victim against the mighty of the modern State. In that light, Article 2 is a fundamental benchmark of justice *ex post facto* and, more importantly, should be a guiding principle *ex ante*."[412]

Nevertheless, a minority of judges in the panel disagreed with the majority's assessment. In their *Joint concurring opinion* the judges Costa, Bratza, Lorenzenand Vajićdid not agree with the majority's view that the lack of control over the operation in the present case was attributable to any gap or deficiency in the level of protection provided by the relevant Greek law.[413] The judges Wildhaber, Kovler and Mularoni in their *Partly dissenting opinion* agreed with this argument. Also, they explained that they "cannot agree that the Court should find a substantive violation of Article 2 in a case that stems from the irresponsible and dangerous behavior of the applicant; where a national criminal court has looked carefully at the relevant facts and decided that the use of force by the police was justified in order to protect the life of third persons; where our Court itself accepts the national court's view that the use of weapons by the police was justifiable; where the applicant suffered injuries (as did some of his victims), but did not lose his life; and where the domestic law restricts the use of police firearms to situations of absolute necessity."[414]

Contrary to the majority's opinion, these judges found that there was a clear chain of command. Moreover, since domestic law did not prohibit off-duty members of the police force from joining a police chase in an exceptional situation, they considered there is no

[412] Skinner S., 2003, 252

[413]Although the applicable legislation listed a wide range of situations in which a police officer could use firearms without being liable for the consequences ,these provisions had been qualified by the presidential decree of 1991, which authorized the use of firearms "only when absolutely necessary and when all less extreme methods have been exhausted". Therefore the judges Costa, Bratza, Lorenzen and Vajićdid not concur with the majority's opinion that "this somewhat slender legal framework" was insufficient to provide "the level of protection "by law" of the right to life that is required in present-day democratic societies in Europe."-*Joint concurring opinion of judges Costa, Sir Nicolas Bratza, Lorenzen and Vajić*in case of *Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004

[414]*Partly dissenting opinion of judge Wildhaber joined by judges Kovler and Mularoni* in case of *Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004

reason why such a participation should *a priori* be considered to constitute a substantive violation of Article 2.[415]

These judges rightfully point out the danger of setting such precedent in the case-law of the Strasbourg Court, fearing it may become a two-edged sword: "Our Court's case-law asserts that a State may have a positive obligation to protect the life of individuals from third parties. Concretely, this may mean that the police had to protect the lives of pedestrians, car drivers and their colleagues from the applicant. The Court's case-law states at the same time that, in exceptional circumstances, physical ill-treatment by State agents that does not result in death may disclose a violation of Article 2. Concretely, this may mean that the use of force by the police against the applicant could amount to a violation of Article 2, notwithstanding the fact that it was not in the end lethal.If these two strands of case-law are over-extended, they may ultimately overlap and come into conflict. The State might then paradoxically violate both its positive duty to protect the life of individuals from third parties and its obligation to curb the use of force by the police. Obviously, such an overlap would be unfortunate. In extreme cases it can place the competent authorities in an impossible situation. In between there must be room for the unpredictability of life and the subsidiarity of the Convention system. Such difficult decisions, taken in the heat of the action, should properly be reviewed by the national courts and our Court should only depart from such findings with reluctance."[416]

From their *Dissentiong opinion*, one can clearly deduce that judges Tsattsa-Nikolovska and Strážnická considered that it is impossible in the circumstances of the present case to make a proper evaluation and conclude beyond reasonable doubt that there has been a violation of Article 2 in substance as a result of the incident. However, in their opinion there are elements in this case which enable an assessment to be made under Article 3 of the Convention of the police officers' conduct during the incident.[417]They based this opinion on the facts that the applicant had driven through a red traffic light and was chased by thirty-three police officers in cars and on motorcycles. They were shooting from guns, revolvers and submachine guns. The goal was to stop and arrest him and there

[415]Ibidem.

[416]Ibidem.

[417]*Partly dissenting opinion of judge Tsatsa-Nikolovska joined by judge Strá*žnická in case of *Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004

was no intention or order given to kill him. It is practically undisputed that the applicant felt fear and panic. When the applicant stopped at a petrol station at his own will he did not offer any resistance and had stayed in the car. He was seriously injured by e great number of shots - he was operated three times, his health deteriorated considerably after the incident and he is now severely disabled. All these facts are basis for an assessment of the level of severity, that is, the duration of the treatment, the physical and moral effects and the state of health of the victim.[418] Therefore judges Tsattsa-Nikolovska and Strážnická concluded that there is a separate issue in this case to be considered under Article 3 of the Convention.

2.8 THE EXCESSIVE USE OF FORCE BY THE STATE AGENTS IN THE CASES AGAINST BULGARIA - POSSIBLE RACIST MOTIVES BEHIND THE EXCESSIVE USE OF FORCE BY LAW ENFORCEMENT OFFICIALS

In a number of cases against Bulgaria the police officers were accused of using unnecessary violence with lethal outcome. As it will subsequently be shown, one of the cases against Bulgaria set a precedent when it comes to the possibility that the excess in use of force has been motivated by racial reasons.

2.8.1 Nachova and others v. Bulgaria

In *Nachova and others v. Bulgaria*[419] two young men, Mr Angelov and Mr Petkov, fled from a construction site outside the prison where they had been brought to work. Both Angelov and Petkov were 21 years old and they got arrested for being repeatedly absent

[418] Ibidem.
[419] *Nachova and Others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005

from the military without leave. Four military police officers, under the command of Major G., were assigned to locate and arrest Angelov and Petkov. The officers were informed about the suspects' whereabouts. They were also told that fugitives were "criminally active" and were instructed to carry their handguns and automatic rifles and wear bullet-proof vests. The officers were given instructions to use whatever means were dictated by the circumstances to arrest them.[420] Four of them went to the village where they believed Angelov and Petkov ran away. Two of the officers wore uniforms and other two wore civil clothes.

Having noticed the vehicle with the police approaching the house in which they were hiding, the Angelov and Petkov tried to escape. As they heard the sound of a window pane being broken, Major G. and Sergeants K. and N. jumped out of the moving vehicle. Major G. went to the west side of the house, Sergeant K entered the house, Sergeant N. headed towards the east side of the house while Sergeant S. remained with the car.[421]

The fugitives escaped through the window and ran towards a neighbor's yard. The Sergeant N shouted them to stop because they were chased by the military police. He had pulled out his gun, but had not fired any shots. They kept on running. Sergeant N. had run out on to the street to try and intercept them. At that time, he had heard Major G. shout the fugitives to freeze or he will shoot. Then the shooting had started.[422]

Major G. claimed that he saw that the fugitives were trying to jump over the fence to the neighbor's yard, so he shouted they should freeze or he will shoot. Then he fired a shot in the air. Angelov and Petkov climbed over the fence and continued to run. Major G. followed them, fired several shots in the air and yelled they should stop, but they continued running. This scenario repeated but they continued to run. According to Major G.'s testimony, eventually he fired to the right of the two men with the automatic aiming at the ground. He shouted 'Freeze!' one more time and then aimed and fired at them as they were scaling the fence.[423]

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[420]However, only Major G. wore a bullet-proof vest. While the other men carried handguns, he was armed with a personal handgun and a Kalashnikov automatic rifle.

[421]Ibidem, para. 24

[422]Ibidem, para. 25

[423]Ibidem, para. 26

Major G. claimed he aimed at their feet to avoid fatal injury. He added that the ground where he stood was at a lower level than the second fence. He explained that he saw shooting as the only way to prevent them from jumping over the second fence and running away. After the shooting both men fell down. According to the other officers, one of the men was lying on his back and the other on his stomach, their feet pointing in the direction of the house from which they had come. Shot fugitives were still showing signs of life.[424]

Both of the men were unarmed. Both of them died on their way to hospital. There were other accounts of the event. Angelov's grandmother, Ms. Tonkova, claimed that all four men entered the yard and one of them started shooting. Despite her pleads to stop he went to the backyard and soon after she heard shots and saw her grandson and Petkov on the ground. A neighbor testified that after the incident, in the yard in which the shooting took place, Major G. offended one of the neighbors by saying: ”You damn Gypsies!”[425]

In this case, the Court assessed that “the legitimate aim of effecting a lawful arrest can only justify putting human life at risk in circumstances of absolute necessity. The Court considers that in principle *there can be no such necessity 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, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost*.”[426]

The Court also pointed out that States are obliged to secure the right to life by putting in place an appropriate legal and administrative framework, defining the limited circumstances under which law enforcement officials may use force and firearms, in the light of the relevant international standard.[427] In addition to that, the Court found it essential that the national legal framework regulating arrest operations *makes recourse to firearms dependent on a careful assessment of the surrounding circumstances, and, in*

[424]Ibidem, para. 27

[425]Ibidem, para.35

[426]Ibidem, para.95

[427]Ibidem.

particular, on an evaluation of the nature of the offence committed by the fugitive and of the threat he or she posed.[428]

In the Court's view, the national law regulating policing operations is to secure *a system of adequate and effective safeguards against arbitrariness and abuse of force* and even against avoidable accident. In addition to that, law enforcement agents must be trained to assess whether there is an absolute necessity to use firearms, with due regard to respect for human life as a fundamental value.[429]

In the *Nachova* case the Court found that in Bulgaria not only was the military police allowed to use lethal force when arresting a member of the armed forces for even the most minor offence, but also it was completely in accordance with the law to shoot any fugitive who did not surrender immediately after an oral warning has been given and the warning shot has been fired in the air. Since relevant regulations on the use of firearms by the military police 'contained no clear safeguards to prevent the arbitrary deprivation of life', the Court concluded that legal framework in Bulgaria is "fundamentally deficient" and "falls well short of the level of protection 'by law' of the right to life that is required by the Convention in present-day democratic societies in Europe".[430] Therefore the Court assessed the existence of a general failure by the respondent State to comply with its obligation under Article 2 of the Convention to secure the right to life by putting in place an appropriate legal and administrative framework on the use of force and firearms by military police.[431]

The Grand Chamber agreed that the authorities failed to comply with their obligation to minimize the risk of loss of life. Although the fugitives were unarmed and posed no threat, the arresting officers were heavily armed and instructed to use all available means to arrest them. The Chamber pointed out that "a crucial element in the planning of an arrest operation must be the analysis of all the available information about the surrounding circumstances, including, as an absolute minimum, the nature of the offence committed by the person to be arrested and the degree of danger – if any – posed by that

[428]Ibidem

[429]Ibidem, para.97

[430]*Nachova and Others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005, para.99

[431]Ibidem, para. 102

person. The question whether and in what circumstances recourse to firearms should be envisaged if the person to be arrested tries to escape must be decided on the basis of clear legal rules, adequate training and in the light of that information."[432]However, the regulations in place allowed a team of heavily armed officers to be assigned to perform an arrest of the two without any previous discussion if they pose a threat. The same regulations did not oblige those armed officers to minimize any risk to life when planning and controlling the operation. Therefore, the Court maintained that the manner in which the operation was planned and controlled showed disregard for the pre-eminence of the right to life.[433]

As for proportionality of the force used, in the light of the fugitives not being armed, not having any record of violence[434] and not posing any threat to the police officers who were arresting them[435] it is clear that Major G., the military police officer who shot the victims, used grossly excessive force. The Court especially pointed out that there were other means available to effect the arrest.[436] Nevertheless, Major G. chose to use his automatic rifle although he also carried a handgun, despite the fact he could not possibly have aimed with any reasonable degree of accuracy using automatic fire. In addition to that, since the Government offered no plausible explanation of the fact that Mr Petkov was wounded in the chest, the Court did not exclude the possibility that he had turned to surrender at the last minute but had nevertheless been shot.[437]

In the Court's opinion, in the circumstances that obtained in the present case any resort to potentially lethal force was prohibited by Article 2 of the Convention, regardless of any risk that Mr Angelov and Mr Petkov might escape. Not only were the fugitives not

[432]Ibidem, para.103

[433]Ibidem, para.105

[434]Moreover, both fugitives had been sentenced to short terms of imprisonment for non-violent offences, they had escaped without using violence and even their previous convictions contained no record of violence. – Ibidem, para. 106

[435] The Strasbourg Court pointed out that the arresting officers must have been aware of that fact on the basis of the information available to them. – Ibidem, para. 106

[436]Namely, the officers had a jeep, the operation took place in a small village in the middle of the day and it was very easy to predict the fugitives' behavior, since Angelov had been found at the same address previous time he had escaped. – Ibidem, para. 108

[437]Ibidem.

suspected of having committed a violent offence, but they also posed no threat to life and limb of the arresting officers.

For all the reasons stated above, the Court found that there has therefore been a violation of Article 2 of the Convention as regards the deaths of Mr Angelov and Mr Petkov since the relevant legal framework on the use of force was fundamentally flawed and grossly excessive force was used to arrest them.

2.8.2 Nikolova and Velichkova v. Bulgaria

In *Nikolova and Velichkova v. Bulgaria*[438], twelve police officers who were training outside of the town noticed two men testing a home – made metal detector. Two officers approached one of them and two officers approached the other, Mr Nikolov. Since they were not wearing uniforms, the latter was afraid and used a hoe he had in his hand to assume defensive position. The officers pulled it out of his hands, threw it to a safe distance and started hitting him in the head. Then they had threw him to the ground, handcuffed him and taken to the premises of the Shumen Regional Police Department, where he fainted. He was taken to hospital, where he had slipped into a coma. After an unsuccessful surgery, Nikolov died in the hospital from severe cranial and cerebral trauma and internal brain hemorrhage.

The applicant argued that the use of force in respect of Nikolov had been entirely "unprovoked and unnecessary" while the Government abstained from commenting.[439]

The Court confirmed the assessment by the national criminal courts that the two police officers, who were acting in their official capacity, were responsible for the death of Mr Nikolov since they had willfully hit him and "the situation had not called for the use of such intense physical violence".[440] Therefore the Strasbourg Court found that the death of

[438] *Nikolova and Velichkova v. Bulgaria,* application no. 7888/03, judgment on 20th December 2007

[439] Ibidem, para. 66

[440] Ibidem, para. 68

Mr Nikolov is attributable to the respondent State. It also held that the force used for in order to arrest Mr Nikolov was not "absolutely necessary" within the meaning of the Court's case-law, and thus in breach of Article 2 of the Convention.[441]

2.9 THE CASES IN WHICH THE FORCE USED BY LAW ENFORCEMENT OFFICIALS WAS ABSOLUTELY NECESSARY AND THEREFORE THERE WAS NO BREACH OF ARTICLE 2 ECHR: EVOLUTION OF THE COURT'S JURISPRUDENCE

It is essential to analyze not only such cases in which the European Court of Human Rights has found a violation of substantive aspect of Article 2 ECHR, but also to scrutinize the judgments in which the Court found no such violation. In this way it can be assessed what element proper planning and control of the operation comprises of and under which circumstances is the use of force considered to be "absolutely necessary" within the meaning under Article 2 ECHR. The examples of good practice by a Member State are arguably equally useful for establishing a standard of "beyond reasonable doubt" as the ones of violation of right to life by use of excessive force by the state officials.

Therefore, we will analyze the positive examples from the Court's case law in more detail.

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[441] Ibidem, para. 68-69

2.9.1 Bubbins v. the United Kingdom

One of the most famous cases in which the Court found that there was no violation of the substantive aspect of Article 2 ECHR was *Bubbins v. the United Kingdom*.[442]In February 1998 Michael Fitzgerald was killed by the police in a shooting after a siege. Namely, Michael's girlfriend came to his flat and there she saw legs of a man disappearing through the kitchen window. She shouted Michael's name several times but there was no response. Not knowing the man was Michael Fitzgerald himself, who was very drunk and has forgotten his keys, she called the police. The call was made at 6:28 h.

The police responded immediately. Two officers came to the scene at 6:34 h. As one of them went to the kitchen window which was open, moved the venetian blinds and identified himself as a police officer he saw a man inside who pointed what appeared to be a handgun at him. He shouted to his colleague that the man inside is armed and to get back. They retreated and called reinforcement, including Armed Response Vehicles ("ARV").[443] In the radio message sent at 6:38 h they mentioned that Michael Fitzgerald's girlfriend knew him to have a replica firearm, but was not aware of him having a firearm itself. She also warned the police officers about Fitzgerald's drinking problem.

Shortly after the call, other police officers arrived at the premises. Two unarmed officers positioned themselves behind the rear wall of the rear garden. They both reported seeing a man in the kitchen pointing a gun at them. Inspector Linda Kelly also arrived at the scene and took front line charge of the situation. Only minutes later, at 6:42 h, ARV carrying officers B and C came to the scene. It was decided to close the road to vehicular and pedestrian traffic.

When the man appeared in the doorway he was warned to drop the gun and go back into the house. However, he raised his hand which appeared to contain a handgun and went back into the flat, only to reappear at the doorway raising the gun a few seconds later. Although the officer gave him the same instruction, the occupant appeared to take no notice of that command.

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[442]*Bubbins v. the United Kingdom*, application no. 50196/99, judgment on 17th March 2005

[443]In 1998 Bedfordshire Police Force had two nominated ARVs on duty at all times. Their primary role was to contain spontaneous firearm situations until the arrival of tactical firearms personnel. – Ibidem,, para. 23

At about 6.51 p.m. one of the armed officers was deployed at the front of the premises and the other at the rear. Officer B positioned himself behind the high brick wall at the rear car park and stood on a previously erected makeshift platform from which he could observe the rear of the premises. He was about 25 yards from the premises. Officer C positioned himself at the front of the building. Both of them were armed with Steyn AUG .223 caliber carbines. As the occupant entered the kitchen, raised his gun and pointed it towards the officer B, the latter shouted that the occupant is surrounded by armed police, so that he should leave the gun inside and come out slowly. However, the occupant left the kitchen and Officer C, who stood at the front of the premises, issued a similar command. However, despite these commands being repeated at intervals throughout the incident, it had no visible effect.[444]

Another ARV carrying officers A and D arrived at the scene at about 7.01 p.m. Only a minute later, it was requested a negotiator to attend the premises. While officer D joined Officer B at the rear of the premises, Officer A joined Officer C at the front of the premises. However, without consulting their seniors, Officers B and D decided to move to the courtyard side, to a position behind the two vehicles, situated within a few feet of the rear wall. This was at about 7.05 p.m. Some twelve minutes later, Police Constable Cattanach, a police dog handler, joined them at that position. Moreover, the flood lighting which was provided resulted in a considerable enhancement of the vision of the police officers in the rear car park.

From time to time, the occupant pointed his gun out of the rear kitchen window at the officers at the rear of the premises and was repeatedly issued instructions to put down his gun and come out. The officers informed the FIR operator about his repeated behavior.

At the same time, there were attempts to trace Michael Fitzgerald. Two detective officers visited local public houses with his previously obtained photograph. As a result of this investigation the police officers at the scene have been erroneously told that Michael Fitzgerald was 5'8" tall. He was actually 5'11".

Officers maintained a cordon around the premises and had children from a nearby school swimming pool evacuated. They also instructed occupants of other houses not to leave their homes. Fitzerald's girlfriend Melanie Joy and neighbors Kate Bellamy and Amanda

[444]Ibidem, para. 28-29

Parkinwere taken by police transport to Greyfriars Police Station in Bedford at about 8 p.m.

At about 7.45 p.m. Superintendent Battle, the Deputy Divisional Commander at Greyfriars Police Station arrived on the scene and after being briefed by Inspector Kelly took the role of Incident Commander. The applicant claimed that Superintendent Battle has been informed that the man in the premises might be Michael Fitzgerald who owned imitation firearms, although this could not be confirmed.[445]

At about 8.01 p.m. Police Constable Wright the Tactical Firearms Adviser arrived at the scene. He and Superintendent Battle reviewed the plan adopted by the ARV teams, and their deployments, and approved.

Around 8.15 p.m. Superintendent Battle telephoned the flat on his mobile telephone. The intention behind this call was establishing if the telephone inside was working and if number related to the premises. The first time he called, he obtained the answer machine. The second time the occupant answered. Being an experienced negotiator, Superintendent Battle introduced himself and informed the occupant that the house was surrounded by armed officers. Superintendent also told him not go to the window or doors with a weapon, but to put the weapon down instead. The occupant told him his name was Mick and ended the call. He left an impression of being drunk.[446] It was subsequently disputed between the Government and the applicant if the information about the occupant's identification as "Mick" has been disclosed to the police officers at the scene.

What police did not know was that John Fitzgerald, Michael Fitzgerald's brother also called these premises. So did Sean Murray, a friend of Michael Fitzgerald at about 7.35 p.m. The latter claimed that Michael Fitzgerald realized that he was surrounded by police and expected the police to storm the house.[447]

Inspector Kelly gave instructions shortly after 8 p.m. for night duty personnel to be called out and requested a log to be brought to the scene.

At about 8.15 p.m. a message was received by FIR from one of the detectives who had obtained information that at about 6.40 p.m. Michael Fitzgerald had been in a public

[445]Ibidem, para. 45

[446]Ibidem, para. 49

[447]Ibidem, para. 52

house. He had been very drunk, wearing blue jeans, a grey shirt and no coat. This information was passed on to Inspector Kelly but in doing so they transmitted the time of the sighting as 6.30 p.m. Since Melanie Joy had called the police at about 6.28 p.m. it was concluded that the person within the premises was not Michael Fitzgerald.

At about 8.19 p.m. the occupant of the flat moved from the ground floor to the rear first floor bedroom. He opened the casement window and pointed his gun in the direction of Officer D. He pushed his handgun through the open window and then withdrew it after shouts from the officers. Only seconds later, the occupant reappeared at the window and stood up in full view of the officers. He took a two-armed stance and aimed what appeared to be the gun at the officers at the rear of the premises. Thinking that he was going to be shot, one of the police officers dived to the ground. He again shouted that the man should drop the gun.

The occupant remained in his threatening stance, aiming at the officer. Officer B then fired one shot which hit the occupant in the chest. That happened about 8:21 p.m. He claimed he did so because he thought that if he does not shoot first, he will be shot.[448] In his statement, officer D claimed that he was on the verge of shooting at the time the shot was fired.[449]

When the officers and paramedics entered the building, at 8.29 p.m, the body of Michael Fitzgerald was found. At 8.47 p.m. Michael Fitzgerald was pronounced dead. It was subsequently confirmed that the death was caused by a single shot wound and that a bullet had been discharged from the weapon belonging to Officer B. No other weapons had been fired. It was also confirmed that Michael Fitzgerald had 352 mgs of alcohol per 100 ml of blood, which would have made an individual of moderate drinking habits either extremely drunk or comatose.

However, it was also established that Michael Fitzgerald's handgun was a replica Colt .45 caliber self-loading pistol. Since it had the appearance of an authentic weapon, it was possible to reveal it to be a replica only by a very close examination.[450]

[448]Ibidem, para. 60 – 62

[449]Ibidem, para. 63

[450]Ibidem, para. 68

In its judgment, the Court reminded that in determining whether the force used is compatible with Article 2, it may be relevant whether a law enforcement operation has been planned and controlled so as to minimize to the greatest extent possible recourse to lethal force or incidental loss of life.

The Court recalled that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and the lives of others. In the present case, the Court assessed that there was no reason to doubt that Officer B honestly believed that his life was in danger and that it was necessary to open fire on Michael Fitzgerald in order to protect himself and his colleagues.[451]

The Court also added that, "detached from the events at issue, it cannot substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life."[452] In this case, officer B was confronted by a man who not only had ignored previous warnings to give himself up and pointed a gun at him, but also conveyed on several occasions a clear impression that he would open fire. Despite fearing he will get shot if he fails to act promptly, Officer B shouted a final warning before he fired the fatal shot. Nevertheless, Fitzgerald did not comply.

Therefore, when assessing the proportionality of use of force by the state agents, the Court concluded that the use of lethal force in the circumstances of this case was not disproportionate and did not exceed what was absolutely necessary to avert what was honestly perceived by Officer B to be a real and immediate risk to his life and the lives of his colleagues.[453]

Another task of the Court in this case was to make an assessment of the planning and control phase of the operation from the standpoint of Article 2 of the Convention. Having

[451]Ibidem, para. 138

[452]Ibidem, para. 139

[453]Ibidem, para. 140

regard to the context in which the incident occurred and to subsequent development of the situation, the Court evaluated whether in the circumstances the planning and control of the operation outside Michael Fitzgerald's flat showed that the authorities had taken appropriate care to ensure that any risk to his life had been minimized and that they were not negligent in their choice of action.[454]

The Court reminded the police operation started as a response to the fear of Michael Fitzgerald's girlfriend that there was an intruder in his flat who might jeopardize Fitzgerald's safety. This fear has been confirmed by police officers who spotted an armed man inside Michael Fitzgerald's flat. The report they made about the said man pointing a gun at the police officer triggered a major police operation. Some armed officers have been included in the operation and positioned to both front and the rear of the flat.

The Court pointed out that "thereafter, the conduct of that operation remained at all times under the control of senior officers" and that "the deployment of the armed officers was reviewed and approved by the tactical firearms advisers who were summoned to the scene."[455]

The police reckoned that they are dealing with a dangerous armed man. Therefore they took measures to protect the public, such as cordoning the zone and lighting the area at dark.[456]During the siege the tension was constant as the man held the firearm in a threatening manner and sometimes even took up a firing position. According to the evidence, the firearm looked authentic and it could not be reasonably expected in the circumstances of this case for it to be identified as a replica even by the police officers who undergone a firearms training.

The police officers negotiated and tried to persuade him to surrender. He had plenty of opportunities to do so and has been warned numerous times to drop his weapon.

The Court criticized the absence of a trained negotiator at the scene of the incident and a failure to inform Melanie Joy or a neighbor that the man inside the flat had identified himself on the phone to Superintendent Battle as "Mick" and sounded rather drunk,

[454]Ibidem, para. 141

[455]Ibidem, para. 143

[456] In this way they wanted to avert any threat to the lives of on-lookers and as the night fell to increase visibility and thereby minimize the risk of error in the event of an exchange of gunfire. – Ibidem, para. 144

which could have helped them identify him. Moreover, the police completely disregarded the information obtained by Melanie Joy at the start of the incident that Michael Fitzgerald had replica guns in his home. Taking into consideration that the police officers have not been able to trace Michael Fitzgerald's whereabouts the Court concluded that "it cannot be excluded that, had these matters been verified, there would have been a greater realization on the part of the police that, what was first thought to be an armed intruder in the flat, was in fact Michael Fitzgerald - inebriated and brandishing a replica gun."[457]

However, the Court one more time expressed necessity of being cautious about revisiting the events with the wisdom of hindsight. Due to a high amount of alcohol found in Michael Fitzgerald's system, it is hard to claim that without any doubts a trained negotiator would have been any more successful in resolving the issue peacefully.[458]Despite being aware of the police presence around his home, Michael Fitzgerald kept making threatening gestures with the gun.

The Strasbourg Court also pointed out that police never effectively confirmed that the man in the flat was Michael Fitzgerald. He did not respond to his girlfriend shouting his name through the letter box. Furthermore, people who saw him last had estimated that he had left the Blarney Stone at 6.40 p.m., while Melanie Joy saw a man coming into the flat through the downstairs window at about 6.25 p.m. That also suggested that the man was not Michael Fitzgerald.

The Court also made reference to the fact that the man inside the flat when talked to through phone at 8 p.m. said that his name was "Mick." Not downplaying the importance of this new information which was relayed to the armed officers, the Court did not find that that piece of information alone should have had the change of the police tactics as its immediate result.[459]

Decision to place the armed police officers at the rear of the flat and subsequently not to withdraw them from this position have been considered and approved by experienced officers. The chain of command existed and was efficient throughout the operation. By the time the fatal shot had been fired the armed officers at the rear of the flat knew that

[457]Ibidem, para. 146

[458]Ibidem, para. 147

[459]Ibidem, para. 147

they were overlooked by a window on the first floor of the flat. The Court assessed that the police did not take any rash action, but tried to resolve the situation without recourse to lethal force or to tactics which might provoke a violent response from the man inside the flat. Inspector Kelly's order to call out the night personnel also points to existence of a firm intention to avoid a confrontation and the risk of bloodshed.[460]

Therefore the Court did not find that the manner in which the operation was planned and conducted inevitably led to the fatal shooting of Michael Fitzgerald. Operational decisions had to be made in a short time as the situation evolved and new information was obtained. It was undisputed that the use of firearms by the police as well as the conduct of police operations of the kind at issue were regulated by domestic law in which there is a system of adequate and effective safeguards to prevent arbitrary use of lethal force.[461]Moreover, all the key officers were trained in the use of firearms. Experienced senior officers controlled and supervised their movements and actions.

Having regard to all stated above, the Court reached the conclusion that it has not been shown that the operation at issue was not planned and organized in a way which minimized to the greatest extent possible any risk to the life of Michael Fitzgerald.[462]

The Court overall conclusion was that, having regard to the actions of Officer B who opened fire and to the planning and control of the operation at issue, the killing of Michael Fitzgerald resulted from the use of force which was no more than was absolutely necessary in defense of Officer B and his colleagues, in conformity with Article 2. There has accordingly been no violation of that Article under its substantive limb.[463]

[460]Ibidem, para. 148

[461]Ibidem, patra. 150

[462]Ibidem, para 151

[463]Ibidem, para. 152

2.9.2 Ramsahai and Others v. the Netherlands

Ramsahai and Others v. the Netherlands[464] case grandson of the applicants' stole a scooter by threatening the owner with a gun. He ran away but the police was informed and started a search for the suspect. Two patrolling officers, officer Bultstra and officer Brons, spotted a man who matched the description of a robber, driving the scooter. That was the applicants' grandson, Moravia Ramsahai. Officer Bultstra ran towards him in an attempt to perform an arrest,[465] but the suspect resisted. As he tried to get away, there was a brief struggle between him and officer Bultstra, but Moravia Ramsahai managed to break loose. Then he drew a pistol from his trouser belt. Officer Bultstra then drew his service pistol and ordered Ramsahai to drop his weapon. Suspect then pointed his pistol towards the ground, but in a threatening manner, and tried to walk away. At that time, the other officer from the patrol car approached. When the suspect raised his pistol and pointed it towards Officer Brons, he fired at him with a service pistol. Moravia Ramsahai was hit in the neck, which has caused excessive bleeding. Approximately 15 minutes later, the ambulance crew came but Moravia Ramsahai was already dead.

The Court did not accept the principal premise on which the applicants based their argument in this case, namely that lethal and therefore excessive force was used to arrest a person suspected of nothing more serious than stealing a scooter,[466] since the officers did not use firearms when attempting to perform the arrest up until the point they were threatened by a pistol.

The Court also refused to accept the applicants' alternative premise that there were shortcomings in the way Officers Brons and Bultstra had planned the operation. Contrary to what the applicants' claimed, the Court considered that it was shown that that Officers Brons and Bultstra at the time when they confronted Moravia Ramsahai were not aware

[464] *Ramsahai and Others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007)

[465] Both officers were wearing uniforms and they went out of a police car. - *Ramsahai and Others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007), para. 12

[466] Ibidem, para. 378

of the fact he was armed. Since they had no reason to believe that they would be performing anything other than a routine arrest, the fact that in these circumstances they have not sought further information or called for reinforcement was understandable and justified.

Taking into the consideration the fact that officer Bultstra drew his service weapon only after Moravia Ramsahai had drawn his pistol and officer Brons drew his service weapon and fired only after Moravia Ramsahai had begun to raise his pistol towards him, it was Court's opinion that Officer Brons was entitled to consider that his life is in danger. Since the suspect's pistol was loaded and ready to fire, the Court maintained that "this assessment cannot be criticized even with the benefit of hindsight"[467].

Moreover, the Court accepted the following: both officers acted in conformity with instructions intended to minimize the danger from the use of firearms by police officers, the firearms and ammunition issued to them were specifically designed to prevent unnecessary fatalities, and Officer Brons was adequately trained in the use of his service firearm for personal defense.[468]

It once again reaffirmed the principle established in the *McCann* case, by which the use of lethal force may be justified under the provision of Article 2 ECHR if it was based on an honest belief which is perceived, for good reason, to be valid at the time but subsequently turns out to be mistaken. The Court also reminded that such judicial standpoint is necessary in order to allow the law-enforcement officials to perform their duty, and to act appropriately and in time in order to protect lives and the lives of others. The Court, moreover, stated: "*From this it must follow, a fortiori, that the incidental use of lethal force in an operation mounted in pursuit of one of the said aims does not violate Article 2 of the Convention if the assessment that a threat to life exists actually turns out to be correct*".[469]

The Court therefore reached a unanimous decision that the use of lethal force did not exceed what was "absolutely necessary" for the purposes of effecting the arrest of Moravia Ramsahaiand protecting the lives of Officers Brons and Bultstra. Consequently,

[467]Ibidem, para. 380

[468]Ibidem, para.381

[469]Ibidem, para. 382.

the shooting of Moravia Ramsahai by Officer Brons does not constitute a violation of Article 2 of the Convention.[470]

2.10 NEWER COURT'S PRACTICE WHEN IT COMES TO THE PROPORTIONALITY OF USE OF LETHAL FORCE BY LAW ENFORCEMENT OFFICIALS

2.10.1 10.1. Akpinar and Altun v. Turkey

In this case[471] the security forces killed the first applicant's brother, Seyit Külekçi, and the second applicant's son, Doğan Altun, during an armed clash which followed an ambush. According to the incident report, after the cease fire two dead bodies were found by the security forces. In their proximity they also found two automatic rifles, four chargers and fifty cartridges. The same report states that the security forces used 10 hand grenades, 2,780 Bixi-type bullets, 1,420 G3-type bullets, 2,620 Kalashnikov-type bullets, and other ammunition used for illumination.

Post mortem examinations showed that Doğan Altun had received nine bullets to his head, shoulders, chest and legs. Moreover, half of his left ear had been cut off. Seyit Külekçi had received eight bullets to his head, shoulders, arms, chest, abdomen and lumbar region. Both of his ears had been cut off. Both bodies had numerous wounds of other nature. It was concluded that they died because firearms wounds caused hemorrhage and damaged the cerebral tissue.

[470]However, the Court did found that there has been a violation of Article 2 of the Convention in respect of failings in the investigative procedures concerning the death of Moravia Ramsahai. The argument for such finding will be explained in more detail in the next chapter.

[471]*Akpinar and Altun v. Turkey*, application no. 56760/00, judgment on 27th February 2007

However, the applicants filed a complaint with the Turhal public prosecutor's office. They claimed that Doğan Altun's left arm had been cut. Moreover, the ears of Seyit Külekçi and Doğan Altun had been cut off and numerous injuries have been found on their bodies not responding to firearms wounds. The applicants called for an investigation against the members of the security forces responsible for the mutilation of their relatives' bodies, alleging their acts represent torture or at least ill-treatment.[472] During the investigation, the members of security forces claimed that the ears of the corpses have already been cut off as they found them after the clash and that no torture or ill-treatment took place.

The applicants filed a complaint to the European Court of Human Rights alleging that under Article 2 of the Convention that the use of force the security forces against their siblings had been disproportionate in the circumstances of the case and had resulted in their unlawful killing. They maintained that security forces could have captured Seyit Külekçi and Doğan Altun alive and by not doing so had failed to fulfill their obligation to protect their relatives' right to life.

In this verdict, the Court reminded, inter alia, that "As the text of Article 2 itself indicates, the use of lethal force by security forces may be justified in certain circumstances. Nonetheless, Article 2 does not grant a carte blanche. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that, as well as being authorized under national law, policing operations must be sufficiently regulated within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force."[473]

When the Court scrutinizes claims of a breach of Article 2 it does so most carefully. It analyses not only how the agents of the State who actually administered the force acted but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination However, "security forces should not be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of established international standards."[474] In this

[472]Ibidem, para. 14

[473]Ibidem, para. 50

[474]Ibidem, para. 51

way the Court showed sensitivity towards the complex position in which agents of the state are in. Security operations are highly important. They bear risk not only for the lives of the terrorists, but also civilians and the agents themselves. The legal framework should and must not disregard that fact and should allow enough freedom to law enforcement officials to make critical decisions in a very short amount of time.

However, the Court scrutinizes not only the legitimacy of the use of force, but also examines whether the regulation and organisation of the operation were conducted in way which makes any risk to individual life as small as possible. In the present case, the Court however notes that since there was no whether the force used during the armed clash had been necessary, it is unable to establish a complete picture of the circumstances surrounding the deaths. That makes the circumstances of the case unclear.

Consequently, as the Court is unable to establish "beyond reasonable doubt" that Seyit Külekçi and Doğan Altun were deprived of their lives by the security forces as a result of a use of force which was more than absolutely necessary, within the meaning of Article 2 § 2 of the Convention, it was led to conclude that there has been no violation of Article 2 of the Convention under its substantive limb.[475]

2.10.2 Huohvanainen v. Finland

On 30 November 1994 applicant's brother J. threatened a taxi driver with a gun, made him abandon his car, pointed his gun at the driver's chest and then pushed it against his abdomen with force causing loss of breath. Then J. made him put his hands up and to lie on the ground face down. When the driver attempted to look up, J. pointed the gun to the back of his head threatened him. Finally, J. took a torch from the car and let the driver leave. Later that night, J. shut himself in his rented house on the island. He did not take any hostages. The police subsequently evacuated the whole island.

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[475]Ibidem, para. 55 - 56

Visibility has been poor as the area of the siege was not illuminated by lights other than those coming from J.'s house. The greater part of the operation was conducted in darkness in an around zero temperature. The house was near the water and had doors and windows on all sides. The ground was uneven and covered with rocks, tree trunks and densely growing bushes. There was no cover in the surrounding area. The woods could not be directly accessed from the bedroom.

Over 50 police officers took part in the siege. The police surrounded the house. The police at the scene were informed that J. had criminal record, that he had previously been involved in an armed siege, that he had been admitted to a psychiatric institution and that he was considered to be especially hostile towards the police. Based on the information obtained from the psychiatric institution where he was treated, J. was described as someone very difficult to conduct negotiations, extremely impulsive, paranoid, aggressive and incapable of co-operating. The police on the scene acquired additional information from two psychiatrists and one psychologist, from police officers who had been involved in J.'s previous siege and from his family and acquaintances.[476]

The officers were instructed first to arrest J. by issuing instructions to him, to abstain from using weapons and to act within the limits of self-defense. A patrol boat and a helicopter were deployed. Units from the fire department and an air ambulance were on stand-by. As it dawned the police started approaching the house. A police dog and handler were on duty. Also, a psychologist from the Police Academy was present to assist in the negotiations but all the attempted calls to the house have not been through.

The proper siege began at around noon. At the request of the police officer in charge of the scene 23 specially trained police officers joined siege together. Their commander, Superintendent H. has been informed about the instructions on the use of force.

When he noticed that the police is coming closer, J. fired shots in the air. During the day he fired again and also aimed at the police officers. Trained negotiators tried many times to reach J. by telephone. They also left messages on his answering machine and sent numerous faxes. He answered only three of these calls during the afternoon and early evening. However, J. refused to negotiate. He threatened them that many will go with him

[476] *Huohvanainen v. Finland*, application no. 57389/00, judgment on 13th March 2007, para. 14

once he comes out. After making other similar threats, he exited the house and shot in the air repeatedly.[477]

The police got informed by J.'s brother who arrived at the scene that J. owned a 22 caliber small-bore rifle and a very heavy 45-70 caliber sporting gun. J. was also said to be an excellent shot since shooting was his hobby.

When the police saw J. carrying two long-barreled weapons, they scaled up the operation, enhancing security measures in order to protect the police officers and any other persons in the area. At 9.15 p.m. J's brother informed the police that J. had called him and promised to let him into the house at dawn. During the evening and night, the police heard J. moving around outside in the darkness. He shot all the lights set around his house. At around 10 p.m. J. fired several shots in the air and at the police. He also shot the helicopter, which was training a searchlight on the house, forcing the crew to perform an emergency landing in a nearby field. As J. hinted around 11 p.m. that the police will have "a blasting operation" they started suspecting that he might also have explosives.

The police rendered surround the house from farther away without losing sight of it not to be possible, while they feared that if they would move the operation further away from the house J. could possibly to enter other people's houses.

On the morning of 2 December 1994, the police found J's location and kept him inside the house. However, he fired repeatedly through the windows and the skylight, aiming at the police. At 9 a.m. J's demand to get a written assurance that he would not be committed to a psychiatric institution was denied. He was afterwards in touch with a police officer from his home town, S.K, whom he called.

The senior police officers assessed the situation. J. had shot at the police over a hundred times and had an excellent shooting position from the roof. The police officers' gear provided little protection. The police concluded the situation cannot go on another night, as J. was able to leave the house undetected when it gets dark.[478]

After a lengthy discussion, it was decided that the operation must continue in the best interest of public order and safety. The police deemed the use of a police dog to be too

[477]Ibidem, para. 21

[478]Ibidem, para. 26

risky. They went through different possibilities. Eventually the officer in overall charge was assisted by the defense forces in the form of two armored personnel carriers with drivers. In that way the house could have been monitored more closely and it was possible to use tear gas if needed. The presence of the carriers would also accommodate the evacuation of injured persons. A psychologist at the aforementioned psychiatric institution maintained that "a show of strength in the form of military force and vehicles might allow J. to retreat honorably".[479]

Around noon, after numerous negotiation attempts had failed, the officer in charge at the scene, Superintendent T., ordered to use the tear gas. However, that had no visible effect on J. Around 2 p.m. Superintendent T. had the window panes and curtains removed to prevent surprise attacks. Shortly after they noticed J. on the roof.

All the calls by the police had remained unanswered. An attempt to establish contact by using megaphone gave no results. The police switched on the searchlights as it got dark. Seeing this, J. fired his gun. He fired shots towards the armored vehicles and the border guard at about 6 p.m. He also threw a gas canister and at least two "Molotov cocktails" and simultaneously set the house on fire. He also broke glass and furniture acting enraged. This behavior concluded that the situation had become more dangerous and more difficult and that J. seemed to be planning an escape. He was acting increasingly hostile and self-destructive. They also believed that J's life was in danger from the fire.

They dismissed abandoning the operation since J. became a serious threat. They rendered the use of a dog to be impossible under the circumstances. They also assessed that an action team should not be sent into the burning house. The only option to prevent him from escaping was to order a police officer to shoot with a shotgun aimed at J.'s leg, despite shooting being viewed as an extreme solution and a last resort.[480]

At 6.26 p.m. they've lit the scene and started the shooting operation. This operation aimed to rescue J. from the burning building without endangering the other persons at the scene. Senior Constable T.L. was chosen as the one who will fire the shot. He chose to do so using a shotgun in order to cause as little injury as possible as well as to minimize the danger to the police officers and rescue personnel. The officer in overall charge,

[479]Ibidem, para. 27

[480]Ibidem, para. 31

Provincial Chief Inspector K.A. authorized the change of instructions on the use of force at 6.31 p.m. Constable T.L. fired one shot through the porthole of armored vehicle at 18 meters' range. The bullet hit J. in the right hand and in the right thigh.

Despite being shot and instructed to surrender, J. continued throwing objects into the fire and moving around inside the house. Since it gave no results, no further shooting was authorized. Only 25 minutes later, the house was in flames. The Special Task Force commander, Superintendent H., expected J. to exit the house within two minutes if he intended to come out at all before it collapses. It was not possible to contact J. anymore since the fire was making too much noise. He was expected to leave the house in one of two ways: by going out through the bedroom window from which the glass had been removed or through lower part the bedroom door.

J. chose the latter – he broke the glass on the lower part of the bedroom door, cleared the frame of shattered glass and started crawling out through the opening. He was armed with two weapons. This happened at about 7 p.m. At that point both Senior Constables A. and L., fired at him from an armored vehicle at six meters' range. They were both aiming at J.'s shoulder and arm. However, due to his body position, as well as the firing angle and the short time available, the bullets hit him in the head. Despite the attempts to resuscitate him, J. died at 7.35 p.m.

The Strasbourg Court subsequently reminded that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but subsequently turns out to be mistaken. The Court further assessed that there was no reason to doubt that Senior Constables A. and L. honestly believed that it was necessary to open fire on J. in order to protect their colleagues who were unprotected outside the armored vehicles.[481]

The judges also pointed out that it is not possible for the Court to exchange its own evaluation of the situation for that of an officer who was expected to react in the heat of the moment in order to protect his life or the lives of others from an honestly perceived danger. In the case in question, the officers were confronted by a man who appeared in the doorway holding two guns and who had fired at them several times during the two-

[481]Ibidem, para. 96

day siege. The decisive fact in the eyes of the Court was that J. emerged from the house heavily armed. Not only had he ignored previous warnings to give himself up but he also had fired in the air and at the police officers a number of times. His actions and statements pointed to a conclusion that he would not hesitate to use his gun again. All the previous warnings did not result in him surrendering.[482]

Further, Senior Constables A. and L. did not intend to kill J. Their plan was to wound him and thereby immobilize him. However, one of the shots resulted in J's death. This was largely due to the restricted sector of fire and the fact that J. was crouching at the critical moment.

Considering all of the above-mentioned facts the Court found that the use of fire arms in the circumstances of this case was not disproportionate. It also did not exceed what was absolutely necessary to avert what was honestly perceived by the police officers to be a real and immediate risk to the lives of their colleagues.[483]

2.10.3 Bitiyeva and X v. Russia

The first applicant in the case *Bitiyeva and X v. Russia,*[484]was a politically active woman who participated in anti-war protests. From 1994 to 1996 she worked in the NGO sector. In January 200 she and her son were taken to the Chernokozovo detention facility by 20 men wearing in military uniforms. According to her claims, she has been ill-treated and humiliated in various ways. Despite having serious health condition, the first applicant has been denied medical assistance. However, as her health deteriorated, she was transferred to a hospital in mid – February 2000. In mid-March 2000 she had been visited in the hospital by the District Prosecutor, who had told her that she had been cleared of charges. In March 2000 she was issued with a certificate confirming that she was under

[482]Ibidem, para. 97

[483]Ibidem, para. 98

[484]*Bitiyeva and X v. Russia*, application nos. 57953/00 and 37392/03, judgment on 21st June 2007

investigation for her alleged participation in illegal armed groups in Chechnya and that she was cleared since no incriminating evidence has been found. She was released from the hospital in the same month. Her son was released on 26th February 2000. No charges were pressed against any of them. The applicants reported about the situation in Chernokozovo at the material time both to the media and in the NGO sector.[485]

On the night of 21 May 2003, the first applicant, her husband Ramzan Iduyev, their son Idris Iduyev, as well as her brother Abubakar Bitiyevand her one-year old grandson were at the first applicant's house. At around 3 a.m. two UAZ-45 cars without registration plates stopped at the house next door. They woke the first applicant's neighbor up, gagged her with adhesive tape and after seeing her passport photo concluded in Russian it is not the person they were looking for. They then told the inhabitants to be quiet for ten minutes and left, taking the woman's passport with them. That passport has subsequently been found in the first applicant's house.

Around half an hour later, eleven people armed with AK-7.62 guns came in the first applicant's house. At the same time a few others, armed with grenade-launchers and machine guns, gathered in the street around the house. They were all wearing the special forces' uniforms. Some of them wore masks, other helmets. After a few minutes a neighbor heard six or seven shots being fired.

The first applicant's other son, who lived in another house in the same yard, claimed that after hearing a scream at the neighbors' at about 3.30 a.m. he promptly put his clothes on and looked outside. He saw several men wearing camouflage uniforms and "special forces helmets" first jumping into the courtyard across the fence and taking up combat positions around the door soon after. He hid behind an armchair right just before several men ran into the house and started searching the rooms. They spoke in Russian. After concluding that the house is empty, they left, taking the video player with them. He heard some noise outside followed by the sound of about 10 shots being fired very rapidly. About five minutes later he heard the soldiers hurrying each other up and then the sound

[485]She also contributed to Human Rights Watch report of October 2000 which had a special part dedicated to the situation and horrible conditions on the Chernokozovo detention centre in January and early February 2000. – Ibidem, para. 35

of the cars leaving. Eyewitnesses saw two UAZ cars heading from there towards the main road to Grozny.[486]

The first applicant was discovered lying on the floor. There was adhesive tape on her mouth and her hands. She had been shot in the face and in the hands. The bullets were fired from an AK-7.62 machine gun. The second applicant's uncle, Abubakar Bitiyev was found lying in the corridor. There was a black hood with strings on his head. Such strings have been known to be used by the military. Someone taped his hands and feet together. He had been shot three times in the back of his head.[487]

The first applicant's husband, Ramzan Iduyevwas also discovered lying on the living room floor with his hands and legs taped together. He had been shot in the back of his head their son Idris Iduyev, was found on the bedroom floor with his hands taped behind his back and his legs taped together. He received three shots in the back of his head.

On the next morning it was established that on the same night two other men from the village had been killed, apparently by the same group. Victims' houses have been raided, they were restrained with an adhesive tape and shot by people who were described as witnesses as belonging to the military.

After the first applicant was killed, her daughter became the second applicant in this case. She claimed that her family members have been killed by State servicemen. She supported her claims by providing the witness statements recounting that the perpetrators were dressed in camouflage uniforms, spoke Russian among each other and travelled in military vehicles through roadblocks during curfew hours. The Government on the other hand pointed out the lack of evidence pointing to special forces as perpetrators of this crime. According to the results of the official investigation, no servicemen of the UGA participated in special operations in the district on that date nor have the vehicles of the military units stationed in the district been deployed on that night.[488]

This case is worth mentioning also due a significant stand by the Court. Namely, it pointed out that in order for the system of individual petition be effective it is essential

[486]Ibidem, para. 40-41

[487]It is assumed Bitiyev was taken to his sister's house by force since he had been sleeping that night in a separate house in the same courtyard. The furniture in that house had been smashed. – Ibidem, para. 45

[488]Ibidem, para. 120–121

that States furnish all necessary facilities to enable a proper and effective examination of applications. When an individual applicant claims that State agents violated his rights under the Convention it is expected that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. If a Government fails to submit such information despite having it in hands, without explaining its reasons in for such failure in a satisfactory manner, that may lead to the drawing of inferences as to the how well-founded the applicant's allegations are. It can also reflect negatively on the respondent State's compliance with its obligations under Article 38 § 1 (a) of the Convention.

In the present case, when requested to submit the investigation file, the Government produced only a smart part of it, namely a few documents and a brief summary of the investigative steps. A number of files were not included - numerous witness statements, the forensic and ballistic experts' reports, the report made about the examination of the scene of the crime, the requests for information about the alleged participation of the security or military forces in the killings and responses to such inquiries. The Government's main argument was that said documents could not been enclosed because they contained information about the location and actions of military and special units and personal information about the participants in the proceedings.[489]

Since the Government did not seek the application of Rule 33 § 2 of the Rules of Court,[490] the Court concluded the Government's reasons for the withholding of the vital information requested by the Court are not sufficient. Consequently, the Government have fallen short of their obligations under Article 38 § 1 (a) of the Convention to furnish all necessary facilities to the Court in its task of establishing the facts.

The Court drew inferences from the Government's conduct. It pointed out that the missing documents "would have been crucial in the verification of the accuracy of the applicant's allegations concerning the involvement of State servicemen in the killings".[491] Moreover, in cases where the applicant makes out a *prima facie* case and the Court is not presented

[489]Ibidem, para. 125

[490]This Article allows the principle of the public character of the documents deposited with the Court to be restricted for legitimate purposes, such as the protection of national security and the private life of the parties, as well as the interests of justice.

[491] Ibidem, para. 131

with the necessary documents, it is for the Government to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred. The burden of proof is thus shifted to the Government and if they fail in their arguments, issues will arise under Article 2 and/or Article 3.[492]

In the present case, the second applicant presented the Court with three statements made by eyewitnesses to the events, which were her brother and two neighbors. They stated that the perpetrators must have been either soldiers or members of the special forces. They based this conclusion on several facts: the killers were speaking Russian, wore camouflage uniforms and helmets, came to the village by two UAZ vehicles, traveled undisturbed during curfew hours and acted in a manner characteristic of special operations. Moreover, according to the testimonies from the servicemen at the roadblocks surrounding the village there had been a group with a "special permit" that night. There was a hood over the head of first applicant's brother's body, similar to the ones used by the military when they detained persons. A total of six people from the village have been killed on the same night, in the same style of execution.

The Court took notice of the claims by the respondent Government that certain documents examined during the investigation did not support the involvement of the servicemen or of military vehicles in the operations in the Naurskiy District on 21 May 2003. However, the Government failed to support this claim with evidence. No copies of these documents have been submitted nor was their content disclosed in more detail. Nothing in the investigation file submitted to the Court gives any incentives on the content of the said documents. Therefore, the Court maintained the Government failed to produce key elements of the investigation which could have shed light on the circumstances of the killings of the first applicant and three members of her family.[493] It did not offer any other explanation of the events nor offered enough evidence to dispute the second applicant's version of the events, despite the aforementioned switch of burden of proof.

Having regard to everything stated above, the Court concluded that the deaths of the second applicant's relatives can be attributed to the State. In the light of this conclusion

[492] Ibidem, para.132

[493]Ibidem, para. 134

and the Government's failure to provide any justification in respect of the use of lethal force by State agents, the Court concluded that there has been a violation of Article 2 in respect of the deaths of Zura Bitiyeva, Ramzan Iduyev, Idris Iduyev and Abibakar Bitiyev.[494]

2.10.4 Cangöz and others v. Turkey

One of the fresh examples of the Court's practice in this regard is the case of *Cangöz and others v. Turkey*[495]. In this case, the applicants' seventeen close relatives were members of the Maoist Communist Party 2,[496] which was an illegal organization in Turkey. They have all been previously convicted for being members of various outlawed organizations at different times. The members of the security forces killed all of the applicants in the rural area within the administrative jurisdiction of the town of Ovacık by on 17 and 18 June.

When the applicants found out from the news that military killed nine MKP members in Ovacık and that armed clashes were continuing, they went there to check if their relatives were among the killed people. When they were taken to identify the bodies, it was not possible to make identification because the faces and the bodies were destroyed beyond recognition. After the authorities identified all the bodies and performed autopsies on them, families were allowed to bury them.

The Government alleged that killed persons were members of the MKP terrorist organization. After being informed that there will be a meeting of MKP in Tuncelia patrolling helicopter found the terrorist group in that area on 17 June 2005. The terrorists fired at the helicopter and an armed clash ensued. Once the terrorists were positively located, the security forces were deployed to arrest them. An encounter of two groups

[494]Ibidem, para. 141

[495]*Cangöz and others v. Turkey*, application no. 7469/06, judgment on 26th April 2016

[496] Hereinafter: the MKP.

occurred at 5 p.m. The security forces asked the terrorists to surrender to which they responded by opening fire. One member of the military was injured. The armed clash between the two groups ended at 9 a.m. on 18 June 2005. Next to the bodies of dead MKP members a number of automatic rifles and ammunition have been found. Three terrorists were taken alive and arrested.

The seventeen dead bodies were clothed. In order for the examination of the bodies to be carried out by the prosecutor and two doctors, the clothes were removed from them. Photographs have been made, both with their clothes on and after they were taken off. The record was also made of the extensive injuries observed on the bodies. However, the doctors performing the examination concluded that a more extensive autopsy was needed so the bodies were handed over to forensic pathologists.

According to the findings of the autopsy report, eight members of MPK had been killed by explosives, three of them died from bullet wounds and six were killed by both explosives and bullets. It was not possible to assert the exact distances from which the seventeen terrorists had been shot, without examining their clothes which had not been provided.

However, the three applicants alleged existence of strong indications that security forces deliberately killed their relatives, bombing them from a distance, without any prior warning and without asking them to surrender. In their view, it had not been absolutely necessary to kill their relatives. Moreover, the burden of providing a plausible explanation for the killings fell on the Government which in applicants' view failed to do so.

The Government maintained to its claim that the security forces aimed to arrest the terrorists and to hand them over to justice. The aim of sending a patrol helicopter to the area was to establish the number of persons in the group, the quantity and the nature of their weapons, and their possible targets. The terrorists were repeatedly asked to surrender. However, they immediately opened fire on the patrol helicopter and the soldiers on the ground. The Government claimed that the security forces had to respond by using force in order to protect themselves, arrest them and give protection to the civilians. Since they had no other means of doing that but to use armed force, the Government argued it was absolutely necessary to fire on the terrorists in order to achieve the aims cited in Article 2 § 2 (a) and (c) of the Convention.

In the present case, the Government bore the burden of proving that the force used by the soldiers was no more than absolutely necessary and strictly proportionate to the achievement of the aims set out in the subparagraphs of Article 2 § 2 of the Convention. Thereforethe Court had two tasks: first one being to examine whether the resort to the use of lethal force by the soldiers was no more than absolutely necessary and was it strictly proportionate to the achievement of the aims set out in the subparagraphs of Article 2 § 2 of the Convention. Moreover, it had to establish whether the operation has been regulated and organized in such a way as to minimize to the greatest extent possible any risk to life. The Court reiterated the McCann principle that law-enforcement personnel in a democratic society are expected to show a degree of caution in the use of firearms even when dealing with dangerous terrorists.[497]

The Court pointed out that the only reason why the applicants' relatives had been present at the time in the area was to organize a meeting, not an armed attack or a terrorist action. This was considered as a relevant factor to take into account when assessing whether it was absolutely necessary to resort to the use of lethal force. Since the security forces were beforehand informed of intended arrival of the applicants' relatives in the area and had watched their action closely even intercepting their phone conversations, it was possible to plan an operation in advance and issue appropriate orders. However, "the Government have not provided the Court with any evidence that clear instructions had been issued by those planning the operation as to how to capture and detain the suspects alive or as to how to negotiate a peaceful surrender. That failure, in the opinion of the Court, must have increased the risk to the lives of any who might have been willing to surrender."[498]

Moreover, despite knowing the details of the terrorists' arrival to the area well in advance, the security forces members chose not to arrest them at much earlier stages, but to do so after they went to the countryside. The reasons for this decision by the operation planners have not been provided.[499]

The Court stressed that it "remains unconvinced that issuing warnings – the accuracy of which is in any event strongly doubted on account of the information in the Kemah report

[497]Ibidem, para. 106

[498]Ibidem, para. 109

[499]Ibidem, para. 109 – 111

– can be said to amount to a meaningful attempt to have as little recourse as possible to lethal force."[500] Furthermore, since the Kemah report stated that "armed Cobra-type military helicopters" had been sent to find the applicants' relatives the Court did not accept the Government's submission that a single helicopter had been sent to the area solely for patrol purposes.

Taking this into consideration, the Court concluded it is not persuaded that alternative and non-lethal means were considered or used to apprehend the applicants' seventeen relatives. Consequently, it expressed strong doubts if the use of lethal force was absolutely necessary in this case. Nevertheless, it proceeded to scrutinize whether the Government have discharged their burden to show that the use of force was in any event strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), and (c) of the Convention.

Namely, "in cases where the respondent Government bear the burden of justifying a killing, the examination of the steps taken in an investigation does not only serve the purpose of assessing whether the investigation was in compliance with the requirements of the procedural obligation, but also of deciding whether it was capable of leading to the establishment of whether the force used was or was not justified in the circumstances and whether the Government have thus satisfactorily discharged their burden to justify the killing".[501]

It was the Government's responsibility to show that the investigation file contains enough evidence that the force used was no more than absolutely necessary and was proportionate. In this regard, the Court observed that the documents in the file are rather often not supporting or even directly contradicting some of the important Government submissions.[502] In this context it is important that the Court did not accept the claim that the soldiers had responded to the terrorists with the same kind of weapons, namely assault rifles since the autopsy report clearly states that the injuries on most of the bodies were caused by explosives. The injuries seen on the video of the bodies couldn't have possibly

[500]Ibidem, para. 112

[501]Ibidem, para.115

[502]According to the documents from the investigation file, and contrary to the Government allegations, the prosecutor never visited the area due to security concerns, the three terrorists had been arrested well before the start of the military clashes. Not only have they not been shooting at the military, but they also helped to locate the applicants' relatives. – Ibidem, para. 117 - 119

been caused by assault rifles. Even the prosecutor concluded that the bodies have suffered "heavy damage" by the military.[503]

The Court also did not accept the claim that only one helicopter was sent to the area and solely for patrol purposes, since it was directly contradicted by the information contained in the investigation file about "soldiers in armed Cobra-type military helicopters" and operation being "supported from the air".[504]

The Court also noted that according the forensic report 16 of the 17 relatives had gunpowder residue. This could be an indicator of them having handled firearms or having pulled the triggers. On the other hand, in the same report it was pointed out that the gunpowder residue might have been explained by the contamination, since the bodies were carried by the soldiers, who had used firearms. Moreover, swabs were taken from their hands some 12-36 hours after the killings. Therefore, the contamination could not be excluded and it cannot be claimed with absolute certainty that the forensic report proves that the sixteen "had actively fired on the security forces".[505]

The soldiers were not subsequently questioned about the issuing or otherwise of surrender warnings, the findings of the Kemah military report, the actual weapons they used in this operation, the role of the "armed Cobra-type helicopters", their position nor distance from their victims. The injured soldier was not questioned either. There was nothing in the investigation file supporting the prosecutor's speculations that the soldiers inflicted severe injuries on the seventeen in order to eliminate "any booby traps" and that the security forces had issued warnings to the deceased and asked their surrender.[506]

The clothes of the deceased have been destroyed before the proper examination, which is consisted with the practice of destroying or failing to secure in evidence the clothes of individuals killed by law-enforcement officials in Turkey. The Court contested the national authorities\ explanation that this was done because at the clothes had "no evidential value", since they could have been used for establishing the distance from

[503] Ibidem, para. 120

[504] Ibidem, para. 121

[505]Ibidem, para. 122

[506]Ibidem, para. 131

which the deceased had been shot. This would be an important part of investigation of the accuracy of the allegations that the applicants' relatives had been killed unlawfully.[507]

The rifles found next to the bodies have not been searched for fingerprints and no explanation has been given for this omission. In view of that failure, the Court expressed doubts if the applicants' deceased relatives had handled those weapons and fired at the soldiers.[508]

It was shown that numerous Government allegations have not been supported or were even contradicted by the documents in the investigation file which rendered them unreliable. At the same time the investigation was almost entirely focused on documents prepared by the military and the evidence collected by the soldiers who participated in the operation in question. The investigation was also filled with a number of serious failures. The manifest inadequacy of the investigation together with the fact that many important questions remained unanswered led the Court to the conclusion that the investigation conducted at the national level is not capable of establishing the true facts surrounding the killings and its conclusions are therefore not to be relied on.[509]

Therefore, the Strasbourg Court found that the Government has failed to discharge their burden of proving that the killing of the applicants' seventeen relatives constituted a use of force which was no more than absolutely necessary or that it was a proportionate means of achieving the purposes advanced by them. Therefore, there has been a violation of Article 2 of the Convention in its substantive aspect.[510]

[507]Ibidem, para. 134

[508]Ibidem, para. 135

[509]Ibidem, para. 138

[510]Ibidem, para. 138 – 139

2.11 CONCLUSION

From the case law outlined above, it is evident that the Court has shown judicial creativity as a response to new situations, not envisaged by the drafters of the European Convention of Human Rights, emerging before it as a consequence of the inevitable evolution of societies and gradual changing of ethical standards. Therefore, it has adopted new techniques of interpretation. As we can infer from the case-law presented above, the Court has through its jurisprudence repeatedly asserted that the Convention has to be seen as a living, evolving instrument. In order to provide effective protection of human rights and freedoms, it should be interpreted in a way that guarantees rights that are "not theoretical or illusory but practical and effective."[511] That has led, inter alia, to imposing new positive obligations, requiring the state to uphold the right concerned by positive action.

The role of Court substantially changed. Only few decades after it was established, from a mere tool for rendering judgments the European Court became a judicial organ which responded to the present – day legal challenges by broadening the scope of application of the Convention.

The principle of positive obligations was also applied to the way the Court has interpreted permitted exceptions to right to life, which are provided by paragraph 2 of the Article 2 of the European Convention. The Court pointed out that it is not enough to merely "respect" and "fulfill" the rights guaranteed by this human rights document, but it is also essential to "protect them", by which is understood that the Member States have duty of taking active measures to prevent the Convention rights and freedoms from being violated.

When it comes to Article 2 of the Convention, the Court established several positive obligations on the Contracting States. In the *McCann and others v. United Kingdom* case, the Court confirmed that Article 2 paragraph 2 ECHR applies to the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. However, there are certain preconditions: the use of force must be no more than "absolutely necessary" for the achievement of one of the permitted purposes, which are

[511]This approach seems to be articulated for the first time in the case of *Artico v. Italy* (application no. 6694/74 , judgment on 13th May 1980). - Dickson B., "Positive obligations and the European Court of Human Rights", Northern Ireland Legal Quarterly, vol. 61, Issue 3, 2010, 205

set out in sub-paragraphs (a), (b) or (c) of the same paragraph. That means that the employed test of necessity must be *stricter and more compelling* from the one applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention.

The Court has previously, in case of *Stewart v. the United Kingdom* pointed out that the word "necessary" in Article 2 paragraph 2 by the adverb "absolutely" points to the application of a stricter and a more compelling test of necessity.[512]

When evaluating evidence in order to evaluate if the force used was "absolutely necessary" the Court insisted on compliance with the standard of *proof "beyond reasonable doubt"* to be complied with. In *Avşar v. Turkey* it explained that "such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un-rebutted presumptions of fact.[513]This standard is especially important for this paper, since as we will subsequently showcase, it is applied both in the cases of alleged violations of right to life and in the cases of alleged violations of prohibition of torture, but with different content.

However, when imposing the positive obligations the Court has had regard to the fair balance between the interest of the community and the interest of an individual. From the Court's case-law it is evident that the Court considered it essential not to impose an excessive burden on the State agents. The reasoning behind this is the Court's awareness that "law enforcement officials operate in difficult circumstances and have to balance individual rights, the public interest and their own protection. As agents of the state, they wield the monopoly of the legitimate violence and are entitled to use weaponry that is not permitted to ordinary citizen. The ECHR represents an endeavor to limit the State's power and to ensure that if the State kills, it does not do so in an arbitrary way. However, when assessing an individual agent's recourse to lethal force, his or her special status must be taken into consideration while, inevitably, recognizing his or her fallibility in the heat of the moment."[514]

[512]*Stewart v. The United Kingdom*, application no. 10044/82, decision on 10th July 1984, para.18

[513]*Avşar v. Turkey*, application no. 25657/94, judgment on 10th July 2001, para.282

[514] Skinner S., 2003, 252

For these reasons, the Strasbourg judges maintained that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. The reasoning behind such a stand, as we've mentioned, is more than clear – the law enforcement personnel being under a constant fear of using the lethal force might have as a consequence them not acting decisively and on a timely manner, in the cases when they honestly believe it is justified to use force. They are more often than not holding not only theirs, but also lives of many other, innocent people in their hands and therefore it is essential to allow them a certain "space to maneuver" and make their own judgments, based on the valid evidence, of the course of action which should be taken.

Another expression of the principle of fair balance is the Court's insisting on the existence of the proportionality between the force used and the aim pursued, which has to be permitted under paragraph 2 Article 2 ECHR. In *The Sunday Times* case, the Commission simply stated that "the test of necessity includes an assessment as to whether the interference with the Convention right was proportionate to the legitimate aim pursued."[515] As T. Ruys explains: "Proportionality (…) demands a careful balance to be struck between the goal to be achieved and the means used to this end. The nature of the threat and the intention of the suspect must be weighed against the possible outcome. It is clear that the application of the arbitrariness must at all times be made on a case – by – case basis, and has to consider the whole context of the incident. This may often prove to be a difficult exercise, as is demonstrated by the voting patterns of the European Court in the *McCann* and *Andronicou and Constantinou v. Cyprus* cases."[516]

In The *Stewart v. the United Kingdom* case the Court also pointed out that when assessing the proportionality of the force used one has to take into consideration the nature of the aim pursued, the dangers to life and limb inherent in the situation and the degree of risk that the force employed may result in the loss of life.[517]

[515]*The Sunday Times v. the United Kingdom*, application no. 6538/74, judgment on 26th April 1979, para. 62

[516]Ruys T., 2005, 10

[517]*Stewart v. The United Kingdom*, application no. 10044/82, decision on 10th July 1984, para.19

In the *McCann* case, another positive obligation has been placed upon the Member states – to plan, conduct and control the law enforcement operations so to minimize, to the greatest extent possible, recourse to lethal force. While the authorities are obliged to take appropriate care to ensure that any risk to life is as minimal as possible, the Court's obligation is to examine whether the authorities were negligent in their choice of action. An important step on the positive-obligations - developing path was the judgment in the *Ergi* case. In this judgment, a violation of Article 2 ECHR was found, inter alia, because the Turkish authorities had failed to take all feasible precautions in the choice of means and methods of a security operation in order to avoid or at least minimize incidental loss of civilian life. Similar conclusion has been reached in the judgment in *Isayeva v. Russia* case. Namely, in that case the Court noted that no military operation in which heavy combat weapons are to be used in a populated area should be planned without taking the consideration of the dangers that such methods invariably entail, as the primary aim of the operation should be to protect lives from unlawful violence.

In the case of *Andronicou and Constantinou v. Cyprus*, the Court went a step further in its interpretation of the Article 2 ECHR, by finding that obligation of the planning and control of security forces operations does not exclusively apply to the violent situations in which there are terrorists involved. Moreover, in his *Partly concurring, partly dissenting opinion* judge Pekannen reminded that the law enforcement officials' superiors are the ones who should be held accountable as well in case of the shortcomings in the way the operation was planned, conducted or controlled.

Another groundbreaking case was *Makaratzis v.* Greece. In this case, it was confirmed that, in exceptional circumstances, physical ill-treatment by State agents which does not result in death may disclose a violation of Article 2 of the Convention. When assessing whether this rule can apply to a particular case, what may be relevant, *inter alia*, are the degree and type of force used and the intention or aim behind its use. It was also pointed out that the states are obliged to provide the level of protection "by law" of the right to life that is required in present-day democratic societies in Europe.

Based on everything we've mentioned, we can conclude that the jurisprudence of the European Court of Human Rights when it comes to the use of lethal force developed gradually, but in a steady pace.

The Court asserted that "as the text of Article 2 itself shows, the use of lethal force by police officers may be justified in certain circumstances. Nonetheless, Article 2 does not grant a carte blanche. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that, as well as being authorized under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force."[518]

We find this assessment to be the perfect conclusion for this chapter.

[518] *Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004, para.58

3 CHAPTER 2 – POSITIVE OBLIGATION UNDER ARTICLE 2 ECHR TO CARRY OUT AN EFFECTIVE OFFICIAL INVESTIGATION

3.1 ESTABLISHMENT OF THE OBLIGATION TO EFFECTIVELY INVESTIGATE ALLEGED VIOLATIONS OF ARTICLE 2 ECHR BY LAW ENFORCEMENT OFFICIALS: THE MCCANN V. THE UNITED KINGDOM CASE

The *McCann* case, as we've already mentioned, dealt with assessing if the state could be accountable for unlawful use of deathly force in a shooting of three IRA members suspected of planning a terrorist attack. It was also one of the most discussed examples of the Court interpreting the Convention as "a living instrument".[519]

Namely, in order to secure that the right to life is effectively respected, the Court created an entirely different category of procedural obligations under the Article 2 - a required effective official investigation into the killings. In the McCann case, the Court first expressed the view that "a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. *The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their*

[519]In order to respond to the new challenges time has set before the European Court of Human Rights, it was not sufficient only to use the Vienna Convention on the Law Treaties as a source of inspiration for the interpretation of the Convention. That is why the Court has adopted new creative techniques of interpretation, the 'living instrument doctrine' and the 'practical and effective' doctrine. The living instrument doctrine was established in the *Tyrer v. United Kingdom* case (application No. 5856/72, judgment on 25th April 1978). In paragraph 31 of this judgment, the Court held that "the Convention is a living instrument which must be interpreted in the light of present day conditions." However, in this case the Court did not elaborate on the doctrine or the reasons behind it, which was criticized by authors who were opposed to judicial activism. – A. Mowbray. "The creativity of the European Court of Human Rights", Human Rights Law Review, vol.50, issue 1, 2005, 60-61

jurisdiction the rights and freedoms defined in the Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State."[520]

In other words, the Court interpreted the Convention in such ways, to make it as practical and effective. This method has been used because of the Court's firm belief that the state cannot fulfill its duties under the Convention by remaining passive. As it is pointed out in legal theory, "the creation of the effective investigation obligation was designed to buttress the express right to life enshrined in Article 2 by deterring public officials from carrying out unlawful killings through the fear of subsequent inquiry (and possible latter prosecution/conviction/punishment)."[521]

It is interesting to point out that, although it was the *McCann* case in which the Grand Chamber first articulated the implied positive obligation to investigate deaths which are the result of use of force by, inter alia, agents of State,[522]the Court found that in this particular case there has been no breach of Article 2 paragraph 1 ECHR on this ground.

Namely, despite allegations made by both applicants and intervenors that there have been various shortcomings in the inquest proceedings,[523] in the Court's view the examination of the circumstances surrounding the killings was thorough, impartial and careful. Among other things, the Court pointed out that public inquest proceedings lasted nineteen days and involved the hearing of seventy-nine witnesses as well as a detailed review of the events surrounding the killings. The applicants were legally represented and the lawyers

[520]*McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 161

[521]A. Mowbray, "The creativity of the European Court of Human Rights", Human Rights Law Review, vol.50, issue 1,2005, 77

[522]A. Mowbray, 2004, 27

[523]They complained that there was no independent police investigation of any aspect of the operation leading to the shootings nor the standard scene-of-crime procedures were not followed. The police did not trace or interview all eyewitnesses and the Coroner sat with a jury which was drawn from a "garrison" town with close ties to the military; and some members of the jury were also servants of the Crown. Applicants claimed that they did not enjoy equality of representation with the Crown in the course of the inquest proceedings since, inter alia, they had had no legal aid and were only represented by two lawyers. In addition to that, the applicants' lawyers did not have access to witness statements in advance, which was made available to the Crown and to the lawyers representing the police and the soldiers. Also, they complained of not having the necessary resources to pay for copies of the daily transcript of the proceedings which amounted to £500-£700. – *Mc Cann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 157-158

acting on their behalf were able to examine and cross-examine key witnesses, and to make their submissions in the course of the proceedings.[524]

In other words, despite acknowledging that the investigation might have been flawed, the Strasbourg Court came to conclusion that The United Kingdom has complied with its procedural obligation under Article 2 ECHR. This approach by the European Court was in legal theory described as pragmatic. The reasoning behind it was the fact that duty of conducting an effective investigation was an implied provision, not expressly stated in the Convention and therefore a subject to much wider margin of appreciation than it would usually be the case. In addition to that, McCann v. the United Kingdom was the first case in which the requirement of effective investigation has been set and therefore it was unrealistic to expect from the Court to impose harsh measures.[525] Moreover, the Court had to balance the necessity for an effective investigation to be conducted as a competent way of establishing responsibility and the need to respect the state sovereignty and its entitlement to enforce its national legislature, in line with the requirements to efficiently protect rights guaranteed by the European Convention.[526]

In that light, it is easier to understand the Court' statement in the *McCann* judgment that for the present case there was no necessity to make a decision regarding what form should the effective investigation take, nor under what conditions it should be conducted. Authors such as J. Chevalier-Watts find that the Court might have avoided imposing further obligations to High Contracting Parties since the public inquest in this case was rather reasonable and thorough.[527]

The significance of the McCann case in development of duty to effective investigation under Article 2 of the Convention is non – disputed. It "created the sea change in the Strasbourg jurisprudence Court and provided the groundwork from which the principles to carry out an effective investigation could be developed."[528]

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[524]Ibidem, para.162

[525]Chevalier-Watts J., "Effective investigations under Article 2 European Convention on Human Rights: Securing the right to life or an onerous burden on the state", The European Journal of International Law, 2010, vol. 10, 705

[526]Chevalier-Watts J., 2010, 704

[527]Ibidem, 703

[528]Ibidem, 705

3.2 WIDENING THE SCOPE OF APPLICATION OF DUTY TO INVESTIGATE: THE CASES AGAINST TURKEY AT THE END OF 20TH AND BEGINNING OF 21ST CENTURY

Turkey recognizing the individuals within its jurisdiction a right to petition to the Convention's institutions in 1987 was a pivotal moment for further development of positive obligations of States under Article 2 ECHR, including the obligation to investigate killings involving the use of force, which was established in the McCann case.[529]

Namely, in the same year a civil state of emergency was declared in South-East Turkey due to constant armed clashes between the government security forces and military part of the Workers Party of Kurdistan (PKK). Numerous applications to the European Court ensued, claiming that Turkey made gross violations of article 2 ECHR.

The case law which resulted from the Court deciding in these cases has helped widening the scope of application of duty to investigate into the killings allegedly performed by state agents.

3.2.1 Güleç v. Turkey case

In the *Güleç v. Turkey*[530] case, the applicant's son was killed in clashes between the demonstrators in Turkey and security force officers. Next to claiming that the force used was highly disproportionate and not absolutely necessary, the applicant also argued that the investigation conducted was not effective.

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[529]Buckley C., "The European Convention on Human Rights and the Right to Life in Turkey", Human Rights Law Review, vol. 1, issue 1, 2001, 36

[530]*Güleç v. Turkey*, application no. 54/1997/838/1044, judgment on 27th July 1998

The Court explained that "the procedural protection for the right to life inherent in Article 2 of the Convention means that agents of the State must be accountable for their use of lethal force" and reiterated that their actions must be subjected to some form of independent and public scrutiny capable of determining whether the force used was or was not justified in a particular set of circumstances."[531] By choosing that wording the Court placed emphasis on the elements of independence and public scrutiny as requirements of an effective investigation.

In the above-mentioned case, the Court found that there has been a breach of Article 2 of the Convention on account of the investigation into the circumstances of the applicant's son's death lacking thoroughness, independence and inclusiveness.

Namely, there have been various shortcomings in the investigation: the investigating officer showed no doubt in the official version of events; he interviewed only few people, leaving out some of the most important witnesses. The gendarmerie did not cooperate with the investigators, claiming that it could not supply the names of the soldiers who had been on board the armored vehicle. Also, there was neither reconstruction of the events nor a metallurgical analysis of the bullet fragment. The source of the bullet which passed through the boy's body was not investigated, although the downward trajectory it followed was consistent with fire having been opened from the Condor's. The investigation concluded that it was "impossible to determine who was responsible for the incidents", which led the Şırnak Provincial Administrative Council to decide that there was no case to refer to the criminal courts.[532] All that showcased the lack of thoroughness. The Strasbourg Court concluded that in cases when the investigators did not take all the reasonable steps to get full testimony from all the primary witnesses, the investigation failed to meet the minimum requirements under Article 2 ECHR.[533]

As for the lack of independence, it was pointed out that the investigation officers were members of the gendarmerie service and thereby hierarchically connected to the gendarmes under scrutiny.[534]The Court at this place emphasized that public authorities

[531]*Güleç v. Turkey*, application no. 54/1997/838/1044, judgment on 27th July 1998, para.78

[532]This decision was confirmed by the Supreme Administrative Court.

[533]Mowbray A., "Duties of investigation under the European Court of Human Rights", International and Comparative Law Quarterly, vol.51, issue 2, 2002, 440

[534]Ibidem, 439

which are to make decision if there will be prosecution based on the investigation report have to be independent from the subjects of the report. Author A. Mowbray found such assessment to be fully justified and commented that ”clearly, an institutional or personal connection between the decision-makers and the relevant State agents will undermine public confidence in the legitimacy of the inquiry/enforcement process.”[535]

Furthermore, the whole investigation was conducted and concluded without any participation of the complainant, who did not receive any of the important investigation – related documents,[536] which implied lack of inclusiveness.

Regardless of the security situation in south-east Turkey, the Court was firm in assessing that “neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, or, as in the present case, a demonstration, however illegal it may have been.”[537]

3.2.2 Ergi v. Turkey case

Ergi v. Turkey[538] case is often described as a milestone in developing the jurisprudence of the European Court of Human Rights.[539]In this case, although the Court was not satisfied *beyond reasonable doubt*[540]that the applicant’s sister had been killed by security forces[541],

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[535]Mowbray A., 2002, 440

[536]*Güleç v. Turkey*; application no. 54/1997/838/1044, judgment on 27th July 1998, para. 82

[537]Ibidem, para.81

[538]*Ergi v. Turkey*, application no.66/1997/850/1057, judgment on 28th July 1998

[539] Chevalier-Watts J., 2010, 706

[540]Namely, in the cases of killings by unknown perpetrators when it was alleged that the perpetrators were the members of security services or that the killing took place with their knowledge or support, both the European Commission and the European Court of Human Rights did not find that such allegation has been proven beyond reasonable doubt. Such allegations were hard to prove because of the lack of direct evidence concerning the identity of perpetrators or that the person kidnapped has been taken into custody. In addition

it has found that Turkey breached its obligation to protect life under Article 2 of the Convention.

Namely, while the applicant argued that the State is obligated to provide a framework of protection of right to life even if one cannot with certainty attribute its violation to it, the Government maintained that the procedural obligation to carry out an effective investigation into the killings could not be applied to such cases.[542]

The Court has broadened the circumstances when the duty to investigate arises,[543] by stating that "this obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority.[544]It is interesting that this wording leaves open the circumstances in which the duty to investigate into the killings might arise and at the same time it is unclear under which circumstances such obligation might not ensue. This approach widens the obligation to investigate the killings to apply to the cases which have not necessarily been envisaged by the judges in the McCann case, and raises concern of imposing too much of a burden on the Member states.[545]

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to that, in most cases there was no independent evidence which would support the applicant's version of the events. Adopting a more cautious approach, the Court has not considered circumstantial evidence to be enough to establish that beyond reasonable doubt state officials killed or kidnapped the victim. - Buckley C., 2001, 36

[541]The Court has found "legitimate doubts as to the origin of the bullet which killed Havva Ergi and the context of the firing" and maintained that there is an insufficient factual and evidentiary basis on which to conclude that the applicant's sister was, beyond reasonable doubt, intentionally killed by the security forces in the circumstances alleged by the applicant." – *Ergi v. Turkey*, application no.66/1997/850/1057, judgment on 28th July 1998, para. 78

[542]Buckley C., 2001, 47

[543]Mowbray A., 2002, 437

[544]Whatever mode of investigation is employed, the authorities have the duty to act of their own motion, once the matter has come to their attention, and not to wait for the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. This has been pointed out by the Court in a number of cases, e.g. *Ilhan v. Turkey* (application no.22277/93, judgment on 27thJune 2000), *Kelly and others v. UK*,(application no. 30054/96, judgment on 4th May 2001).

[545] Chevalier-Watts J., 2010, 706

Moreover, the Court noted that "the mere knowledge of the killing on the part of the authorities gave rise ipso facto to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death."[546]

Although such an obligation might seem too demanding for the High Contracting Party to the Convention, especially ones whose security and order have been frequently threatened as it was the case with Turkey at the time, the Court pointed out it has been mindful of such predicaments, but one more time repeated such extreme circumstances cannot displace the obligation under Article 2 to ensure that effective, independent investigation was conducted. That duty is of even higher importance in cases such as this, when many circumstances leading to the killings were not clear.[547]

In the Court's view, in the *Ergi* case there was no effective investigation. Firstly, the condition of practical independence when collecting and evaluating evidence was not fulfilled, as the public prosecutor accepted with almost no questioning the conclusion of the gendarmerie incident report that the applicant's sister was killed by the PKK measures[548] and he had issued a decision of lack of jurisdiction following that conclusion. The fact that such report was drafted by a gendarmerie commandant who was not present during the clash was of little importance.[549]

Furthermore, the prosecutor did not order any additional investigatory measures to be taken despite the fact that neither the incident report in question nor the sketch map made it evident that a member of PKK had fired the bullet which killed the applicant's sister.[550]He justified this lack of action by stating that none of deceased's relatives approached him with any suspicion of wrongdoing on the part of the security forces, which explanation the Court declined as utterly unacceptable. In addition to that, there was no inquiry whether the security forces had conducted the operation in a proper

[546]*Ergi v. Turkey* (application no.66/1997/850/1057, judgment on 28th July 1998), para. 82

[547] Chevalier-Watts J., 2010, 707

[548]Mowbray A., 2002, 440

[549] The gendarmerie commander who made the report, İsa Gündoğdu, had stated that he was unaware of the identity of any of the officers or units involved and that he information provided was derived from apparently brief coded radio transmissions. – *Ergi v. Turkey* (application no.66/1997/850/1057, judgment on 28th July 1998), para. 83

[550]No statements were taken from members of victim's family, people who live in the village or military personnel that took part in the operation. – Ibidem, para. 83

manner and were the plan and the way it was implemented adequate in the circumstances of the case.[551]

In the legal theory it was subsequently explained that "the need for practical independence in the conduct of investigations supplements the institutional dimension by seeking to ensure that investigators do not automatically accept the veracity and accuracy of reports or statements by State agents without conducting further relevant inquiries."[552] The Court's decision in this regard has therefore been regarded as very important, since it pointed out the necessity of both institutional and practical independence and the critical analysis of the submitted materials.

3.2.3 Yaşa v. Turkey case

The aforementioned principle according to which the procedural obligation under Article 2 is not confined to cases where it has been established that the killing was caused by an agent of the State was subsequently confirmed in the case *Yaşa v. Turkey*.[553]The applicant complained that he and his uncle were victims of armed attacks which were parts of an orchestrated campaign against pro-Kurdish newspapers such as the one they sold in their kiosk. In November 1992 his kiosk was burned.[554] In January 1993, as he was riding a bicycle with his son on the back, the applicant has been shot eight times by two unknown men. He fired back but has not hit anyone.[555]

[551]This was despite the fact that military expert stated that the operations should as far as possible not be planned in or about civilian areas and that in the instant case the plan had been to restrict the activity to the north of the village.

[552]Mowbray A., 2002, 440

[553]*Yaşa v. Turkey*, application no. 63/1997/847/1054, judgment on 2nd September 1998

[554]The applicant claimed that after receiving death threats from the police in October 1992, in November 1992 he was warned by two police officers that his kiosk will be burned if he continues to sell the aforementioned paper. One week after the visit by the two officers, that was exactly what happened. – Ibidem, para. 8 - 10

[555] The applicant has spent 11 days in the hospital and despite accusing police officers for being assailants in his shooting he was not asked by the public prosecutor's office to make a statement about the assault. However, the applicant was convicted and sentenced to one year imprisonment for carrying an unlicensed firearm. This sentence was later converted to a substantial fine. – Ibidem, para. 15-17

In June 1993 the applicant's uncle who has been running the kiosk since March that year has been killed in front of his own son by an unknown perpetrator. The police arrested the applicant on the same day and according to his claims they have assaulted him and threatened him, stating that they killed his uncle and that the applicant was the intended target. Following the attacks, the applicant's 13-years-old brother started to look after the kiosk. He was killed in October 1993 in an attack by an unknown assailant. In the same attack, the applicant's other brother, who was 16 at the time, was severely injured. After these attacks, the applicant's family felt forced to sell their business.

The Government denied applicant's claims and pointed out lack of evidence supporting them. It also pointed out that the applicant submitted no official complaint to the authorities accusing police officers for the attacks. Furthermore, it refuted all allegations of existence of official intimidation of persons who were in any way connected with selling newspapers.[556]

Despite being presented with new evidence[557] the Court agreed with the Commission's assessment that it was not proven beyond reasonable doubt that law enforcement officials have been involved in the shooting of the applicant or his uncle. Moreover, the alleged obstructions and mistreatment of the applicant in custody by the police have not been substantiated. However, in the light of a number of protests and appeals to get protection submitted by the applicant the Government had to or ought to have been aware that those involved in the publication and distribution of the newspaper in question "feared that they have fallen victim to a concerted campaign tolerated, if not approved, by State agents".[558]

In this case the Court outlined that the Member State is obliged to effectively investigate all attempted murders and deaths which have occurred in suspicious circumstances.[559]

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[556]Ibidem, para. 29 – 31

[557]The new evidence in question was a copy of so called "Susurluc report", i.e. a confidential report that Board of Inspectors made for information purposes within the office of the Prime Minister. Although it was intended to be solely read by the Prime Minister, majority of it was made available to the public. This report contained an analysis of serious events such as killings of well-known figures and supporters of Kurds and deliberate acts by certain people supposedly serving the State. In this report a connection between the ongoing fight against the terrorism in the region and underground relations that it resulted in. On the page 73 of the report it was stated that one of the financers of the Pro-Kurdish newspapers Özgür Gündem was a PKK member who was subsequently killed by the Turkish Security Organization. – Ibidem, para. 46.

[558]Ibidem, para. 34

[559] Buckley C., 2001, 47

This case was specific also because five years after the investigations were opened the Government was not able to provide the Court with any tangible result.This lack of progress was explainedby the investigations taking place in the context of the fight against terrorism, which forced the police and judicial authorities to act cautiously and cross-check the results of the various investigations in order to make positive identifications of perpetrators of earlier crimes and acts of violence.[560]

The Court, however, asserted that despite the prevailing climate at the time in that region of Turkey, marked by violent action by the PKK and the response of the authorities, may have impeded the search for conclusive evidence in the domestic criminal proceedings, "circumstances of that nature cannot relieve the authorities of their obligations under Article 2 to carry out an investigation, as otherwise that would exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle".[561]

The investigators' apparent and immediate exclusion of the possibility of involvement of the State agents in the attacks, despite the amplitude of the evidence proving otherwise,[562] was also heavily criticized in the judgment.[563] The Court maintained that regardless of whether the applicant had formally identified the security forces as being the assailants or not, the authorities had to take into consideration the possibility of State agents being implicated in the attacks.[564]

Since there was no evidence before the Court that proved beyond reasonable doubt that agents of the security forces or police were involved in the shooting of either the applicant or his uncle, the Court concluded that there has been no violation of Article 2 in its substantive aspect. Nevertheless, due to the numerous shortcomings in the investigation, the Strasbourg Court found that the failure to properly investigate the incidents constituted a breach of Article 2 in its procedural aspect.

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[560] *Yaşa v. Turkey*, application no. 63/1997/847/1054, judgment on 2nd September 1998, para. 103

[561] Ibidem, para. 104

[562] In south-east Turkey journalists, newspaper kiosks and distributors of the Özgür Gündem were attacked and even killed in a number of occasions. The owner newspaper at the time, Mr Y. Kaya, repeatedly requested government protection. – Ibidem, para. 106

[563] *Yaşa v. Turkey*, (application no. 63/1997/847/1054, judgment on 2nd September 1998), para. 105 - 106

[564] Ibidem, para. 107

3.2.4 Kaya v. Turkey case

In the case of *Kaya v. Turkey*[565]the facts of the killing of the applicant's brother have been disputed. While he claimed that Turkish soldiers shot his brother and subsequently planted a weapon in his hands, the Government claimed that the deceased died in an armed clash between the soldiers and members of militant PKK and that the gun found next to him was his.

In its judgment, the Court criticized the state authorities for taking this case as a "clear-cut" one of a lawful killing, especially in the absence of supporting evidence. It found that "the minimum formalities relied on by the Government were in themselves seriously deficient even for the purposes of an alleged open and shut case of justified killing by members of the security forces".[566]

The prosecutor's heavy reliance on the assumption that the deceased was a terrorist killed in a clash with security forces was mirrored in severe violations of the duty to conduct an effective investigation. Firstly, none of the soldiers involved in the incident were taken statements from and no evidence was collected at the scene save to the weapon and ammunition allegedly used by the deceased.[567] Furthermore, the prosecutor failed to make his own independent reconstruction of the events and to establish independently that deceased, despite looking like a typical farmer and wearing such clothes, was actually a terrorist as the members of security forces have claimed. Moreover, it was not checked if there were gunpowder traces on the deceased's hands or clothing and the weapon was not dusted for fingerprints.[568]Despite being the only source of information about the nature, severity and location of the bullet wounds sustained by the deceased, the autopsy report

[565]*Kaya v. Turkey*, application no. 158/1996/777/978, judgment on 19th February 1999

[566]*Kaya v. Turkey*, application no. 158/1996/777/978, judgment on 19th February 1999, para.88

[567]Inter alia, it was not investigated if there are spent cartridges over the area proving the allegations of an intense gun battle having been waged by both sides. – Ibidem, para. 89

[568]The Court underlined the seriousness of these shortcomings whenit is taken into consideration that the corpse was later handed over to villagers, thereby making any further analyses impossible. – Ibidem.

was incomplete in certain crucial respects – it contained no data on the number of bullets which hit the deceased and no estimation of the distance from which the bullets were shot. Therefore, the Court concluded that "it cannot be maintained that the perfunctory autopsy performed or the findings recorded in the report could lay the basis for any effective follow-up investigation or indeed satisfy even the minimum requirements of an investigation into a clear-cut case of lawful killing since they left too many critical questions unanswered."[569]

One additional proof that showcases the prosecutor's firm belief in the version of the events offered by the State officials and the neglect of the internationally recognized duty to conduct an effective investigation is his failure to take any measures to investigate death of the applicant's brother.

Most notably, the public prosecutor issued his decision of non-jurisdiction before waiting the result of the ballistic tests,[570] thereby effectively excluding any possibility of the security forces somehow being culpable, including with respect to the proportionality of the force used in the circumstances of the alleged armed attack.[571]

For all the above reasons, the Court found that the investigation into the circumstances of Mr. Kaya's death has not been adequate and that Turkey thereby failed to protect the right to life.

3.2.5 Öğur v. Turkey case

In the subsequent case of *Öğur v. Turkey*[572]the applicant claimed that his son, who worked as a night watchman, has been killed by the unidentified security officers and village guards. The Government disputed his version of the incident and claimed that he was a member of PKK who was killed by warning shots fired by the security forces.

[569]Ibidem.

[570] Ibidem.

[571]Ibidem, para. 90

[572]*Öğur v. Turkey*, application no. 21594/93, judgment on 20th May 1999

In this case, the Court has again found that Turkey has violated the Article 2 of the ECHR since investigations conducted cannot be regarded as effective and capable of leading to the identification and punishment of those responsible for the events in question. The reasons were similar as in the previous cases. Firstly, the investigation has not been through enough. The prosecutor did inspect the scene of the incident, but the report he made was insufficient and lacked thoroughness –there was no post – mortem examination of the body although it might have provided additional information on the distance from which the deceased was shot, none of the items discovered at the scene was submitted to a more detailed inspection, the examination of witnesses was selective as none of the members of the security forces has been interviewed and the expert report prepared at the prosecutor's request contains imprecise information and questionable findings.[573]

Despite several witness' accounts claiming that the fatal shot was fired by security forces, the subsequent investigation carried out by the administrative investigation authorities made no attempts to establish the identity of the shooter.[574]

Secondly, the condition of independence was not fulfilled, since not only that the investigating officer appointed by the governor was member of gendarmerie and therefore subordinate to the same chain of command as the security forces he was investigating, but also the members of Administrative Council, whose role was to make decision whether the State should institute proceedings against the law enforcement officials involved in the shooting, were senior officials from the province and its chair was the governor administratively in charge of the operation under investigation. This was even clearer in the light of testimonies that members of the Administrative Council who had opposed the chairman had been replaced.[575]

Lastly, the relatives of deceased had no access to the case file during the administrative investigation, which also prompted the Courts conclusion that Article 2 was violated. It is interesting that although at this point in time the Court has not officially established criteria that need to be fulfilled for the investigation to be considered effective, it has in its practice put the emphasis on reviewing the same behaviors from the investigative

[573]*Öğur v. Turkey*, (application no. 21594/93, judgment on 20th May 1999), para. 89

[574]Ibidem, para. 90

[575]Ibidem, para. 91

authorities which are in its later jurisprudence to be set as conditions for effectiveness of the investigation.

3.2.6 Cakıcı v. Turkey case and Tanrikulu v. Turkey case

Only a few months later, on 8th of July 1998, the Court passed the judgment both in the *Cakıcı v. Turkey* case[576] and *Tanrikulu v. Turkey.*[577]In the first case, the Government's and the applicant's versions of the events differed significantly. While the applicant claimed his brother was taken into custody in the provincial gendarmerie headquarters, where he was severely beaten and tortured, and subsequently was transferred to another gendarmerie station where he was most likely killed, the Government alleged that Ahmet Çakıcı, has never been taken to custody but his identity card was found on a body of a terrorist killed in an armed clash with security forces.

The Court found that responded state violated Article 2 of the Convention, inter alia, due to the lack of effective procedural safeguards disclosed by the inadequate investigation carried out into the disappearance and the alleged finding of applicant's brother's body. Namely, despite the applicant and his father making several petitions and enquiries to both the National Security Court prosecutor and the local one in relation to the disappearance of Ahmet Çakıcı, the authorities took no other measures except enquiries as to possible entries in custody records and obtaining two short and vague statements from one witness. There were also no attempts of verifying the 1995 the report that his body had been found or to make positive identification.[578]

The Strasbourg Court found that Turkey violated Article 2 ECHR since the investigation conducted into the circumstances of the applicant's brother was inadequate.

[576]*Cakıcı v. Turkey*, application no. 23657/94, judgment on 8th July 1999

[577]*Tanrikulu v. Turkey*, application no. 23763/94, judgment on 8th July1999

[578]*Cakıcı v. Turkey*, application no. 23657/94, judgment on 8th July 1999, para. 80

In the second case, the applicant's husband, a doctor suspected to be a PKK sympathizer, was shot and killed on a steep road between the hospital and city police headquarters. Again the applicant claimed that the incident occurred in a certain way, and the Government offered a substantially different version of the events. The applicant asserted that at least eight members of security forces armed with machine guns stood in line across the road where her husband was killed and that although she had begged them to stop the two men who were running away from the scene, they took no action. The Turkish authorities alleged that only two police officers were at the time present at the police headquarters and they have been instructed to guard it and not leave their post under any circumstances.

In this case as well the Court found the violation of the procedural aspect of right to life. Although a couple of police officers searched the crime scene right after the shooting and gathered a number of empty cartridges and one deformed bullet,[579] while one took the applicant's statement about the events and despite them subsequently searching the area together, the Court found that the incident report, drawn up only an hour after the shooting, points to a very superficial investigation of the crime scene.[580]The sketch map drawn by one of the police officers was imprecise and not very detailed[581], while the post-mortem examination was not conducted by forensic specialists but by two general practitioners and it supplied the investigators and the Court with limited amount of forensic information. In addition to that, there was no full autopsy of the body of the deceased.[582] However, some additional witnesses were subsequently questioned and ballistic tests were made in the regional police laboratory.[583]

The European Curt also heavily criticized the fact that the public prosecutor qualified the shooting of Dr. Tanrıkuluas a terrorist offence and therefore referred the investigation to the prosecutor at the Diyarbakır National Security Court. In the Court's view, this

[579] Apart from this bullet discovered at the crime scene, the investigation file does not contain any trace of attempting to retrieve the remaining eleven bullets, which inevitably passed through late doctor's body. – *Tanrikulu v. Turkey*, application no. 23763/94, judgment on 8th July1999, para. 107

[580]Ibidem, para. 104

[581]Ibidem, para. 105

[582]Ibidem, para. 106

[583]Ibidem, para. 107

conclusion was not supported by the evidence available to the public prosecutor at that time.[584]Moreover, in the months following to this decision, almost no investigative measures were taken and despite one year passing from the incident no statements were taken from those law enforcement officials who had been standing guard outside the security directorate. Additionally, the Government has failed to provide any concrete information on the progress of that investigation despite the Courts request to do so.[585]

3.2.7 Mahmut Kaya v. Turkey case

In the following year, the Court also found violation of duty to conduct effective investigation of the alleged violations of right to life involving agents of State in the case *Mahmut Kaya v. Turkey*.[586]*Mahmut Kaya v. Turkey* was a landmark case in a way, because the European Court on Human Rights did not only find violation of Article 2 because Turkey did not conduct an official investigation, but also because it failed to protect life.[587]

In this case doctor Kaya was found dead together with a lawyer Can, after they went with two unknown men who wanted him to give medical assistance to an allegedly wounded member of PKK. Although the Court did not find sufficient evidence to prove *beyond reasonable doubt* that the state agents killed him, there were strong inferences that the perpetrators of the murder were known to the authorities. The Court accepted the Commission's view that the authorities suspected him to be a PKK sympathizer. At the same time, there was evidence that lives of PKK supporters were at risk from security

[584]Ibidem, para. 108

[585] Ibidem, para. 109

[586]*Mahmut Kaya v. Turkey*, application no. 22535/93, judgment on 28th March 2000

[587] G. Smith, "Police Complaints and Criminal Prosecutions", Modern Law Review, vol. 64, Issue 3, 2001, 390

forces or people acting on their behalf.[588] The authorities were aware – or ought to be aware - that doctor Kaya is at a real and immediate risk from unlawful attack and that quite possibly that risk derived from the activities of persons or groups acting with the knowledge or consent of the security forces.[589] Having this all in regard, the Court maintained that the lack of preventive action by the authorities constituted a breach of Article 2 of ECHR.

Also, the Court noted that certain defects that undermined the effectiveness of the criminal law protection in that region during the period relevant for this case "permitted or fostered a lack of accountability of members of security forces for their actions"[590] and left Hasan Kaya without protection required by law.

It should further be noted that no disciplinary measures were taken against the officers. What is more, until 1999, well after the beginning of the criminal proceedings against them, both officers were still serving in the police, and one of them had even been promoted. That is not in line with the Court's case-law which puts an emphasis on importance of State agents facing such serious charges being suspended from duty while being investigated or tried and be dismissed if convicted. In the Court's view, such a reaction to a serious instance of deliberate police ill-treatment which resulted in death cannot be considered adequate. By punishing the officers with suspended terms of imprisonment, more than seven years after their wrongful act, and never disciplining them, the State in effect fostered the law-enforcement officers' "sense of impunity" and their "hope that all would be covered up"[591]

Moreover, four different prosecutors at various hierarchical levels were in charge of the investigation, with very little result.[592]Two autopsies were performed, first of which

[588]The Court called it "undisputed" that in Turkey at that time were a significant number of killings – the "unknown perpetrator killing" phenomenon – which included prominent Kurdish figures, and recalled that in 1993 there were rumours alleging that contra-guerrilla elements were targeting persons suspected of supporting the PKK. These allegations were supported by the Susurluk report, published in January 1998.- *Mahmut Kaya v. Turkey*, application no. 22535/93, judgment on 28th March 2000, para. 89 – 91
[589]Ibidem, para.91

[590]Ibidem, para. 98

[591]See: *Nikolova and Velichkova v. Bulgaria,* application no. 7888/03, judgment on 20th December 2007, para.63

[592]The Court also noted that from the early stages the inquiry was in the hands of bodies in charge of terrorist or separatist offences. - Ibidem, para. 108

stating that there were no marks of ill-treatment on the bodies, which were however apparent. The second went into more detail and established the existence of marks on both bodies, but offered no explanation of visible signs of torture. The scene was not forensically examined and no report was made whether the victims were killed at the scene or how they were transported from one city to another, which are more than 130 km apart. No custody records have been reviewed and no potential eyewitnesses at the place where the car was found had been questioned.[593]

In addition to that, only leads in the investigation concerned alleged contra-guerrilla and security force involvement and they were based on information voluntarily provided by the victims' relatives and obtained from the press. The public prosecutor's response was very mild and of limited range. It lacked thoroughness which is particularly visible when it comes to locating one of the suspected contra-guerrillas Mahmut Yıldırım and a wanted terrorist Yusuf Geyik who had according to same evidence took part in the killings.No inquiry was made of two gendarmes recognized by one of the witnesses of the shooting. Members of the press who seemed to have some information were also never contacted by the investigation authorities.[594]

The Court also assessed in this case that "the Court does not underestimate the difficulties facing public prosecutors in the south-east region at that time…Nonetheless, *where there are serious allegations of misconduct and infliction of unlawful harm implicating State security officers it is incumbent on the authorities to respond actively and with reasonable expedition*".[595]That was not the case with this investigation, as there were significant, long delays in seeking statements from witnesses and equally long periods of inactivity.[596]

Having regard to the above stated, the Court was "not satisfied that the investigation carried out into the killing of Hasan Kaya and Metin Can was adequate or effective. It failed to establish significant elements of the incident or clarify what happened to the two

[593]Ibidem, para. 104

[594]Ibidem, para. 105

[595]Ibidem, para. 107

[596]Ibidem, para. 106

men and has not been conducted with the diligence and determination necessary for there to be any realistic prospect of identifying and apprehending the perpetrators."[597]

3.2.8 Gül v. Turkey case

Turkey was again found to have violated the procedural aspect of its obligations under Article 2 in the case of *Gül v. Turkey*.[598]The applicant's son has been shot through the door of his apartment by the members of security forces in a house search operation, in front of his family. When he was shot, he was unarmed and in the process of opening the doors.

The reasons for the Court's unanimous decision that the respondent state failed to conduct an effective investigation into the death of Mehmet Gül were basically similar as in the previous cases concerning this state. There have been a number of serious omissions in the investigation which included not collecting the crucial evidence such as the bullet which he allegedly fired at the police officers and not testing his hands for traces of gun powder, not testing the gun for the fingerprints and not recording the evidence found at the scene in a proper manner. The autopsy examination did not provide a full record of the injuries on Mehmet Gül's body, or a detailed and objective analysis of clinical findings.[599] Moreover, the procedures adopted after the incident did not oblige further examination of the guns used by the security forces or the expended ammunition.[600]

The investigation into killings was undertaken by administrative council which lacked institutional and practical independence. The inspector appointed by the administrative council did take statements from numerous witnesses, but has failed to clarify the background of the security forces operation in question.[601]

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[597]Ibidem, para. 108

[598]*Gül v. Turkey*, application no. 22676/93, judgment on 14th December 2000

[599]*Gül v. Turkey*, application no. 22676/93, judgment on 14th December 2000, para. 79

[600]Ibidem, para. 90

[601] Ibidem, para. 91

The 1995 criminal proceedings did not comply with the effective investigation safeguards either. The only people that were questioned in front of the criminal court were the three officers charged and nor the applicant nor the members of his family were informed on the course of the procedure nor given the opportunity to share their version of the events. The evaluation of events contained in the two additional expert opinions was completely based on the police officers' account, leading to the conclusion of their lack of fault.[602]The European Court of Human Rights heavily criticized such approach, by establishing that "in basing itself without any additional explanation on the experts' legal classification of the officers' actions, the court in this case effectively deprived itself of its jurisdiction to decide the factual and legal issues of the case".[603]

3.2.9 Avşar v. Turkey case

Less than a year later, the Court reached its verdict in the *Avşar v. Turkey*[604] case. In that case, the Court noted that the mere fact that the authorities were informed that security officers abducted Mehmet Şerif Avşar and he was later on discovered to be dead, gave rise to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding this incident.[605]

The Court found that there were serious defects in the reliability, thoroughness and independence of the gendarme investigation: it took the authorities twelve days after the incident to take into custody the people who took Mehmet Şerif Avşar from his shop,[606] the investigation was entrusted to the members of gendarmerie who were implicated in

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[602] Ibidem, para. 93

[603] Ibidem, para. 94

[604] *Avşar v. Turkey*, application no. 25657/94, judgment on 10th July 2001

[605] *Avşar v. Turkey*, application no. 25657/94, judgment on 10th July 2001, para. 396

[606] Ibidem, para. 397

the course of events and even the inconvincible statements taken from the village guards were subsequently revoked and oral testimonies accepted instead,[607] no attempt has been made to identify or locate the seventh person, who had been present at the gendarmerie and the gendarme investigation resulted in reconstruction reports which the European Court deemed to be unreliable.[608]

As for the investigation conducted by the public prosecutor, the Court also found it to be failing short of the effective investigation standard: no intervening investigative enquiry has been made beyond taking further statements from the suspects and it was only in November 1994that the public prosecutor's department sent an inquiry to the central provincial gendarme command concerning the identity of the seventh person. After receiving the answer that no such person had been found and that the search was continuing, the public prosecutor and the gendarmes did not take any further steps to locate the seventh person.[609]

The criminal court proceedings lasted over five years and ten months and ended up in the convictions of four village guards and Mehmet Mehmetoğlu for abduction and Ömer Güngör being found guilty of murder. The Court considered that in cases such as this, when suspects have been convicted and sentenced for their participation in the killing under investigation, there is not much to base the claim that the procedure has not proved capable of identifying and punishing the perpetrators on.[610] It was added that the fact that one suspect, amongst several, has been successful in escaping the process of criminal justice cannot be regarded as conclusive of a failing on the part of the authorities. However, since this case is about the responsibility of the respondent State for the death of Mehmet Şerif Avşar[611] and its respect for the rule of law and obligations to protect life guaranteed under the Article 2, the Court found that the procedural obligation under Article 2 of the Convention should examined in more detail.

[607]Ibidem, para. 398

[608]Ibidem, para. 399

[609]Ibidem, para. 401

[610]Ibidem, para. 403

[611]Ibidem, para. 404

The proceedings failed to establish either the identity of the alleged member of security forces or the exact nature of his role in the incident. The gendarmes and public prosecutor did not acknowledge his existence and made no investigation about him. The criminal court, on the other hand, did take some steps in that direction, albeit dilatory and half-hearted.[612]

The Court noted that, despite six persons being convicted for killing of Mr Avşar, Turkey failed to adequately address a crucial issue of the role played by the seventh person, an alleged member of the security forces. The criminal court passed its verdict in the absence of what could be significant evidence about the involvement security force in the incident. The Court pointed out that "a proper and effective investigation into this aspect of the case was necessary to clarify to what extent the incident was premeditated and whether, as alleged, it formed part of the unlawful activities carried out with the connivance and acquiescence of the authorities at that time in the south-east of Turkey".[613] The Court also pointed out that since proceedings were still pending after six years and since the individual potentially identified as the seventh man has fled the country, it is doubtful that the cassation proceedings have the capability to remedy the numerous defects in the proceedings.[614]

It was therefore concluded that the investigations by different state authorities failed to promptly and adequately investigate the circumstances surrounding the incident which resulted in fatal outcome. Turkey breached its procedural obligation to protect the right to life.[615]

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[612]It took the criminal court almost a year since the village guards implicated a seventh person and its identity has been revealed to order further inquiries from the gendarmerie. The court also took for granted the gendarmerie command's statement that they have no information of such person. In late 1996 the court was informed about the possibility of the mystery man being an army member. Nevertheless, as the army denied any knowledge of the identity of the seventh person, that line of investigation has been abandoned. One month after receiving information about army sergeant Gültekin Şütçü being mentioned in the Susurluk report in February 1998, the criminal court requested a copy of that report from the Ministry of Justice. The Ministry provided it in January 1999, without giving any explanation for the delay. There is no evidence that the court made any attempt to speed up the Ministry's response. However, it was only 5 months after obtaining the report that the court acted upon the family counsel's application that the court instructed the public prosecutor to make an enquiry with the army about Gültekin Şütçü. Despite steps being taken for him to be questioned, he did not appear in front of the court and apparently has fled the country. - Ibidem, para. 405

[613]Ibidem, para. 406

[614]Ibidem, para. 407

[615]Ibidem, para. 408

These cases have a lot in common. Firstly, in all the cases members of security forces are either proven or alleged perpetrators of the killings. Secondly, there were various deficiencies in the investigations, regarding their lack of thoroughness (more often than not, the state authorities have readily accepted the "official" version of the events, without making any serious attempt to scrutinize it and collect possible evidence that proves otherwise), independence (both hierarchical and practical), inclusiveness (the applicants and other members of victims' families as well as the general public have routinely been denied access to important information and documents related to the investigation), promptness (most investigations lasted several years and criminal proceedings, when ensued, were also years – long) and overall effectiveness (the perpetrators were in majority of cases not identified or not prosecuted and in some cases not even suspended during the investigation and trial period).

Despite numerous difficulties the applicants faced during the investigation, serious and unreasonable omissions on the side of state authorities in charge of the investigation and criminal prosecution, which resulted inperpetrators effectively being enabled act with the impunity, it can be argued that through their applications in front of the Strasbourg Court they did achieve success.[616]Through submitting the Turkish investigative procedures to impartial judicial examination in order to establish if it complied with its obligation under the Convention, the European Court on Human Rights made requirements for the effective investigation more clear, pointed out their necessity even in the times of disruption of public order and daily violent clashed between the law enforcement authorities and members of terrorist groups, thereby taking an additional step forward in the evolution of positive obligations under Article 2 ECHR.

[616]Buckley C.,2001, 44

3.4 THE OBLIGATION TO CONDUCT AN EFFECTIVE INVESTIGATION UNDER ARTICLE 2 AND THE INTER – STATE COMPLAINTS: THE CASE OF CYPRUS V. TURKEY

Another important aspect of duty to investigate was pointed out in case of *Cyprus v. Turkey*.[617] In this case, the applicants alleged that ever since the Commission adopted its previous report in respect of a preceding State application by Cyprus against Turkey in 1983, Turkey continued to breach various ECHR articles in Northern Cyprus. The applicant Government claimed these breaches were a part of the administrative practice of Turkish state. The respondent Government objected to the admissibility of the application on several grounds and contested all of the allegations.

In respect of the alleged violations of procedural aspect of Article 2 ECHR, by sixteen votes to one the Court found that it had been continuously violated by the respondent state due to its failure to effectively investigate into the whereabouts and fate of the Greek-Cypriot missing persons who disappeared in life – threatening circumstances.[618]

Namely, the Court maintained that despite lack of proof that any of the missing persons have been unlawfully killed the procedural obligation under Article 2 ECHR also arises when there is proof of an arguable claim that an individual, who was last seen in the custody of agents of the State, subsequently disappeared in a life-threatening context.[619]

In other words, the Court further expanded the scope of application of positive obligations of Member states when it comes to protecting the right to life. In such cases, the mere existence of an credible claim of the person disappearing in life – threatening circumstances after last being seen in the custody of law enforcement officials, the State is under obligation to promptly, thoroughly and efficiently investigate allegations that its

[617] *Cyprus v. Turkey*, application no. 25781/94, judgment on 10th May 2001

[618] *Cyprus v. Turkey*, Human Rights Case Digest, vol. 12, issue 3, 2001, 303

[619] *Cyprus v. Turkey*, application no. 25781/94, judgment on 10th May 2001, para. 132

officials violated individual's right to life. This obligation sets in despite the fact of death of the missing person has not been officially confirmed.

In this particular case, it has been proved that many of the missing persons were previously detained either by Turkish or Turkish-Cypriot forces, at a time when the conduct of military operations was accompanied by arrests and killings on a large scale. Therefore, the Court found the Commission's description of the situation as life-threatening to be justified. Although there was not enough evidence to conclude that respondent State's is responsible or liable for the death of missing persons, there were clear indications that at the material time in northern Cyprus there was the climate of risk and fear and that the detainees were exposed to real dangers.[620]

However, the allegations by relatives of the missing persons that the latter had disappeared after being detained in circumstances in which there was a well-justified fear for their welfare were never investigated into by the Turkish authorities. They did not try to identify the names of the persons who were reportedly released from Turkish custody into the hands of Turkish-Cypriot paramilitaries or find and examine the places where the bodies were allegedly disposed of. Moreover, no official inquiry was about the alleged transfer of Greek-Cypriot prisoners to Turkey.[621]

The Court also pointed out that the respondent State's procedural obligation at issue cannot be discharged through its contribution to the investigatory work of the United Nations Committee on Missing Persons, since those procedures themselves cannot be regarded sufficient to meet the standard of an effective investigation required by Article 2 of the Convention, especially in view of the narrow scope of that body's investigations.[622]

Based on these facts, the Court reached the above-mentioned conclusion of the existence of breach of Article 2 ECHR by Turkey in this case.

[620] Ibidem, para. 133

[621] Ibidem, para.134

[622] Ibidem, para. 135

3.5 THE NORTHERN IRELAND CASES AND DEVELOPMENT OF THE PROCEDURAL POSITIVE OBLIGATION UNDER ARTICLE 2 ECHR

We are about to review a few cases in which the judgment was delivered on the same day, 4th of May 2001, and one that was solved 2 years later. These cases are connected in more than that one way. They all refer to the individuals being killed during the Northern Ireland conflict by either law enforcement officers or paramilitary.[623] In every of them, the Court has found that The United Kingdom has breached its obligation under the Article 2 ECHR to effectively investigate deaths which resulted from use of lethal force by the members of security forces or police officers.

3.5.1 Kelly and Others v. The United Kingdom case

The pivotal case in this regard was the case of *Kelly and Others v. The United Kingdom.*[624] The facts of the case are following: after obtaining information that there was likely to be a terrorist attack on local station of the Royal Ulster Constabulary[625]in May 1987, twenty four soldiers and three RUC officers ambushed them. The conflict escalated and resulted in 9 being killed, one of which was not connected with IRA, and two of which were members of IRA, but unarmed.

After bringing the case to the local authorities[626], the applicants filed a complaint to the European Court of Human Rights, complaining, inter alia, that The United Kingdom

[623]Chevalier-Watts J., 2010, 711

[624]*Kelly and Others v. The United Kingdom* (application no. 30054/96, judgment on 4th May 2001)

[625]In further text: the RUC.

[626] After the incident, there was a police investigation, followed by a four-day inquest opened on 30 May 1995 in public before a Coroner and a jury of 10 members. On the same day of the inquest, counsel for the six families sought for the statements of prospective witnesses to be made available to them at the commencement of the proceedings together with the maps and photographs. The Coroner made available

failed to comply with the procedural requirement under Article 2 to provide an effective investigation into the circumstances of shooting.

In this case, the Court unanimously gave twofold justification for the duty to hold inquiries. Namely, it underlined that "the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility".[627] In other words, the Court reflected on the widening of the scope of the investigation obligation to include killings where perpetrators are both private persons and state personal.[628]

Furthermore, the Court has set some criteria for an investigation into alleged unlawful killing by State agents to be considered *effective*. Firstly, persons responsible for and carrying out the investigation have to be independent from those implicated in the events.[629] This implies not only a lack of hierarchical or institutional connection but also a practical independence.[630]

Secondly, the investigation must be capable of leading to a determination of whether the force used in such cases was justified in the circumstances[631] and to the identification and punishment of those responsible. That is an obligation of means, not result.[632]

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the maps and photographs but did not permit counsel to see witness statements until the witness was giving evidence. The counsel's request for adjournment in order to seek judicial review of this decision was refused twice. Therefore, on 31 May 1995, following consultation with the families, counsel withdrew from the hearing to seek a judicial review. The hearing of the inquest proceeded without representation for any of the nine families. The Coroner heard 45 witnesses, both civilian and from the police, while the soldiers did not appear but their statements were lodged. On 2 June 1995 the inquiry concluded that all nine men had died from serious and multiple gun shot wounds. As for the judicial review of the Coroner's decisions, in his judgment of 24 May 1996, the High Court refused to quash the Coroner's decisions or the jury verdict.

[627]*Kelly and Others v. The United Kingdom* (application no. 30054/96, judgment on 4th May 2001), para. 94

[628] Mowbray A., 2002, 438

[629] See e.g. *Güleç v. Turkey* (application no. 54/1997/838/1044, judgment on 27th July 1998) and *Öğur v. Turkey* (application no.21594/93, judgment on 20th May 1999).

[630] As previously mentioned, in the case of *Ergı v. Turkey* (application no.66/1997/850/1057, judgment on 28th July 1998) the Court has found violation of Article 2, because the investigation lacked independence, since the public prosecutor investigating the death of a girl during an alleged clash mostly relied on the information provided by the gendarmes implicated in the incident.

[631]This condition was established in *Kaya v. Turkey* judgment (application no. 158/1996/777/978, judgment on 19th February 1999).

[632]*Kelly and Others v. The United Kingdom* (application no. 30054/96, judgment on 4th May 2001), para.96

Thirdly, the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident.[633] Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.[634] The Court through its practice established exactly is what type of action is considered as "taking reasonable steps" in this context – taking the accounts of the events from the eye-witnesses, correctly using forensic science methodology (i.e. taking reasonable steps to record and recover all the relevant items at the scene of investigation which can subsequently be tested)[635] and conducting a thorough autopsy of the victims' bodies.[636]

In addition to that, there is an implied requirement of promptness and reasonable expedition.[637] Despite possible existence of obstacles or difficulties which prevent progress in an investigation in a particular situation, in order to maintain public confidence in authorities' respect for the rule of law and to prevent any appearance of collusion in or tolerance of unlawful acts, it is essential that authorities promptly investigate a use of lethal force.[638]

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[633]This includes inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. - *Kelly and Others v. The United Kingdom* (application no. 30054/96, judgment on 4th May 2001), para.96

[634]For example, during 1980s in inquests in Northern Ireland, a person suspected of causing death could not be compelled to give evidence. In practice, in inquests involving the use of lethal force by members of the security forces in Northern Ireland, they did not attend but submitted written statements or transcripts of interviews instead. In accordance to the law, they were admitted in evidence. In the inquest in the *McKerr v. UK case*, the police officers involved in the shooting declined to appear at the inquest and were not subjected to examination concerning their account of events. The fact that they submitted their statements to the coroner instead did not enable any satisfactory assessment their reliability or credibility on crucial factual issues. The European Court concluded that this detracted from the inquest's capacity to establish the facts relevant to the death, and thereby to achieve one of the purposes required by Article 2 of the Convention. - *McKerr v. the United Kingdom*, application no. 28883/95, judgment on 4th May 2001, para. 144

[635]Mowbray A., 2002, 441

[636]Ibidem.

[637]See *Yaşa v. Turkey* judgment (application no. 63/1997/847/1054, judgment on 2nd September 1998), para. 102-104;*Cakıcı v. Turkey* (application no. 23657/94, judgment on 8th July 1999), para. 80, 87 and 106; *Tanrikulu v. Turkey* (23763/94, judgment on 8th July 1999), para. 109; *Mahmut Kaya v. Turkey*, (application no. 22535/93, judgment on 28th March 2000), para. 106-107

[638]*Kelly and Others v. The United Kingdom* (application no. 30054/96, judgment on 4th May 2001), para.97

In order to secure accountability in practice as well as in theory, there must be a sufficient element of public scrutiny of the investigation or its results. Although the Court accepted that degree of public scrutiny required may well vary from case to case, it explicitly stated that the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.[639]

Summa summarum, the Court has, through its jurisprudence, and in accordance with the 'practical and effective' principle of interpretation of the ECHR[640], established that the in order for the positive obligation under Article 2 ECHR to be satisfied, the investigation undertaken must be independent, effective, prompt and reasonably expeditious and subjected to sufficient public scrutiny.[641]

When it comes to the requirement of effectiveness, the Government argued that the procedural aspect of Article 2 was satisfied by the combination of procedures available in Northern Ireland, namely, the police investigation, the inquest proceedings and civil proceedings. In their view, these procedures combined secured the fundamental purpose of the procedural obligation in that they provided for effective accountability for the use of lethal force by State agents. The Government submitted that procedural obligation under Article 2 ECHR does not require a criminal prosecution to be brought but that the investigation was capable of leading to a prosecution. They claimed that was the case in this application.

In this respect, the Court sustained that "if the aims of fact finding, criminal investigation and prosecution are carried out or shared between several authorities, as in Northern Ireland… the requirements of Article 2 may nonetheless be satisfied if…they provide for the necessary safeguards in an accessible and effective manner."[642] In the Court's view, the available procedures – the police investigation, the inquest proceedings or the civil

[639]For example, in *Güleç v. Turkey* (application no. 54/1997/838/1044, judgment on 27th July 1998), the father of the victim was not informed of the decisions not to prosecute and in *Öğur v. Turkey* (application no.21594/93, judgment on 20th May 1999), the family of the victim had no access to the investigation and court documents.

[640]The central element in the Court's use of this principle of interpretation has been the view that states cannot fulfill their duties under ECHR by simply remaining passive. - Mowbray A., 2005, 78

[641]Ibidem.

[642]*Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para.137

proceedings[643] - have not struck the right balance between taking into account other legitimate interests such as national security or the protection of the material relevant to other investigations and the necessary safeguards.[644]

As for the police investigation, the Court commended its prompt start and the fact that all the necessary scene of the incident procedures had been respected. Many investigative measures have been taken properly: the evidence was secured and forensic examinations were conducted. The soldiers were interviewed within the reasonable three days period and there were no signs or evidence of investigators colluding in, or facilitating, the production of coordinated statements.[645]

When it comes to the applicants' complaint that the RUC officers involved in the investigation could not be regarded as independent or impartial, the Court considered that although there appeared to be no structural or factual connection between investigating officers and the soldiers under investigation, the operation was conducted jointly with local police officers and with the co-operation and knowledge of the RUC in that area. Even though the investigation was supervised by an independent police monitoring authority, the police officers conducting it were, albeit indirectly, connected with the operation under investigation.[646] In other words, the Court concluded that institutional independence criterion was not complied with in this particular case. Such approach was well – accepted by legal scholars, since it was considered that "such a structural separation will contribute to the objective independence of the investigation and the public's acceptance of its legitimacy".[647]Next to the institutional, there was also a need for practical independence during the process of collecting and evaluating evidence.[648]

Furthermore, related to the fact that neither applicants nor their families nor the public had the open access to the investigation files, the Court maintained the view that

[643]The Court recalled that the obligations of the State under Article 2 cannot be satisfied merely by awarding damages, since the investigations required under Articles 2 and 13 of the Convention must be able to lead to the identification and punishment of those responsible. – Ibidem, para. 104

[644]Ibidem, para. 137

[645]*Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para.113

[646]Ibidem, para. 114

[647]Mowbray A., 2002, 440

[648]Ibidem, 442

disclosure or publication of police reports and investigative materials cannot be regarded as an automatic requirement under Article 2, since it may involve sensitive issues with possible prejudicial effects to private individuals or other investigations. Therefore, the requisite access of the public, or the victim's relatives may be provided for in other stages of the available procedures.[649]

However, when examining the role and actions of DPP,[650] the Court assessed that in cases like this, when the police investigation procedure is causing suspicion of a lack of independence and is not susceptible to public scrutiny, it is highly important that the officer who is in charge of deciding whether or not to prosecute also gives an appearance of his decision-making being independent. In this type of a controversial incident, which involves the use of lethal force, it is therefore preferred to back up such a decision with certain arguments.

In this case, although nine men were shot and killed, the applicants were not given any information why the shootings were not regarded as a criminal offence or why the soldiers concerned have not been prosecuted. This is, according to the Court, in no way compatible with the requirements of Article 2, since that information was not forthcoming in some other way.[651]

In this case, as in other inquests in Northern Ireland, the police officers or soldiers concerned took advantage of the fact that persons suspected of causing the death may not be compelled to give evidence and instead of attending the inquest they have submitted written statements or transcripts of interviews. The Court has repeated its assessment that this practice fails to enable any satisfactory assessment of either their reliability or credibility on crucial factual and diminishes the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force.[652]

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[649]*Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para. 115

[650]DPP is, as we have explained, an independent legal officer responsible for making the decision whether to bring prosecutions in respect of any possible criminal offences carried out by a police officer and not obliged to give reasons for any decision not to prosecute, without any challenge by the way of judicial review.– Ibidem, para. 116

[651]Ibidem, para. 117 - 118

[652]*Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para. 119 – 121

Applicants also pointed out the alleged restriction of this inquest's scope of its examination, since according to the domestic courts' practice the Coroner is obliged to confine his investigation to the matters directly causative of the death and not to extend his inquiry into the broader circumstances. However, the Court held that such practice does not necessarily contradict the requirements of Article 2. When assessing if an inquest fails to address necessary factual issues the court has to examine the particular circumstances of the case. In the present application, the matters relevant to the death have not been examined not due to the scope of the inquest as conducted, but because of the absence of the soldiers concerned.[653]

Moreover, the Court found that in this case the inquest could not play an effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Article 2.[654] Namely, only the identity of the deceased and the date, place and cause of death can be given in the jury's verdict. In this case, the only possibility for the inquest to affect the prosecution is by the Coroner sending a written report to the DPP if he considers that a criminal offence may have been committed. However the DPP has no obligation to take any decision in response to this notification or to provide detailed reasons for not directing a prosecution as recommended.[655]

Furthermore, the fact that the applicants were not able to obtain copies of any witness statements until the witness concerned was giving evidence which resulted in several long adjournments before the inquest opened and contributed significantly to the proceedings lasting longer. Lack of applicants' access to witness statements before the appearance of the witness made their position more difficult in terms of preparation and ability to participate in questioning. The Court was therefore not persuaded that their interests were properly protected in this procedure.[656]

Finally, the requirement of promptness and reasonable expedition has also not been complied with as there was a delay in the procedure. Without giving any reasons for it,

[653]Ibidem, para. 122

[654]Ibidem, para. 124

[655]Ibidem, para. 123

[656]Ibidem, para. 127 – 128

the RUC forwarded the papers related to DPP's decision not to prosecute only two years after it was made. There were then a series of adjournments before the inquest opened. Even though the applicants requested these adjournments or consented to them, they were needed to some extent due to the difficulties relatives faced in participating in inquest procedures. Furthermore, the Court reminded that the fact that these adjournments were requested by the applicants do not dispense the authorities from ensuring compliance with the requirement for reasonable expedition.[657] The Court goes on to assert that "if long adjournments are regarded as justified in the interests of procedural fairness to the deceased's' families, it calls into question whether the inquest system was at the relevant time structurally capable of providing for both speed and effective access for the families concerned."[658]

The inquest progress nevertheless did not proceed with diligence even in the periods unrelated to the adjournments, as there were delays in its commence and rescheduling. Finally, the inquest was opened eight years after the incident took place. However, once it opened, it concluded within a matter of days.[659] Nevertheless, as the Court asserted, the time taken in this inquest cannot be regarded as compatible with the State's obligation under Article 2 of the Convention to ensure that investigations into suspicious deaths are carried out promptly and with reasonable expedition.[660]

3.5.2 McKerr v. the United Kingdom case

Very similar case was of *McKerr v. the United Kingdom*.[661] As we previously established, in November 1982 police officers had fired more than 190 shots at a car driven by

[657]Ibidem, para. 130 – 132

[658]Ibidem, para. 132

[659]Ibidem, para. 130

[660]Ibidem, para. 134

[661]*McKerr v. The United Kingdom*, application no. 28883/95, judgment on 4th May 2001

Gervaise McKerr. McKerr and his two passengers, all unarmed, had been killed in that attack. His wife and subsequently his son filed a complaint to the European Court of Human Rights, claiming inter alia that the state authorities had failed to conduct an effective investigation into the shooting or to provide redress. They also alleged that was a proof of The United Kingdom's officially tolerance of their state agents using unlawful and unnecessarily disproportionate force.

The Government on the other hand again claimed that even if some part of the procedure did not provide a particular safeguard, the system taken as whole ensured police accountability for any unlawful act.

In defining the limits of positive obligations imposed on the states through the use of 'practical and effective' principle of Convention interpretation the Court has been careful not to impose unrealistic and excessive burden on the states. Therefore, in this case the Court put an emphasis on the obligation to undertake effective investigation into the killings being "not an obligation of result, but of means"[662]. In other words, the Member state complied with this obligation if it has provided adequate resources for an effective investigation, even if it did not result in persons responsible for unlawful killings being identified and/or punished.[663]

Nevertheless, the Court found there was a violation of procedural aspect of the ECHR's guarantee of right to life, due to the numerous shortcomings of the proceedings for investigating the use of lethal force by the police officers. The Court pointed out the lack of independence of police officers investigating the incident[664] as well as the lack of public scrutiny and information to the victim's family concerning the independent police investigation into the incident. In this context, special emphasis was placed on the fact that the state authorities failed to provide the family with adequate reasons for DPP's

[662]*McKerr v. The United Kingdom*, application no. 28883/95, judgment on 4th May 2001, para. 113

[663] Mowbray A., 2005, 78

[664]The Court acknowledged that the way RUC officers carried out the investigation into the killing by RUC police officers was supervised by the ICPC, an independent police-monitoring authority, was satisfactory. However, it made notice of existence of a hierarchical connection between the officers who were conducting the investigation and the officers being investigated, even more so because they were all under the responsibility of the RUC Chief Constable. In addition to that, the Court found that "the power of the ICPC to require the RUC Chief Constable to refer the investigating report to the DPP for a decision on prosecution or to require disciplinary proceedings to be brought is not, however, a sufficient safeguard where the investigation itself has been for all practical purposes conducted by police officers connected with those under investigation." – Ibidem, para. 128

decision not to prosecute any police officer for perverting or attempting to pervert the course of justice.[665] In addition to that, in the Court's opinion the inquest procedure "did not allow for any verdict or findings which might play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed".[666]

An additional shortcoming was that witness statements were not revealed to the applicant's family before they appeared at the inquest. In the Court's view, that prejudiced the ability of the applicant's family to participate in the inquest and contributed to long adjournments in the proceedings.[667] As it was pointed out in the judgment, it is essential that the adopted procedures protect the applicants' interests, which may be opposed to the interests of the police or security forces implicated in the events.[668] However, the Court did not find convincing the evidence of the adequate and

[665]Since there were some doubts about possible concealment of evidence, the DPP ordered the Chief Constable of the RUC to conduct further investigations and establish if the course of justice had been perverted. Mr Stalker, a senior police officer from a different police force in England, was appointed the investigator but he was subsequently removed from the inquiry and replaced by Mr Sampson, a senior police officer from outside Northern Ireland. However, none of the reports was made public. The Attorney-General shortly stated on 25 January 1988 that there was a discovery of certain misconduct. Nevertheless, in the same statement the DPP's decision not to prosecute any of police officers for offences of obstruction was announced. – Ibidem, para. 138-139

[666]The scope of the inquest was limited to the facts immediately relevant to the deaths under examination and the coroner was not allowed to extend his investigation to the broader circumstances of the case, despite legitimate and serious concerns about the circumstances of the incident. In accordance with already mentioned practice of police officers and soldiers not attending the inquests involving the use of lethal force by members of the security forces in Northern Ireland, and submitting written statements or transcripts of interviews as evidence instead, in this case the members of security forces involved in the shooting used their right not to appear at the inquest. Coroner did not examine them and their accounts of events were made available to him through their statements. Therefore it was not possible to assess their reliability or credibility on crucial factual issues in a manner that could be deemed satisfactory. The Court found it detracted from the inquest's capacity to establish the facts relevant to the death. The jury's verdict could only provide the identity of the deceased and the date, place and cause of death. If the coroner he considered that a criminal offence might have been committed, he had the possibility to send a written report to the DPP. Nevertheless, the DPP would not be obliged to take any decision in response to this notification or to provide detailed reasons for not responding. These were the grounds for the Court to conclude that inquest could not play any effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, did not comply with the requirements of Article 2. – Ibidem, para. 142 - 145

[667]Since *McCann and Others v.the United Kingdom* case, the Court has emphasized the importance of the next-of-kin of a deceased being fully-informed and involved in the procedure. Moreover, in the light of the change of the practice of non-disclosure in the United Kingdom, there is a general recommendation that the police disclose witness statements twenty-eight days in advance. By not doing so in this case, the Court found that the state authorities placed the applicants at a disadvantage when it comes to preparation and ability to participate in questioning, in contrast to RUC who had the resources to provide for legal representation and full access to relevant documents. – Ibidem, para. 147-148

[668]Ibudem, para. 148

fair protection of applicant's interests as next-of-kin in this respect submitted by the Government.

Another disputed question was of the use of public interest immunity certificates. Namely, the applicants claimed they have been used as a mean of preventing certain questions being examined or certain documents being disclosed. The Government negated such accusations. The Court concluded that PII Certificate, second to be issued, had indeed prevented the inquest from examining matters relevant to the outstanding issues in the case. Namely, this certificate was issued to prevent the Stalker and Sampson reports being disclosed. That was justified by the need to protect the effectiveness of special units and the integrity of intelligence operation. In the light of existence of strong indications that the undisclosed reports contained material relevant to the issue of the existence of any shoot-to-kill policy and certainty that they've dealt with the evidence of obstruction of justice, it was the Court finding that by issuance of such certificate the inquest was prevented from reviewing what could be very important material. Therefore, the inquest was not able to fulfill any useful function in carrying out an effective investigation of matters arising since the criminal trial.[669]

Another shortcoming of the investigation was that the police officers who shot the applicant's father were not obliged to attend the inquest as witnesses. They declined to do so and therefore were not questioned. They submitted their statements to the coroner, thus not enabling any satisfactory assessment of either their reliability or credibility on crucial factual issues. The Court concluded that detracted from the inquest's capacity to establish the facts relevant to the death, and thereby to achieve one of the purposes required by Article 2 of the Convention.[670]

Conclusively, the requirement of promptness was not fulfilled. Not only did the independent police investigation not proceed with reasonable expedition,[671] but also the inquest proceedings did not commence promptly and were not pursued with reasonable expedition.[672] The Court specified that "the frequent and lengthy adjournments call into

[669]Ibidem, para. 149-151

[670]Ibidem, para. 144

[671]Ibidem, para. 140

[672]Ibidem, para. 148 and para. 152-154

question whether the inquest system was at the relevant time structurally capable of providing for both speed and effective access for the deceased's family, and the necessary documents for the coroner's examination of the issues."[673]

It was the Court's conclusion that the lack of independence of the RUC investigation and the lack of transparency regarding the subsequent inquiry into the alleged police obstruction in that investigation have been the main cause of the problems in the procedures which followed.[674]

In the judgment, it is very clearly stated that the role of the European Court is not to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. It was also pointed out that there should not necessarily be one unified procedure satisfying all requirements. However, it is précised in the verdict, "if the aims of fact-finding, criminal investigation and prosecution are carried out by or shared between several authorities, as in Northern Ireland, the Court considers that the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, the various procedures provide for the necessary safeguards in an accessible and effective manner."[675] In the Court's view, the right balance has not been struck in the *McKerrv. The United Kingdom* case.

This has not been a new stand since the Court held it in previous cases as well[676], but in this particular one it went into more detail showcasing which State interests are considered "legitimate" to have regard of in the process of balancing the interests, which in turn helped further development of the obligation to conduct an effective investigation.

[673]Ibidem, para. 155

[674]Ibidem, para. 158

[675]Ibidem, para. 159

[676] For example, in *Kelly and Others v. The United Kingdom* (application no. 30054/96, judgment on 4th May 2001).

3.5.3 Hugh Jordan v. The United Kingdom case

The Court applied the same criteria in the *Hugh Jordan v. The United Kingdom* case.[677] Namely, in this case despite the fact that the police investigation was conducted in accordance with the Article 2 ECHR and the majority of the applicant's criticisms were unfounded[678], the Court found several shortcomings in the proceedings for investigating the use of lethal force by the police officer. The Court criticized the lack of independence of the police officers investigating the incident from the officers implicated in the incident[679], the lack of public scrutiny[680] as well as the fact that the victim's family has not been informed of the reasons for DPP's decision not to prosecute any police officer. It also criticized that the victim's family was not able to legally require that the police officer who shot the applicant's son attends the inquest as a witness but he was allowed to submit the records of his interviews with the police were instead.[681]Other shortcomings were that the inquest procedure did not allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed,[682]the absence of legal aid for the representation of the victim's

[677]*Hugh Jordan v. The United Kingdom*, application no. 24746/94, judgment on 4th May 2001

[678]The investigation started immediately after the applicant's son death and numerous eyewitnesses gave their account on the incident. Despite appeals to the public, some civilian witnesses were reluctant to come forward. However, it was not proven that the ones that did testify have been in any way intimidated. The appropriate forensic examinations were made as well. - *Hugh Jordan v. The United Kingdom*, application no. 24746/94, judgment on 4th May 2001, para. 118-119

[679]Ibidem, para.120

[680] As regards the lack of public scrutiny of the police investigations, it is important to point out the Court's stand that disclosure or publication of police reports and investigative materials cannot be regarded as an automatic requirement under Article2, as it may involve sensitive issues with possible prejudicial effects to private individuals or other investigations. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures. - *Hugh Jordan v. The United Kingdom*, application no. 24746/94, judgment on 4th May 2001, para. 121

[681]The Court criticized the fact that suspects for murder in Northern Ireland could not be compelled to provide evidence since it "does not enable any satisfactory assessment to be made of either his reliability or credibility on crucial factual issues. It detracts from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force and thereby to achieve one of the purposes required by Article 2 of the Convention." – Ibidem, para. 127

[682]Namely, unlike in England, Gibraltar and Wales, in Northern Ireland the inquest may affect a possible prosecution only if the Coroner sends a written report to the DPP alleging that in his opinion a criminal offence may have been committed. However, the DPP is not obliged to take any decision in response to this notification or to provide detailed reasons for not taking any further action. In the *Hugh Jordan v. the*

family, as well as non-disclosure of witness statements prior to their appearance at the inquest, which hindered the applicant's ability of the to participate in the inquest and contributed to long adjournments in the proceedings.[683] The Court also noticed that the inquest proceedings did not commence promptly[684] and have not been pursued with reasonable expedition.[685]

In this verdict it was repeated that the duty to investigate is an obligation of means and not result. Such approach has however been criticized by authors such as Bell, who claimed that its outcome "merely continues the pattern of litigation, forum bouncing and investigation denial of investigation."[686]

United Kingdom case after the Coroner has referred to him information about a new eye witness who had come forward, the DPP reconsidered his decision not to prosecute. Nevertheless, after giving it additional consideration, the DPP maintained his decision without givingany explanation on what facts he based his conclusion that available evidence is still insufficient to justify a prosecution. – Ibidem, para. 129

[683]The Court noted that lack of access to the witness statements was the reason for several adjournments in the inquest. Therefore the previous inability of the applicant to have access to witness statements before the appearance of the witness had placed him at a disadvantage when it comes to preparation and ability to participate in questioning. Quite opposite to that, RUC on the other hand had the resources to provide for legal representation and full access to relevant documents. That led the Court to state that "the right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events. Prior to the recent development in disclosure of documents, the Court is not persuaded that the applicant's interests as next-of-kin were fairly or adequately protected in this respect." – Ibidem, para. 134

[684]The inquest opened more than 25 months after the victim's death. – Ibidem, 136.

[685] The inquest has not concluded at the date of the European Court's judgment, which was issued more than eight years and four months after the events in issue. There have been four adjournments which the applicant either requested or gave his consent to, since they were primarily referring to legal challenges to procedural aspects of the inquest which he considered essential for his full participation. Nevertheless, in the paragraph 138 of the judgment the Court clearly noted that "The fact that they were requested by the applicant does not dispense the authorities from ensuring compliance with the requirement for reasonable expedition. If long adjournments are regarded as justified in the interests of procedural fairness to the victim's family, it calls into question whether the inquest system was at the relevant time structurally capable of providing for both speed and effective access for the deceased's family." Furthermore, the inquest has not progressed with diligence in the periods when there were no adjournments - the inquest's start was delayed and after the adjournments there were two several months long delays in scheduling the resumption of the inquest. – Ibidem, para. 137-140

[686] Bell C., Keenan M., "Lost on the way home – the right to life in the Northern Ireland", Journal of Law and Society, 2005, vol. 32, issue 1, 85

3.5.4 Finucane v. the United Kingdom case

A judgment in another interesting case in that context was passed two years later in the *Finucane v. the United Kingdom*.[687] Namely, in February 1989 two masked men broke into the Finucane home. They fired a number of bullets and shot applicant's husband, solicitor Patrick Finucane, in the head, neck and chest. That happened in front of the applicant and their three children. The applicant herself was injured by what most likely was a ricochet bullet. Despite an illegal loyalist paramilitary group the Ulster Freedom Fighters (UFF) claiming responsibility for killing, the applicant believed her late husband was targeted for murder by the from officers of the Royal Ulster Constabulary (RUC) due to his involvement in a number of high-profile cases arising from the conflict in Northern Ireland. She based her belief also on the fact he received numerous death threats by the police and some of the RUC officers.[688]

After restating the general principles, the Court examined the facts of the present case. Namely, immediately after the killing, in February 1989, the RUC opened an investigation. The police took all the necessary steps to secure evidence at the scene and managed to locate both the car and gun used in the incident. In addition to that, they questioned a number of possible suspects. The investigation made it apparent that that the weapon believed to have been used in the murder had come into the hands of the loyalists via the security forces. However, none of the interviewed people was connected to security forces. No prosecutions resulted from the investigation due to alleged lack of evidence.[689]

Having in mind that RUC who conducted this investigation belonged to the police force suspected by the applicant and other members of the community to be behind threats against Patrick Finucane, and that they were under command of the Chief Constable of the RUC, the Court found that "there was a lack of independence attaching to this aspect

[687] *Finucane v. the United Kingdom*, application no. 29178/95, judgment on 1st July 2003

[688] *Finucane v. the United Kingdom*, application no. 29178/95, judgment on 1st July 2003, para. 10 - 11

[689] Ibidem, para. 74 – 75

of the investigative procedures, which also raises serious doubts as to the thoroughness or effectiveness with which the possibility of collusion was pursued."[690]

Subsequently, an inquest on 6 September 1990 opened and closed on the same day in 1990. Only immediate circumstances of the killing of applicant's husband have been examined and the allegations that security forces had been involved in the shooting have been completely disregarded. The applicant's claim of her husband's life being threatened by the police have not been examined either. However, subsequent events showed that there were indications of some branches of security forces knowing or assisting in the attack on the victim, which supported suspicions that the authorities knew about or connived in the murder. The Court assessed that the inquest cannot be regarded as effective, nor as a means of identifying or leading to the prosecution of those responsible since it failed to address serious and legitimate concerns of the family and the public.[691]

That partly changed in the police inquiries. First police inquiry (named Stevens 1) took place in 1989 and lasted one year. Second (Stevens 2) started in 1993 and ended in 1995. Despite the facts that these special police inquiries were headed by a senior police officer from outside Northern Ireland and that they did uncover valuable information, there was not enough evidence pointing out that they were investigating the shooting with a view to bringing prosecutions. Since the applicant never received any information of the investigation's findings and the reports were not made public, the Court noted that the necessary elements of public scrutiny and accessibility of the family were missing.[692]

A third inquiry, Stevens 3, commenced in 1999 and was still ongoing at the time of submitting the application to the European Court of Human Rights. Nevertheless, even the Government has admitted that it cannot comply with the requirement that effective investigations be commenced promptly and conducted with due expedition since it takes place some ten years after the event. Moreover, it is not clear if the final report will be made public and if yes, to what extent.[693]

[690]Ibidem, para. 76

[691]Ibidem, para. 78

[692]Ibidem, para. 79

[693]Ibidem, para. 80

In 1999 a criminal prosecution was brought against William Stobie for the murder of Patrick Finucane. Since the prosecution did not provide enough evidence, he was found not guilty in November 2001.[694]

The Court also examined the applicant's allegations that the DPP, as the legal officer responsible for deciding whether to bring prosecutions in respect of any possible criminal offences and not obliged to support that decision with any reasons, had shown a lack of independence in this case. In this regard, in its judgment the Court reiterated its previous stance that "where the police investigation procedure is itself open to doubts as to its independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making."[695] However, in the *Finucane* case such reasons have not been given, nor were the information made available neither to the applicant nor to the public which might have provided reassurance that the procedure complied with the rule of law. That was utterly incompatible with the requirements of Article 2.[696]

[694]Ibidem, para. 72

[695] Ibidem, para. 82

[696] Ibidem, para. 83

3.5.5 Conclusion

What can be derived from the above examined cases is that the shortcomings the Court has focused on have predominately been the same. The Court outlined the lack of independence of the police officers who investigated the incident from the ones involved in it, the lack of public scrutiny and the fact that information regarding the reasons for DPP's decision not to prosecute any of the officers involved has not been communicated to the victim's family. It also found the breach of duty to investigate under Article 2 ECHR when there was a lack of promptness referring to the beginning of the inquest proceedings and in cases where the authorities failed to conduct inquest proceedings with reasonable expedition. In numerous cases against The United Kingdom, the Court found the fact that persons suspected to have unlawfully used lethal force were not obliged to be physically present at the inquest, but are allowed to submit written statements instead to constitute a breach of Article 2 ECHR.

In the light of facts that during the inquest the Coroner's task is to investigate only those circumstances which directly caused the death, that the inquest procedure does not necessarily lead to identification or criminal prosecution but may eventually result in a Coroner's report to the DPP which is not bounding in any way, that the members of the inquest jury are allowed to record all the deficiencies in the investigation which they find but not to give any kind of assessment of liability, it is hardly a surprise that according to a decision by the House of Lords issued in 2004the very regime for investigating suspicious deaths in England and Wales - i.e. the inquest procedure itself, as previously understood and followed - would not comply with requirements under Article 2 ECHR in certain cases.[697]

By clearly stating that it is not its role to specify the details of the procedures the Member States should adopt when inspecting the circumstances of deaths of individuals which resulted from use of force by state officials, the Court opened the established requirements for an effective investigation to interpretation. In other words, each case

[697]Weekes R., 2005, 26

was to be judged on a case to case basis. Quite expectedly, this approach was criticized by some authors as inadequate and minimalistic.[698]

It was also alleged that the impact of the above explained requirements for an effective investigation might been nominal, since there are constraints on the Court's ability to enforce or demand change of regime in a liberal democracy.[699]

Moreover, the procedural obligation imposed by the Article 2 ECHR is subjected to a certain amount of discretion, which may lead to states winning declaratory relief only or withstanding significant legal challenges.[700]

This critical point of view is based on the view that "the example of Northern Ireland suggests that at the point of conflict's eruption, leading Western states are well placed to define context in a way that is favorable to their interests. The 'shock' effect of the eruption of violent conflict and terrorism tends to produce an environment in which international human rights mechanisms may display a high degree of indulgence to state claims. For as long as violence continues, the treat it is seen to pose to a liberal – democratic state contributes to a context where at least some of this indulgence is likely to persist. With the passage of time though, a gradually more stringent approach may be evident, particularly from thematic mechanisms focusing on patterns of abuse.

Northern Ireland also suggests that a peace process, marking the beginning of a transition from violence, creates a new context in which a much more critical approach may be evident from international adjudicatory bodies, even in absence of a rhetoric of 'transitional justice'. This may be true not only of judgments in relation to the state's conduct during the transition, but also of retrospective evaluation of action taken during the violent conflicts. Thus the 'past' may be policed in a way in which it was not when it was the 'present'."[701]

Nevertheless, other authors claimed that the duty to conduct an effective investigation into killings has provided the victims and their families a certain leverage over state

[698] Chevalier-Watts J., 2010, 711

[699] Bell C., Keenan M., 2005, 88

[700] Ibidem, 85

[701] Campbell C., "Wars on terror and vicarious hegemons: the UK, international law and Northern Ireland conflict", International and Comparative Law Quarterly, Vol. 54, Issue 2, 2005, 353

actors, thereby balancing the legitimate interests of the state and public order and the rights of the individuals concerned and their families. At the same time, when establishing this aspect to right to life, the Court obviously has had regard to the necessity of restoring public confidence.[702]

R. Weekesagrees with the opinion that we should not underestimate the significance of development of obligation to effectively investigate the cases where lethal force has been applied. He continues to explain that the Strasbourg Court is not well – equipped for conducting the fact – finding process which is essential for finding there was a breach of substantive obligation. Therefore in this author's view "the recent refinement of the adjectival obligation should better allow other tribunals to apply, and to determine any violation of, those substantive obligations which make Article 2 the most fundamental of the Convention rights."[703]

Additional interesting point was made by C. Campbell, whohas also examined this phase of development of positive obligations under the European Convention in the context of transitional justice and harmonization of domestic and international legal standards when it comes to the protection of right to life. He explained that "as regards some other implications of the Article 2 decisions for Northern Ireland, it was suggested above that international legal standards can play a particularly important role in transition because the approximation of domestic to international standards can play an important role in building the legitimacy of domestic law in communities that have been at the sharp end of conflict. In that regard, the rulings have buttressed the process of change in relation to police reform / transformation, the independent investigation of the police wrongdoing, and inquests, all sites to profound attrition during the conflict."[704]

[702]Chevalier-Watts J., 2010, 715

[703]Weekes R., 2005, 26

[704]Campbell C., 2005, 350

3.6 THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 ECHR: CHECHNYA CASES

The conflict in Chechnya resulted in a number of complaints against Russia.[705]The three cases we will focus on have been pivotal when it comes to duty to investigate alleged violations of duty to investigate if the use of lethal force has been in accordance with ECHR.

3.6.1 Isayeva, Yusupova and Bazayeva v. Russia case

In case of *Isayeva, Yusupova and Bazayeva v. Russia*[706] the Court clearly stated that in cases when individuals have been killed as a result of use of force, the purpose of conducting an official investigation is to secure that the domestic laws protecting the right to life are implemented in an efficient manner. In addition to that, in those cases involving State agents or bodies, the official investigation should ensure that they are accountable for deaths which have occurred under their responsibility. It has also underlined that once the matter has come to their attention the authorities have the obligation to act of their own motion, without waiting for the next of kin to lodge a formal complaint or to take responsibility for the conduct of any investigative procedure*s*.[707]

Namely, the applicants were a part of a convoy headed to Grozny which was bombed by the Russian military in October 1999. In the unselective attack, Ms Isayeva's two children

[705]According to official data, that number was well over 100 in 2011. – Bindman E., Russia, "Chechnya and Strasbourg: Russian Official and Press Discourse on the 'Chechen Cases' at the European Court of Human Rights", Europe-Asia Studies, 2013, vol. 65, 1954

[706]*Isayeva, Yusupova and Bazayeva v. Russia*, applications nos. 57947/00, 57948/00 and 57949/00, judgment on 24th February 2005

[707]*Ibidem*, para. 209

and daughter – in - law were killed. She and Ms Yusupova were wounded. Bazayeva's car which contained all of the family possessions was destroyed as well. The applicants' version of events has been confirmed in the subsequent criminal investigation, which lasted for several years with numerous suspensions and reopening. In 2004, the criminal investigation reached the decision that the use of force in this case has been legitimate since the planes in question have been attacked from the ground by the rebels. Moreover, it was not disproportionate.

The Court noted that according to the documents submitted in the investigation file here was a series of serious and unexplained failures to act once the investigation had commenced, which included, inter alia, ending the investigation solely and exclusively based on the initial denial by the military that any military aviation flights taking place in the vicinity on that day.[708] There was no attempt of establishing the identity and rank of the senior officer at the military roadblock who ordered the refugees to return to Grozny and allegedly promised them safety on the route. Nor he nor other military officers from that roadblock have been questioned about the incident.[709]

Moreover, no inquiry was made about the declaration of the "safe passage" for civilians for 29 October 1999. The prosecutor did not even try to identify any representative of the military or civil authorities who would be responsible for the safety of the exit. Additionally, there was no effort to clarify the lack of coordination between the public announcements of a "safe exit" for civilians and the fact that the military did not take any regard of the promised "safe exit"in planning and executing their mission.[710]

Furthermore, the investigation did not take sufficient steps to identify other victims and possible witnesses of the attack. Until March 2003 there were no attempts to locate the third applicant. Until that date, the investigation did not contact the applicants directly; they were not asked to testify and were not awarded the victim status in accordance with the domestic legislation. The Court noted that although some attempts were made by the Government to locate the first and second applicant, one has to take notice of the fact that

[708] Despite being requested, no plan of the operation of 29 October 1999 was produced and the subsequent refusal to open a criminal investigation was based. There was no request for additional documents to clarify these contradictions such as operations record book, mission reports and other relevant documents produced immediately before or after the incident. – Ibidem, para. 210

[709]Ibidem, para. 211

[710]Ibidem, para. 211

the applicants had to flee Grozny because of the wide-scale attacks on the city. They had no permanent address to submit to the authorities since they were moving from one place to another in an attempt of finding shelter. Accordingly, their personal circumstances of the applicants and the omissions and the defects in the domestic investigation outweigh their failure to make their addresses known to the authorities.[711]

Therefore, the Court unanimously found that the authorities failed to carry out an effective investigation into the circumstances of the attack on the refugee convoy on 29 October 1999, which rendered recourse to the civil remedies equally ineffective in the circumstances.

3.6.2 Issayeva v.Russia case

The case of *Issayeva v. Russia*[712]has to do with indiscriminate bombing of the village Katyr – Yurt where the applicant lived. In the attack, which took place in February 2000, the applicant's son and three nieces were killed. A criminal investigation was opened in September 2002. The investigation closed two years later. Despite confirming the applicant's version of events, the investigation resulted in decision that the use of force has been legitimate in the light of the fact that a big group of terrorists was hiding in the village and showed no intention to surrender.

When assessing if the investigation carried out into the attack of 4th-7th February 2000 met the requirements of Article 2 of the Convention, the Court firstly noted the considerable delay in opening the investigation that was not explained nor justified in any way.[713]

[711]Ibidem, para 224

[712]*Isayeva v. Russia*, application no. 57950/00, judgment on 24th February 2005

[713] Despite the fact that NGO Memorial on behalf of the applicant in March 2000 submitted a very detailed and well-supported application claiming that the assault on Katyr-Yurt resulted in numerous civilian casualties the complaint in question was rejected in April 2000 due to the alleged lack of corpus delicti. Only after a considerable delay, the investigation was finally opened in September 2000. - Ibidem, para. 216-217

Noting that military investigators did carry out a substantial amount of work in order to make a reliable account of the assault,[714] the Court also pointed out some obvious serious flaws in the investigation. Namely, no reliable information was provided about the declaration of the "safe passage" for civilians prior to or during the military operation in Katyr-Yurt.[715] Moreover, very few additional inquiries have been made on the allegations brought up by several witnesses that the village residents in question were not let out of the village as a form of "punishment" for not cooperating enough with the military authorities.[716] In addition to that, the investigation failed to identify other victims and witnesses of the attack and the domestic law was not respected when the information about closing the procedures and quashing the decisions to grant victim status had been conveyed to applicants.[717]

The Court also found that the conclusions of the military experts' report of February 2002 about the lawfulness and proportionality of the military action were highly disputable and not responding to the data gathered during the investigation. Since the decision of closing the investigation was based on those exact conclusions and since the applicant had no realistic prospects of challenging the conclusions made in the report and during the investigation, in Court's view the investigation did not comply with requirement to be capable of leading to the identification and punishment of those responsible for numerous breaches of right to life.[718]

For all the reasons analyzed above, the Court unanimously found that the authorities failed to carry out an effective investigation into the circumstances of the assault on

[714] Ibidem, para.218

[715]The investigators did not pinpoint any member of the authorities as responsible for the declaration of the corridor and for the safety of civilians who used it. There was no clarification of the reasons behind the lack of coordination between a "safe exit" for civilians being announced at one hand and the fact that military has given very little consideration to the "safe exit" guarantee in planning and executing their mission. - Ibidem, para.219

[716]In this respect, especially important was the testimony of Major-General Nedobitko, who stated that had the villagers been more "cooperative", it would have been possible to open both exits. – Ibidem, para 220.

[717]Instead of respecting the legal procedure, the Head of Government of Chechnya was asked to locate and inform the victims of this development in the proceedings, whose names were provided without additional details such as their permanent or temporary addresses, dates of birth or any other relevant data. There was no proof that the Government of Chechnya actually informed the applicant and other victims that the investigation was closed and their victim status re-questioned.– Ibidem, para. 222

[718]Ibidem, para.233

Katyr-Yurt on 4-7 February 2000. Accordingly, Russia had violated Article 2 ECHR in this respect.

3.6.3 Khashiev and Akayeva v. Russia case

In the case of *Khashiev and Akayeva v. Russia*[719] the applicants alleged that the in January 2000 the Russian military forces killed their siblings and nephews, civilians living in Grozny at the time, in an extra – judicial execution. The criminal investigation was opened 4 months later, but after being closed and reopened several times it eventually did not lead to identification of the perpetrators.

Having regard to the specific security situation in Chechnya at the time, the Strasbourg Court accepted that "there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in preserving public confidence in maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."[720]

When assessing if the investigation carried out in this case has met the requirements of Article 2 of the Convention, the Court firstly noted a considerable delay in opening the criminal investigation[721] and then pointed out "a series of serious and unexplained failures to act"[722] in its course. No evidence was provided that the investigators tried locating 205th brigade from Budennovsk, which was heavily mentioned in the witness' accounts, with the goal of examining its members' possible involvement in the

[719] *Khashiev and Akayeva v. Russia*, applications nos. 57942/00 and 57945/00, judgment on 24th February 2005

[720] *Khashiev and Akayeva v. Russia*, applications nos. 57942/00 and 57945/00, judgment on 24th February 2005, para.155

[721] I t was around 3 months after receiving very detailed and serious allegations of several people being killed that the investigation has been opened. – Ibidem, para.157

[722] Ibidem, para 158

murders.[723] They did not obtain the plan of the military operations conducted in the relevant district of Grozny at the material time[724] nor identify and question other victims and possible witnesses of the crimes in a timely manner.[725] In addition to that, only two statements were taken from local residents, no map or plan of the district was provided and there was no proof that the investigators even attempted to establish a list of local residents who remained in Grozny in winter 1999 – 2000.[726] The Court also pointed out that although the prosecutors in charge were aware of these issues and had given instructions how to correct the omissions which occurred, not one of the instructed steps was taken.[727]

There was not an order to conduct autopsies of the victims' bodies. The forensic reports were made on the basis of the photographs of the bodies taken by the first applicant as well as descriptions of the bodies of Khamid Khashiyev and Rizvan Taymeskhanov prepared by the officers of the local Department of the Interior without removing the clothes from the bodies.[728] Since this approach resulted in very limited information, the Court considered that "an earlier and more comprehensive forensic report, including a full autopsy, would have provided substantially more details as to the manner of death"[729]. Prosecutors did not order exhumation or autopsy of the bodies of Lidiya Khashiyeva, Anzor Taymeskhanov and Adlan Akayev. Their bodies were also not forensically examined.

The Court also noted that not only was the investigation adjourned and resumed eight times between May 2000 and January 2003, and was transferred from one prosecutor's office to another on at least four occasions. Applicants were not informed about these developments and no explanation was given as to the reasons for it.[730]

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[723]Ibidem, para 158

[724]Ibidem, para. 159

[725]For example, it took them almost three years to award the second applicant the victim status and her statement was not taken during the whole duration of proceedings. - Ibidem, para. 160

[726] Ibidem, para. 161

[727] Ibidem, para. 162

[728] Ibidem, para. 163

[729] Ibidem.

[730] Ibidem, para. 164

Clearly the requirements of promptness, reasonable expedition, inclusion of family members and sharing information with them, public scrutiny, effectiveness and independence were not met when it comes to the criminal investigation in this case.

In the light of the foregoing, the Court found that Russian authorities violated Article 2 ECHR by failing to carry out an effective criminal investigation into the circumstances surrounding the deaths of Khamid Khashiyev, Lidiya Khashiyeva, Rizvan Taymeskhanov, Anzor Taymeskhanov and Adlan Akayev.[731]

3.6.4 Conclusion: the further development of the Court's jurisprudence regarding procedural aspect of Article 2 ECHR in Chechnya cases

The Chechnya cases are slightly different than the ones connected to the Turkish authorities targeting suspected PKK sympathizers and members, or the cases which are connected to the Northern Ireland conflict. Namely, while in the latter the victims were carefully chosen for their supposed alignment with or membership of illegal military groups, in the three cases we have reviewed the victims were civilians who were not personally targeted but died because of an indiscriminate lethal force has been used by the Russian military. There were even some allegations by the applicants that the civilians have been in this manner "punished" for not cooperating with the authorities or being associated with the subversive groups.[732]

All the investigations are marked with considerable delays and the unexplained failures to act by the investigation authorities. Much of the evidence was not obtained, despite the existence of reasonable possibility of collecting it – many of the key witnesses or suspected perpetrators have not been examined, in some cases there were no autopsies conducted or the autopsy reports have not been based on detailed and thorough

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[731] *Khashiev and Akayeva v. Russia*, applications nos. 57942/00 and 57945/00, judgment on 24th February 2005., para.166

[732] See: *Isayeva v. Russia*, application no. 57950/00, judgment on 24th February 2005, para 220

examinations of the bodies. In addition to that, the investigators have often failed to identify other victims and potential witnesses.

What makes these cases especially interesting is the fact that the Court in a way distanced itself from its previous approach of not specifying in any details what procedures should the Member State adopt in order to comply with the effective investigation requirements. In legal theory this evolution has been viewed as natural response to a very serious situation, where due to many shortcomings in the investigation it clearly fell below the minimum standard imposed by the Strasbourg Court. Therefore, the depth of Court's scrutiny and admonition is justified and burden on the state is well - balanced with the respect to right to life.[733]

3.7 THE COURT'S INTERPRETATION OF THE OBLIGATION TO CONDUCT EFFECTIVE INVESTIGATION WHEN THE VICTIM SURVIVED THE USE OF FORCE WHICH COULD HAVE BEEN LETHAL: THE CASES OF ILHAN V. TURKEY AND MAKARATZIS V. GREECE

Another interesting case was *Ilhan v. Turkey*.[734]Mr Ilhan was taken by the gendarmes into custody and 36 hours later was admitted to a hospital due to life-threatening injuries. After treatment, according to the medical reports, he lost about 60% function on his left side. Around 2 months after the incident the public prosecutor officially decided that no charges will be raised in respect of Mr Ilhan's injuries. However, the applicant was charged with the offence of resistance to officers and was subsequently sentenced to a money fine.

This case was different since, as the Court noticed, the force used against the applicant was not in the event lethal. Nevertheless, the Court asserted that this does not exclude an

[733] Chevalier-Watts J., 2010, 717

[734]*Ilhan v. Turkey*, application no. 22277/93, judgment on 27th June 2000

examination of the applicant's complaints under Article 2 and continued to explain that "only in exceptional circumstances that physical ill-treatment by State officials which does not result in death may disclose a breach of Article 2 of the Convention. It is correct that the criminal responsibility of those concerned in the use of force is not in issue in the proceedings under the Convention. Nonetheless, the degree and type of force used and the unequivocal intention or aim behind the use of force may, among other factors, be relevant in assessing whether in a particular case the State agents' actions in inflicting injury short of death must be regarded as incompatible with the object and purpose of Article 2 of the Convention. In almost all cases where a person is assaulted or ill-treated by the police or soldiers, their complaints will fall to be examined rather under Article 3 of the Convention."[735]

However, since the Court was not satisfied that the use of force the gendarmes during the apprehension of Abdüllatif İlhan was of such a nature or degree as to breach Article 2 of the Convention and found no violation of Article 2 of the Convention in this regard.[736] Therefore, the Court deemed it unnecessary to examine the allegations of the authorities not conducting an effective investigation into the use of force in this case.[737]

The Court came to a different conclusion in the case *Makaratzis v. Greece.*[738] As we already mentioned in the previous chapter, in this case the applicant's car were chased by the police after passing through the red light. After several collisions with other cars and breaking through a number of police roadblocks, the police started firing at his car. Eventually, he stopped at the gas station but refused to go out of his car and the police started firing – it is however disputed were they firing at the car, as the applicant claimed, or in the air, as it was claimed by the police officers. When he was finally arrested, he was taken into hospital and remained there for nine days. He was severely injured and has been shot multiple times. His mental health suffered as well after the incident. It was

[735] *Ilhan v. Turkey*, application no. 22277/93, judgment on 27th June 2000, para. 76

[736] In their *Joint partly dissenting opinion*, judges Bonello, Tulkens, Casadevall, Vajić and Greve opposed such conclusion by stating that the doctors confirmed that the hits in the head the applicant sustained were "life – threatening" and the Government failed to show that such use of force was absolutely necessary within the meaning of paragraph 2 of Article 2 of the Convention. - *Joint partly dissenting opinion* of judges *Bonello, Tulkens, Casadevall, Vajić and Greve*, para. 4

[737] Ibidem, para.79

[738] *Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004

undisputed that some of the police officers left the scene of the shooting without providing their personal, or data about the weapons used. Seven officers faced criminal charges and have been acquitted. The reasoning behind that decision was the following: was since not all of the participants in the shooting have been identified, it could not be established beyond reasonable doubt that the police officers who were accused were the ones who actually fired at the applicant and shot him.[739]

In this case, the Court explained why the positive obligation to conduct effective investigation in cases of suspected breach of Article 2 ECHR is of special importance when the alleged violators are law enforcement officials: "Since often, in practice, the true circumstances of the death in such cases are largely confined within the knowledge of State officials or authorities, the bringing of appropriate domestic proceedings, such as a criminal prosecution, disciplinary proceedings and proceedings for the exercise of remedies available to victims and their families, will be conditioned by an adequate official investigation, which must be independent and impartial. The same reasoning applies in the case under consideration, where the Court has found that the force used by the police against the applicant endangered his life."[740]

The Strasbourg Court further noted that in the instant case an administrative investigation was opened after the incident, during which the investigators interviewed quite a few police officers and other witnesses and conducted laboratory tests. This investigation resulted in criminal charges being raised. However, the Court observed some striking omissions in the conduct of the investigation. In that context, especially important was the failure by the domestic authorities to identify all the policemen who took part in the chase.[741]They never asked for the list of the policemen who were on duty in the area when the incident took place or attempted to establish their identity in any other way. Moreover, the Court described as "remarkable" the fact that authorities collected only three bullets and that the police never found or identified the bullets which injured the

[739]*Makaratzis v. Greece*, Human Rights Case Digest, 2004- 2005, vol. 15, 517 - 518

[740]Makaratzis v. Greece, application no. 50385/99, judgment on 20th December 2004, para. 73

[741] We've already mentioned that not all of the policemen stayed at the scene after the incident – some left without being identified and have not reported neither handed over their weapons.

applicant, except for the bullet which was removed from the applicant's foot and the one which is still in his buttock.[742]

The Court maintained the opinion that these omissions made the fact – finding by the national less efficient than it might otherwise have been. In the view of the seven police officers subsequently being acquitted on the ground that it had not been shown beyond reasonable doubt that it was they who had injured the applicant, since many other shots had been fired from unidentified weapons, the Court went on to express its lack of conviction that the domestic authorities, as Government has claimed, could not have done more to obtain evidence concerning the incident.[743]

Having regard to those omissions and the deficiencies in the investigation and especially the fact that the Government failed to identify all the officers who were involved in the shooting and wounding of the applicant, the Court concluded that the authorities failed to carry out an effective investigation into the incident, thereby violating Article 2 of the Convention.[744]

It is clear that the Strasbourg court was on the slippery slope when asked to find the violation of right to life in the cases when the force used has not in the event been lethal. That being even more so when it comes to procedural aspects of this right. The Court however used this opportunity to further develop its jurisprudence and allowed the applicant's complaints under Article 2 to be examined. The Court limited the application of this rule to by stating that cases when applicant survived being physically ill-treated by State officials may only in exceptional circumstances disclose a breach of Article 2 of the Convention. The Court did not go so far to explain in more depth what can be considered as "exceptional circumstances" which would justify such approach in a concrete case, but it did state that some factors such as the degree and type of force used and the intention or aim behind the use of force maybe relevant in this respect.

As for the deficiencies in the investigation which were observed as not complying with the State's procedural obligation under the Article 2, the Court pinpointed the investigators' omission to identify all the participants in the incident, to collect all the

[742]*Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004, para. 75 – 76

[743]Ibidem, para. 77

[744]Ibidem, para. 78 - 79

relevant evidence (special emphasis was placed on the fact that not all the weapon used in the shooting by the police officers was identified or examined and that not all the bullets were collected from the scene, but only the ones that actually hit the applicant and remained in his body). In the light of such shortcomings, it is clear that the investigation in question was not able to lead to successful identification and punishment of those responsible, not have the authorities complied with their obligation to take reasonable steps available to them to secure all the evidence concerning the incident

3.8 VIOLATION OF THE STATE'S PROCEDURAL OBLIGATION TO INVESTIGATE ALLEGED DISCRIMINATORY MOTIVES BEHIND THE KILLINGS: THE PIVOTAL NACHOVA AND OTHERS V. BULGARIA CASE

In *Nachova and others v. Bulgaria*[745], the Court concluded that Bulgaria violated its procedural duty to investigate alleged racist motive, and in that way violated its obligations under Article 2 of the Convention. This case was an excellent example of further widening the scope of the application of duty to investigate killings by including the obligation to investigate potential existence of discriminatory motives behind the use of lethal force.

Namely, in this case a Bulgarian military policeman shot and killed two unarmed Romani men, who he was attempting to arrest because they've deserted the army. Although the deserters did not have any weapon, a senior official ordered the officers to use whatever means were dictated by the circumstances to arrest the deserters. They were shot in a Romani neighborhood and there were testimonies that Major G, after the killing, pointed a gun at a Romani child standing nearby and made some racist comments about "Gypsies".

The investigation by the Bulgarian military officials resulted in conclusion that the shooting officer had done everything within his power to save the victims lives. After the

[745]*Nachova and others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005

prosecutor closed the investigation, and the subsequent appeals were dismissed, the families of victims filed applications with the European Commission of Human Rights, alleging that Bulgaria violated Articles 2, 12 and 14 of the European Convention.

A Chamber of the Court in its judgment on 26th February 2004 unanimously held that Bulgaria violated articles 2 and 14 of the Convention, and that no separate issue arose under Article 13. It held that "the use of firearms could not possibly have been absolutely necessary" and criticized the Bulgarian investigation as "flawed" because it did not apply a standard comparable to the 'no more force than necessary' standard required by Article 2.

Namely, the Court assessed that the investigation validated the use of force in the above described circumstances basing its decision on the Bulgarian regulations which allowed it. In the Court's view, these regulations were of the fundamentally defective nature and displayed obvious disregard of the right to life. The Court heavily criticized this approach: "By basing themselves on the strict letter of the regulations, the investigating authorities did not examine relevant matters such as the fact that the victims were known to be unarmed and represented no danger to anyone, still less whether it was appropriate to dispatch a team of heavily armed officers in pursuit of two men whose only offence was to be absent without leave. In short, there was no strict scrutiny of all the material circumstances."[746]

Moreover, the Court pointed out omission to take a number of indispensable and obvious investigative steps, such as making a reconstruction of events, checking the arresting officers' accounts of the events, not relying on the sketch map that did not indicate the characteristics of the terrain, but ordering for relevant measurements to be made.[747]

In addition to that, in the course of investigation a number of highly relevant facts were not being taken into consideration. The authorities did not examine how come that Mr Petkov had been shot in the chest and why the spent cartridges were found in Mr M.M.'s yard, only a few meters from the spot where Mr Angelov and Mr Petkov fell. The Major G. grossly excessive use of force when he fired at the two unarmed men who were running in automatic mode has also been completely overlooked. Instead of seeking

[746] *Nachova and others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005, para. 114

[747] Ibidem, para. 115

proper explanation for these facts, the investigator and the prosecutors readily took Major G.'s statements to be true and terminated the investigation, thereby effectively protecting him from prosecution.[748]

Since authorities failed to effectively investigate killings by the law enforcement officials in a number of previous cases[749] the Strasbourg Court expressed its concern, explaining that this casts serious doubts on the objectivity and impartiality of the investigators and prosecutors involved.[750]

When it comes to the question if the killings were the result discrimination against Roma, the Chamber found that the evidence of Major G's potential discriminatory motives has not been adequately investigated. Therefore, the Chamber shifted the burden of proof to Bulgaria[751], which was found to have violated the Article 14 of ECHR.[752]

The obligation to investigate potential racial motives behind the killings is justified in the following way: "States have a general obligation under Article 2 of the Convention to conduct an effective investigation in cases of deprivation of life. That obligation must be discharged without discrimination, as required by Article 14 of the Convention ... Where there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence... When investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist

[748] Ibidem, para. 116

[749] See: *Velikova v. Bulgaria*, application no. 41488/ 98, judgment on 18th May 2000 and *Anguelova v. Bulgaria*, application no. 38361/97, judgment on 13th June 2002

[750] *Nachova and others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005, para. 118

[751] Ibidem, para.129

[752] Ibidem, para.130

overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights…"[753]

The Court also took notice of extreme difficulties encountered when proving racial motivation in practice. Therefore it emphasized that respondent State's obligation to investigate possible racist overtones to a violent act is not absolute: "The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence."[754]

3.9 THE EFFECTIVE INVESTIGATION OF DEATHS IN CUSTODY – THE EXAMPLE OF ANGUELOVA V. BULGARIA CASE

It was on 29 January 1996 that Anguel Zabchekov, aged 17, was arrested by the police as a suspect on theft charges. During the chase Zabchekov fell on the ground a couple of times. The reinforcement came. The suspect was handcuffed to a tree and asked about the theft. While the officers explored the area and talked to the owners of the cars which were broken into, Zabchekov remained handcuffed to a tree. Only after this part of investigation was performed, he was taken into the police station. According to the police officers, he was too drunk to be questioned. Subsequently, he fell asleep at the station. However, after a while he started slipping from the chair, shivering and breathing heavily. The police officers called an ambulance. The doctor who examined him claimed he had noticed bruises on the patient's chest and that at that time the boy had still been alive but had been unconscious with a weak pulse. Zabchekov was sent to the hospital, where he died soon after.

[753] Ibidem, para. 160

[754] Ibidem.

The applicant, Zabchekov's mother, alleged that her son had died as a result of ill-treatment by police officers. The Government claimed that her son sustained the fatal skull injury long before he was arrested. Since he was drunk and staggering he fell several times during the chase and this is how he received other injuries on his body. The Government also pointed out a lack of evidence of any ill-treatment by the police.

In this case, the Court reiterated its stance about the specific vulnerability of persons in custody which results in the authorities having an obligation to account for their treatment. Consequently, where an individual is taken into police custody in good health but later dies, it is incumbent on the State to provide a plausible explanation of the events leading to his death.[755]

In this context, it is especially interesting that in assessing evidence the Court adopts the standard of proof "beyond reasonable doubt" which "may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact."[756] The Court continued to asses that in cases "where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation".[757]

In this particular case, in the view of fact that Zabchekov's death occurred after a several-hours long police detention, it was the Government's obligation to provide a plausible explanation of his death. The Court did not accept the explanation that the skull-fracture had been inflicted at least ten hours prior to the time of death, since it was based on the second forensic report which was based on a visual examination of photographs of the blood clot taken six hours after Mr Zabchekov's death. It was incomplete and in a stark contrast to the conclusions of the first report which had been based on a direct observation of the body.[758] Although in the second report it was alleged that the first

[755] *Anguelova v. Bulgaria*, application no. 38361/97, judgment on 13th June 2002, para.110

[756] Ibidem, para.111

[757] Ibidem.

[758] Ibidem, para. 114

report's findings concerning the strength of the blow and the time of the skull fracture had been incorrect, such claim was not substantiated by any evidence. Also, the Court found it unlikely that a person who suffered a skull fracture of such serious nature would immediately after such an injury spend time with friends and in a bar, and even less likely that he would decide to try and steal car parts.[759] Moreover, the Court reminded that Zabchekov ran from the police and was able to walk normally when brought to the police station, both of these facts implying that his health was good at the time.

The Court also noted that according to the first forensic report the skull injury had most likely been inflicted between four and six hours prior Zabchekov's death and, therefore, possibly at a time when he was in police custody, either before or after he was taken to the police station. A number of other injuries to his body could have been the result of the same events that caused the skull fracture. Forensic evidence did not support the Government's claim that Zabchekov sustained these injuries as he fell on the ground in the chase.[760] In addition to that, none of the witnesses who were in contact with the applicant's son until he was taken to the police station reported that he complained of an ailment.

According to the medical opinion submitted by the applicant, handcuffs may leave marks if they are too tight or the person is struggling or is dragged. The Court noted that the autopsy found a very slight mark on Zabchekov's left hand and severe bruising on his right hand. Also, according to the reports, at some point he was handcuffed to a tree. The Court therefore found it to be unlikely that the injury to his right wrist was the result of normal use of tight handcuffs. It assessed that the other two possible explanations of him struggling or being dragged may suggest that he was subjected to ill-treatment.

Finally, the Court found that allegations of the applicant's son illness were not reliable and, in any event, cannot lead to any reasonable conclusion as regards the skull fracture or the other injuries found on his body.[761]

It also pointed out several examples of police officers behaving in a suspect manner,[762] as well as the fact that the authorities took evidence presented by the police as credible

[759] Ibidem, para. 116

[760] Ibidem, para.119

[761] Ibidem.

although there were serious indications calling for caution. Despite these facts requiring thorough investigation, such an investigation was not undertaken. The Court found the Government's explanation of Mr Zabchekov's death implausible in the light of everything stated above. Accordingly, there has been a violation of Article 2 ECHR.

When it comes to the investigation, the Court noticed that although numerous acts of investigation were undertaken in the present case,[763] the incomplete autopsy made it impossible to establish what object might have caused the skull fracture.[764] Moreover, the forging of the detention was never fully investigated and some critical questions had not been raised in examinations and confrontations. The Court criticized the fact that reconstruction of the events conducted on 20 March 1996 was exclusively concerned with the number of times and the places where Zabchekov had fallen to the ground when he had been trying to escape. In this reconstruction, the events that took place at the police station, time between the Zabchekov's arrest and his arrival at the police station and the times when he had been lying on the ground, handcuffed to a tree or was alone with police officers have been ignored. The investigator did not visit the site of Mr Zabchekov's arrest.[765] It was a police officer from the same police station as the implicated officers who visited the scene. The Court also pointed out that the investigation focused on the origin and timing of the skull injury while other traces left on his body have been practically disregarded, without any reasons being given for these omissions.[766]

Furthermore, the authorities found the testimony of the police officers to be trustworthy despite their suspect behavior. Since there were some obvious contradictions between the

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[762] Such suspicious behavior includes not calling a doctor between 3 a.m. and 5 a.m. on 29 January 1996 to see Zabchekov, and possibly trying to choose which doctor will examine him, their apparently false statement, in answer to a question by Dr Mihailov, that Mr Zabchekov had been taken to the police station in the same condition as that in which the doctor had seen him at about 5 a.m., tampering with the detention records and registering Zabchekov post factum as an "unidentified person" although he had been well known to the police officers as a suspect on theft charges and had been recognized by them at the very moment of their encounter. – Ibidem, para. 120

[763]The police started with the investigation promptly. They questioned the witnesses repeatedly and organized two confrontations and a reconstruction of the events. An autopsy was carried out and other relevant evidence was collected and analyzed. – Ibidem, para.141

[764] Ibidem.

[765] Ibidem, para. 142

[766]Ibidem, para. 142

two medical reports, the authorities accepted the conclusions of the second report without illuminating the inconsistencies. They also decided to end the investigation exclusively relying on the opinion in the second medical report about the timing of the injury despite the analysis it contained was of a contentious nature.[767]

The Court found that the investigation lacked the requisite objectivity and thoroughness, which decisively undermined its ability to establish the cause of death of the applicant's son and the identity of the persons responsible. Very importantly, the Court pointed out that "its effectiveness cannot, therefore, be gauged on the basis of the number of reports made, witnesses questioned or other investigative measures taken."[768]In this light, the Court did not find it necessary to examine the applicant's allegations that the failings of the investigation in her case were the result of a general problem of lack of independence, impartiality and public accountability on the part of the authorities handling investigations of police ill-treatment. Since it had established that the investigation into the death of the applicant's son was not sufficiently objective and thorough, the Court concluded that there has been a violation of the respondent State's obligation under Article 2 § 1 of the Convention to conduct an effective investigation into the death of Mr Zabchekov.[769]

[767]Ibidem, para. 143

[768]Ibidem, para. 144

[769]Ibidem, para. 145

3.10 THE EVOLUTION OF STRASBOURG COURTS JURISPRUDENCE IN REGARD TO THE OFFICIAL INVESTIGATION OF ALLEGED VIOLATIONS OF RIGHT TO LIFE IN THE LAST DECADE

The European Court on Human Rights has gradually developed the doctrine of positive obligations through its jurisprudence. It was a long way from establishing the obligation to effectively investigate cases when the state authorities used force with lethal outcome to framing it in a certain way and developing a whole set of circumstances in which it ensues, as well as criteria for assessment if this obligation has been complied with.

In this context, the practical requirements the investigation has to fulfill in order not to constitute a breach of Article 2 are being pinpointed in much more detail. Therefore it is interesting to analyze the way Court applied its ever developing standards in cases which emerged before it in the last decade.

3.10.1 Ramsahai and Others v. the Netherlands case

In the *Ramsahai and Others v. the Netherlands*case[770], Moravia Ramsahai, the son and grandson of the applicants, was shot by the policeman in June 1998. Namely, previously that night he stole a scooter from its owner at gun point and the police was notified. Two police officers on patrol spotted him and tried to make an arrest. He reached out for his weapon and did not drop it when warned to do so. He pointed it at the policeman who approached him instead. The policeman then shot Moravia in the neck and he died around 15 minutes later.

[770] *Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007)

The criminal investigation was immediately opened and for the first 15 - 16 hours it was conducted by the same police force to which the two policemen involved in the incident belonged. Subsequently the State Criminal Investigation Department took charge. The public prosecutor decided not to raise criminal charges as the officers acted in self – defense. The Amsterdam Court of Appeal confirmed this decision.

The Court primarily examined the effectiveness and independence of the investigation. It also questioned if the applicants were sufficiently involved and informed about the investigation course. In addition to that, the independence of public prosecutor in the light of his connections with the public police service was inspected.

The Court has found that there have been several shortcomings in the investigation. Firstly, the prosecutors did not attempt determining the precise trajectory of the bullet. Next, they did not order testing of the hands of Officers Brons and Bultstra for gunshot residue. Moreover, there was no examination of Officer Brons' service weapon and unspent ammunition. There was no reconstruction of the incident. In addition to that, questioning of Officers Brons and Bultstra took place only several days after the incident, which delay has enabled them to discuss the incident with others and with each other.[771]

However, in the Court's view, the omission to carry out the forensic examinations did not impair the effectiveness of the investigation as a whole, since the identity of the suspect was clear from the beginning and there were other ways of establishing the circumstances of the incident in a proper way. The Court also found that since there was no trace of the bullet after it hit Moravia Ramsahai, there was no sufficient information in order to establish itstrajectory.[772]

When it comes to the fact that there were no steps taken in order to separate two officers involved in the incident and that their statements were taken only three days after the incident, the Court did not find any reasonable explanation as to why their statements could not have been taken down sooner and checked against each other and subsequently against forensic evidence. Nevertheless, the Court found no evidence that the two officers

[771]*Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005, para 401

[772]Ibidem, para. 402

colluded with each other or with other police officers to obstruct the proper course of the investigation.[773]

Then the Court examined if the investigation had complied with the independence requirement. S we've already mentioned, the Amsterdam/Amstelland police force remained in charge of the investigation for the first fifteen and a half hours; after that, the State Criminal Investigation Department took over. Since the State Criminal Investigation Department is a nationwide service which has its own chain of command and answers only to the country's highest prosecuting authority, the Court considered it to be sufficiently independent for the purposes of Article 2 of the Convention.[774]

However, the fact remained that the essential parts of the investigation were carried out by police force to which Officers Brons and Bultstra belonged and which acted under its own chain of command[775] and other investigations were undertaken by the same police force at the behest of the State Criminal Investigation Department.[776]

In accordance to its jurisprudence, the Court has in this case reaffirmed its stand that there is a violation of Article 2 in its procedural aspect in cases when the colleagues of the law enforcement official who was accused for an unlawful killing directly carried out an investigation[777]. Even if they were supervised by another authority, however independent, it is not a sufficient safeguard for the independence of the investigation[778]. Ergo, the condition of independence was not fulfilled in the *Ramsahai and Others v. the Netherlands* case.[779]

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[773]Ibidem, para. 403

[774]Ibidem, para. 404-405

[775] Police officers that belonged to the Amsterdam/Amstelland police force conducted the forensic examination of the scene of the shooting, as well as the door-to-door search for and the initial questioning of witnesses, including their colleagues from office. – Ibidem, para. 406

[776] Ibidem, para.407

[777] See: *Aktaş v. Turkey*, application no. 24351/94, judgment of 24th April 2003, para. 301

[778] See also: *Hugh Jordan v. The United Kingdom*, application no. 24746/94, judgment on 4th May 2001, para. 120 and *McKerr v. The United Kingdom*, application no. 28883/95, judgment on 4th May 2001, para. 128

[779]*Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005, para 408

This conclusion was not supported by all the judges in the Chamber. Namely, in their *Partly dissenting opinion* the judges Thomassen and Zagrebelsky criticized the judgment for adopting a "surprisingly formalistic attitude" when it comes to finding a violation of Article 2[780]. In their view, in cases where a substantive violation of Article 2 has been positively excluded by the Court it is irrelevant whether the investigations and national procedures are in accordance with what the Court's case-law indicates as appropriate and desirable. Since in their opinion "neither of the criticisms made by the majority with regard to the investigation has any bearing whatever on the effectiveness of the national inquiries and on the Court's conclusion that no substantive violation of Article 2 has occurred"[781], they found that the Court's decision turns counter to the Court's consistent case-law on procedural defects under Article 6, which does not preclude the overall fairness of the proceedings considered as a whole, even when some procedural requirements are not met.[782]

The two judges maintained that the fact that Amsterdam police force was heavily included in the first part of the investigation which was seen as lack of independence in the judgment does not cast doubt on the reliability of the findings. They deemed it necessary because of some of the investigative measures had to be taken as soon as possible and any delay pending the arrival of a different police force could have the serious consequences. As soon as it was possible and justified, a different and independent police force became responsible for carrying out the investigation, which in the opinion of judges Thomassen and Zagrebelsky proves that the authorities were capable of carrying out a complete and reliable investigation into the circumstances of the case.[783]

The Court continued to assess that although the applicants called for specific additional investigations to have been carried out and wished to have been informed of the progress of the investigation as it went along, the investigating authorities "cannot be required to

[780]Ibidem, para.13

[781]*Partly dissenting opinion of judges Thomassen and Zagrebelsky* in case of *Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007), para. 9

[782]Ibidem, para.13

[783]Ibidem, para. 9

indulge every wish of a surviving relative as regards investigative measures".[784]Namely, "the disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects for private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2.[785] The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures."[786]

The Court also did not find it established that the applicants' claim of being denied access to certain documents entirely[787] is accurate, since there was proof of them being given an opportunity to study the case file in its entirety.[788] Therefore, the Court held that applicants were granted sufficient access to the information yielded by the investigation for them to participate effectively in proceedings aimed at challenging the decision not to prosecute the officer who shot their son and grandson.[789]

In the present case the Court of Appeal[790] relied on the case file compiled by the Amsterdam/Amstelland police force and the State Criminal Investigation Department. However, unlike in a few of its earlier decisions[791], the Courtfound that in this case the Court of Appeal was entitled to consider the information available sufficient for it to reach the decision.[792]On the facts of the present case the Court assessed that neither

[784]*Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005, para 411

[785] Ibidem.

[786]This approach the Court also took in the McKerr case; see: *McKerr v. The United Kingdom*, application no. 28883/95, judgment on 4th May 2001, para. 129

[787] They made a special reference to being denied access to the official report submitted by Public Prosecutor De Vries to the Chief Public Prosecutor and forwarded to the Acting Procurator General. - *Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005, para 413

[788] Ibidem, para. 414

[789]Ibidem, para. 416

[790] The Amsterdam Court of Appeal could not order investigative measures, although it had the authority to order the Public Prosecutor to seek a preliminary judicial investigation in order to obtain specific information. – Ibidem, para. 417

[791] For example, the cases of *Kaya v. Turkey*, application no. 158/1996/777/978, judgment on 19th February 1999 and *Finucane v. the United Kingdom*, application no. 29178/95, judgment on 1st July 2003

[792]*Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005, para 418

Public Prosecutor nor the Court of Appeal have acted unreasonably in sparing the officer who shot Mr Ramsahai a trial.[793]

In addition to that, it was pointed out that there are good reasons for withholding information about a police officer's past career from members of the public when the decision to be taken is only whether or not his conduct on a particular occasion justifies putting him on trial.[794]The Court also agreed with Government's argument that the Court of Appeal's hearing did not needto be public, since a person whom it is not appropriate to put on trial should also be spared the unpleasantness of being made a public spectacle.[795]

On the other hand, in accordance to the Article 2, the decision by the Court of Appeals that a person vested with public authority at whose hands a human being has died should not face criminal proceedings has had to be open to public scrutiny[796], i.e. public.[797]The proceedings for investigating the death of the victim have therefore fallen short of the applicable standards envisaged by Article 2 ECHR.[798]

However, judges Thomassen and Zagrebelsky again did not concur with the majority's opinion on the matter. They made reference to previous case-law of the Court, where the Court considered the lack of public scrutiny in conjunction with the exclusion or strict limitation of the next-of-kin's participation in the proceedings. In any case, the Court allowed for some limits to public scrutiny.[799]They supported their stand by concluding

[793]Ibidem, para.429

[794]Therefore the Court finds that it was not necessary for Officer Brons's service record to be laid open for inspection by the applicants. - Ibidem, para 419

[795] Ibidem, para. 421

[796]*Finucane v. the United Kingdom*, application no. 29178/95, judgment on 1st July 2003, para. 79

[797]*Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005, para. 422

[798] Ibidem, para. 430

[799] They pointed out the example of *Bubbins v. the United Kingdom*, application no. 50196/99, judgment on 17th March 2005, where the Court in para.157-158 accepted that the effectiveness of the inquest was not undermined on account of the decision to grant anonymity to law enforcement officers in question. - *Partly dissenting opinion of judges Thomassen and Zagrebelsky* in case of Ramsahai and others v. the Netherlands, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007), para. 10

that "the lack of publicity with regard to the Court of Appeal's decision has no bearing on the quality and strength of the evidence to be taken into consideration".[800]

They also made comparison between *Finucane v. the United Kingdom*case, where the Court elaborated on the need for public scrutiny of the investigation and the *Ramsahai and others v. the Netherlands*case. They pointed out the difference between the legal systems in these two cases as well as in the surrounding circumstances. Namely, in the Finucane case, there were well-founded suspicions thatsecurity forces were colluding with the killers and the real motives behind the authorities' inquiries were rightfully questioned. There apparent lack of independence in the investigation which gave rise to serious doubts its fulfillment of the thoroughness or effectiveness requirement. Since the reports were not made public and the applicant was never informed of their findings, there was a velar lack of the necessary elements of public scrutiny and accessibility to the family.[801]In the *Ramsahai and others v. the Netherlands*case, in contrast, the applicants had the possibility of effective part-taking in proceedings aimed at challenging the decision not to prosecute Officer Brons and were delivered the Court of Appeal's reasoned decision after the hearing was over.[802]

When examining the role of the Public Prosecutor, the Court pointed out that in the Netherlands the Public Prosecution Service is not fully judicially independent, albeit has its own separate chain of command. It is the police that act under its behest in operational matters of criminal law and the administration of justice.[803] The undeniable dependence of public prosecutorson the police for information and support, however, does not necessarily lead to a conclusion of their lack sufficient independence vis-à-vis the police. It is, however, an entirely different situation when there is a close working relationship between the public prosecutor and a particular police force.[804]

In this case, the Court admitted that it would have been a better solution if the responsibility to supervise the investigation and decide whether to prosecute Officer

[800]Ibidem.

[801]Ibidem, para 11.

[802]Ibidem, para.12

[803]*Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005, para. 425

[804] Ibidem, para. 426

Brons was bestowed on a public prosecutor in no way connected to the Amsterdam/Amstelland police force, especially given the fact this force was involved in the investigation itself. However the Court concluded that the Public Prosecutor's degree of independence, if considered together with the possibility of review by an independent tribunal, satisfies Article 2.[805]

We can see that the Court took quite formalistic approach in some aspects (deciding that the conducted investigation has fallen short of the independence requirement despite finding that there was no violation of substantive aspect of right to life) while in others had made a turn from the previously established case – law (the ruling that the decision made by the Court of Appeal should have been open to public scrutiny), showcasing creativity and fresh argumentation. When pointing out the lack of effectiveness in collecting the necessary evidence, however, it relied on its earlier jurisprudence and pointed out that there have been certain shortcomings in that process: the statements of the police officers implicated in the shooting were taken only three days after the incident, they have not been separated to reduce the risk of collusion (this being especially important since they were the only witnesses of the incident and the only one who could testify about what has happened) and no reconstruction of events has been made.

3.10.2 Akpinar and Altun v. Turkey case

Around the same time, the Court delivered a judgment in the case *Akpinar and Altun v. Turkey*.[806] The brother of first applicant and the son of the second have been killed on 14th of April 1999 by the security forces in an ambush for the members of illegal subversive groups.After the clash, the bodies were taken to the gendarmerie command's courtyard and identified. On the following day, post mortem examination established that Doğan

[805] See: *McShane v. the United Kingdom*, application no. 43290/98, 28 May 2002, para. 118

[806] *Akpinar and Altun v. Turkey*, application no. 56760/00, judgment on 27th February 2007

Altun was shot nine times and half of his ear has been cut off. Seyit Külekçi received eight bullets and both of his ears were cut off.

The investigation which was opened at the applicants' request resulted in a few of the gendarmes being charged with insulting the corpses in October 2000. Only three months later, the court of first instance suspended the criminal proceedings alleging that they will be reactivated in the case of the offence being repeated in the following five years. This decision has not been appealed against.

When deciding on the admissibility of the case, the Court notedthat there are no indications in the case file that the steps which the gendarmerie authorities took after the armed clash and killings[807] were part of an administrative investigation under supervision of an independent authority. There was no evidence that these measures were initiated in order to assess whether the force used during the clash had been necessary and when had the mutilation of the bodies of Seyit Külekçi and Doğan Altun occurred.[808]

The Court pointed out that the Turhal public prosecutor did not take any investigative step in respect of the killing of Seyit Külekçi and Doğan Altun. The only investigation he initiated of his own motion after the incident was against the deceased and the four people who had fled after the clash, under the chargesthat they belonged to a terrorist organization. It was only after the prosecutor receivedthe applicants' petition that he opened second investigation, which exclusivelyfocused on the allegedmutilationof Külekçi's and Altun'sbodies.[809]

Despitethe fact that several bullet wounds in various parts of their bodieswere discovered on dead bodies it was also not investigated whether the force used by the security forces was justified in the circumstances of the case.[810]

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[807]Namely, the gendarmerie officers who had participated in the operation made a draft of the scene-of-incident report and drew a sketch plan. A day after the armed clash, a medical expert carried out the post-mortem examinations on the deceased in the premises of Turhal gendarmerie command. The local public prosecutor was present during the examination. On the same day, the Turhal gendarmerie command sent the firearms and bullets found next to the corpses for a ballistic examination. - *Akpinar and Altun v. Turkey*, application no. 56760/00, judgment on 27th February 2007, para.38

[808] Ibidem, para. 39

[809] Ibidem, para. 40

[810]By this omission to act, the public prosecutor also violated Article 153 of the Turkish Code of Criminal Procedure. - Ibidem, para. 40

Due to the specific circumstances of the case and the context of fight against terrorism in Turkey at the time, the Court understood how the applicants could have felt vulnerable and apprehensive of State representatives and therefore did not request investigation onthe lawfulness ofthe deadly force used by the security forces. On the other hand, even without filing a specific complaint, they could legitimately have expected that the necessary investigation would have been conducted.[811] In addition to that, the applicants did not possess the necessary knowledge to challenge the lawfulness of the killings. However, by submitting a petition to the Turhal public prosecutor's office, in which they complained about the mutilation of their relatives' bodies, the applicants took steps in respect of their relatives' death as far as their knowledge of the surrounding circumstances would allow.[812]

The Government called for taking into consideration the context of terrorism in Turkey at the material time. However, the Court followed the reasoning from the earlier case – law that "neither the prevalence of armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an independent and impartial official investigation is conducted into deaths arising out of clashes involving the security forces.[813]

Having regard to everything above stated, the Court concluded that Turkish authorities have violated procedural obligation under Article 2 of the Convention, because of the failure to conduct an effective, independent and impartial, investigation into the circumstances surrounding the killing of the applicants' relatives.[814]As a consequence of this breach, it was not possible to form a complete picture of the circumstances of the case.[815]

By analyzing this case, we can see that the Court followed its previous jurisprudence and has continued to scrutinize the behavior of Turkish state authorities and find the breaches of duty to investigate into killings by its law enforcement officials. Nevertheless, the ever

[811] Ibidem, para. 41

[812]Ibidem, para. 42

[813] In this context, see *Kaya v. Turkey*, application no.,158/1996/777/978, judgment of 19th February 1998, para. 91

[814]*Akpinar and Altun v. Turkey*, application no. 56760/00, judgment on 27th February 2007, para.61

[815]Ibidem, para. 60

same and repeated deficiencies in the investigative procedure (not initiating the investigation procedure at its own motion, not having it conducted by an independent authority, not performing it in a thorough and impartial way and not collecting the evidence which could lead to the identification and conviction of the perpetrators) raise concerns that Turkey shows little intent to give up its practices which represent flagrant and constant breaches of international and human rights law.

3.10.3 Bitiyeva and X v. Russia case

The judgment in case of *Bitiyeva and X v. Russia*[816]is also an example of the newer Court practice. In late January 2000, the first applicant and her son were taken to the detention facility, where the applicant claimed they have been ill-treated and subsequently denied medical assistance. However, as her health deteriorated, she was transferred to a hospital in mid – February 2000 and a couple of weeks later was issued with a certificate confirming that she was investigated for her alleged partaking in illegal armed groups, but no incriminating evidence has been found on her. No charges were pressed against her or her son. The Government claimed that since neither the applicant not her son had a valid ID when they have been asked to present identity documents, their arrest and detention were in accordance with a Presidential decree aimed at preventing homelessness. Authorities also alleged that she was put in hospital as her health condition has gotten serious, but that no further investigation is possible since the records were missing and the detention facility staff has in the meantime changed.

Biitiyeva lodged a complaint with the European Court of Human Rights in April 2000. She, her husband and their son, as well as Ms Bittiyeva's brother have been killed in her house by11armed men who drove to the town in two UAZ-45 vehicles without registration plates. The rest of the group who got out of the vehicles stayed on the street in front of the house, armed with grenade - launchers and machine guns. There were all

[816]*Bitiyeva and X v. Russia,* application nos. 57953/00 and 37392/03, judgment on 21st June 2007

wearing Special Forces uniforms and some were their helmets as well. Others were masked. After six or seven shots being heard, the group gathered again, got into the car and drove away in the direction of Grozny. When the bodies were discovered, their hands and feet were taped together and the applicant's husband had a black hood over his head. All of the victims were shot in the head.

It was subsequently discovered that two more men have been killed in a similar fashion and presumably by the same group. According to people who worked on the village roadblocks, this group was a military group and they had a "special mission" permit.

The investigation started immediately. Experts examined the crime scene and investigators took statements from the witnesses.[817] The information of possible involvement of security forces has been looked into. However, the bodies were buried the same day despite the fact that no autopsy has been performed. Despite lasting for two and half years, the investigation has not shown any visible progress. It was only in late 2005 that the second applicant X., who was the daughter of the first applicant, has been granted the victim status. The victims were informed only about adjournments and reopening of the investigation, but were kept in dark regarding any other important information related to it.

The Court firstly pointed out that its ability to make an assessment of adequacy of the investigation was limited due to Government failing to produce key elements of the investigation. The Court however assumed that the Government chose to disclose materials which demonstrate to the maximum extent possible the effectiveness of the investigation.[818]

The authorities did make some efforts to find the killers of the first applicant and three members of her family: the investigation was started on the day of the killings and on the same day the scene of crime was examined and a number of witnesses questioned, as well as around 20 servicemen of the law-enforcement bodies. At some point during the investigation, the prosecutors sought information if the members of the United Group Alliance have been involved in an operation in the district. They also reviewed the log

[817] *Bitiyeva and X v. Russia*, application nos. 57953/00 and 37392/03, judgment on 21st June 2007, para. 147

[818] Ibidem, para. 146

records of the vehicles belonging to the military units which were stationed in the district.[819]

However, the investigation into the deaths was never completed and the individuals responsible were not identified or indicted. It is true that the obligation under Article 2 to investigate effectively is an obligation of means, but that cannot be used as an excuse for the observed lack of progress over two and a half years from the start of the investigation.[820]Namely, many important questions remained unanswered, such as how many people participated in the killings? Had they used any vehicles and which routes had they taken to reach and leave the village? What was the sequence of their actions and which weapons had they used? What was the underlying motive for the killings? What exactly happened that night?[821]

Moreover, the second applicant was not informed about being granted a victim status. Only the decisions to adjourn and to reopen the investigation had been communicated to her, without any sign of progress being made in the investigation itself.[822]

Therefore, it is not surprising that the Court found that there has been a violation of Article 2 of the Convention. In the Courts view, the respondent State has failed in its obligation to conduct an effective, prompt and thorough investigation into the killing of the first applicant and of the second applicant's three other relatives.[823]

This decision, although of a newer date, is consistent with the Court's jurisprudence in this regard. What makes it especially interesting is the fact that the Court put a certain limitations to the established rule according to which is duty to investigate "obligation of means and not of result". Namely, in this case the investigators have made inquiries into the allegations that these murders were committed by the members of Special Forces. They reacted promptly and have interviewed all the key witnesses as well as some of the law enforcement officials who could have had some information on the incident. It could

[819]Ibidem, para. 57

[820] The prosecutor's order of 9 December 2005 cites the same facts as those set out in the decision of 21 May 2003 to open a criminal investigation. – Ibidem, para 148.

[821]Ibidem.

[822] Ibidem.

[823]Ibidem, para. 149

be argued that they did everything that could have been reasonably expected in the circumstances. However, the Court found that a number of unanswered questions regarding the killings are direct results of numerous omissions on the part of the investigative authorities. The Strasbourg court this time made a step forward in its case – law and clearly stated that the above mentioned and generally accepted rule that duty to investigate is obligation of means cannot be used as an excuse for an overly long and ineffective investigation procedure, which is in end effect incapable of identifying and punishing the persons who violated the tight to life.

3.10.4 Cangöz and others v. Turkey case

The applicants in the case *Cangöz and others v. Turkey*[824]are 17 Turkish nationals whose relatives have been killed in June 2005 by the security forces. The deceased were members of an outlawed organization in Turkey.[825] Their meeting in a rural area near the city of Tunceli has been ambushed. After the one-day-long clash between the terrorist group and the security forces ended, the dead bodies of the applicants' relatives have been exhibited in a car park for identification and examination purposes.

The investigation was opened on the same day and was closed on 20 June 2006, finding it established that the security forces' actions had been lawful within the context of self-defense.

When examining the applicants' claims that the authorities failed to comply with their procedural duty under Article 2 ECHR, the Court pointed out some shortcomings in the investigation, which disrupted the establishment of the facts and which had resulted in Government's inability to discharge their burden to justify the killings.[826]Namely, the Assize Court did not investigate applicants' claims that the security forces were aware of

[824]*Cangöz and others v. Turkey*, application no. 7469/06, judgment on 26th April 2016

[825] They were all members of the Maoist Communist Party, i.e. the MKP.

[826]*Cangöz and others v. Turkey*, application no. 7469/06, judgment on 26th April 2016, para 138

their relatives' arrival well in advance and instead of arresting them at much earlier stages intentionally waited until they went to the countryside, where the conditions were suitable for the start of an operation to kill them.[827] Moreover, since the prosecutor did not go the place of the incident to secure the scene and to collect the evidence, this was done by the same soldiers under investigation for killing the applicants' relatives.[828] Neither perpetrators nor the wounded soldier were questioned about the incident.[829] The applicants' relatives' clothes and a number of other items found on their persons have been destroyed on the orders of the Ovacık prosecutor due to their alleged lack of evidential value. The prosecutor did not order any search for fingerprints on the rifles allegedly found next to the bodies of the applicants' relatives. Many of the Government submissions contradicted the evidence collected by the investigation and no explanation was given to that fact.[830]

The Strasbourg court also asserted the importance of this examination when it comes to the placement of burden of proof: "In cases where the respondent Government bears the burden of justifying a killing, the examination of the steps taken in an investigation does not only serve the purpose of assessing whether the investigation was in compliance with the requirements of the procedural obligation, but also of deciding whether it was capable of leading to the establishment of whether the force used was or was not justified in the circumstances and whether the Government have thus satisfactorily discharged their burden to justify the killing".[831]

In relation to the applicant's complaint that they had been removed from the investigation because the investigation file had been categorized as "confidential", Court reiterated that in all instances the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard their legitimate interests.[832]In this regard, the Court was not convinced by the prosecutor's argument that applicants' access to the file had to be restricted since the victims were allegedly affiliated with a terrorist organization and has

[827] Ibidem, para. 110

[828] Ibidem, para. 125-126

[829] Ibidem, para. 127

[830] *Cangöz and others v. Turkey*, application no. 7469/06, judgment on 26th April 2016, para. 110-137

[831] Ibidem, para 115

[832] Ibidem, para. 142-144

found that the Court's decision to comply with such request has effectively prevented the applicants from taking any meaningful part in the investigation.[833] Namely, the applicants had access solely to the autopsy reports and the documents concerning the forensic examination of the clothes of four of their deceased relatives. Only after approximately three years passed from closing of the investigation, the entire investigation file has been forwarded to the applicants by the Court. The Court also noted that out of the numerous requests made by the applicants, the investigating authorities granted only one.[834]

Taking all the above stated into consideration, the Court concluded that the national authorities failed to carry out an effective investigation into the killing of the applicants' relatives and accordingly had violated the Article 2 of the Convention in its procedural aspect.[835]

This case has been rather straightforward. The investigation commenced on the same day when the clash ended and lasted for a year. Therefore the requirement of promptness and reasonable expedition of the investigation has been met. However, there was an obvious lack of independence (same security forces members implicated in the shooting conducting investigative measures on the scene), thoroughness (failure to question the perpetrators and the wounded soldier about the incident, destroying ofthe victims' clothes and a number of other items found on their persons, not ordering a search for fingerprints on the rifles allegedly found next to the bodies of the applicants' relatives), effectiveness (contradictory evidence submitted by the Government not being cross-examined and the possible intention to ambush and kill the terrorists by the security forces) as well as public scrutiny (categorizing the investigation file as confidential and allowing the family members only very limited access to the documents it contained and with a considerable delay).

Having regard to the fact that investigation which was conducted in this case failed to comply with the standards of effective investigation established by the Court's jurisprudence, it is no surprise that the Court decided there has been a violation of Article 2 of the Convention in its procedural aspect.

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[833]Ibidem, para. 145

[834]Ibidem, para. 46

[835]Ibidem, para. 148-149

3.11 A FEW POSITIVE EXAMPLES OF A MEMBER STATE COMPLYING WITH THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 ECHR: THE BUBBINS V. THE UNITED KINGDOM AND HUOHVANAINEN V. FINLAND CASE

So far we analyzed numerous examples of states not complying with their obligation to conduct an effective investigation into killings by law enforcement officials. In order to fully grasp which requirements an investigation should fulfill in order to be considered effective, it is equally essential to study some positive examples of cases where the Member State conducted an investigation which was prompt, independent, exposed to public scrutiny and provided the family with all the necessary information and access to all the relevant documents.

3.11.1 Bubbins v. the United Kingdom case

First case we are going to focus on is the *Bubbins v. the United Kingdom* case.[836] As for the facts of the case, the applicant's brother, Michael Fitzgerald, was killed by the police in a shooting after a siege in February 1998. Namely, Michael's girlfriend has been very worried for his safety when she saw legs of a man disappearing through the kitchen window and had her boyfriend not respond to her calling him afterwards. Not knowing the man was Michael Fitzgerald himself, who was very drunk and has forgotten his keys, she called the police.

After a two-hour siege, the applicant's brother seemed to aim a gun at one of the police officers. The police ordered him to drop the gun, but he did not comply. He was

[836] *Bubbins v. the United Kingdom*, application no. 50196/99, judgment on 17th March 2005

subsequently shot once, but that shot was lethal. Only after his body had been examined, it was established that Fitzgerald was actually holding a replica.

The investigation followed and the report was sent to the Director of Public prosecutions who decided there was no enough evidence to start the criminal proceedings. The Police Complaints authority confirmed this decision, finding that the police investigation was thorough enough. As the result of the subsequent inquest, the coroner found that this was the case of lawful killing. This verdict was returned by the jury. The applicant requested legal aid to pursue proceedings for judicial review of the inquest verdict, but was denied.

The European Court of Human Rights reviewed the applicant's allegations that in this case the inquest's fact-finding role had certain defects which undermined its effectiveness.

Firstly, the Court found that the disputed Coroner's decision to grant anonymity to Officers A, B, C and D was reached only after a careful consideration of the competing interests at stake. Moreover, representations from the family's lawyers have been heard and the possible threat of reprisals against Officer B and his family if his identity were to be disclosed was examined. The Coroner gave full reasons for his decision and the High Court accepted them.[837]

Next question was if the applicant was guaranteed a sufficient measure of participation in the investigation and an appropriate forum for securing the public accountability of the State and its agents for their alleged acts and omissions leading to the death of Michael Fitzgerald.[838] The Officers B, C and D were hidden from the public by a screen, but gave evidence at the inquest and were cross-examined by the family's legal representative in the sight of the Coroner, the family's lawyers and the jury. By these procedures the Coroner counterbalanced any possible handicaps for the family which could have resulted from decision to grant anonymity to these police officers as witnesses, so that the effectiveness of the inquest was not undermined on that account.[839]

The Court also reminded that "whilst it is of the utmost importance that a complete and accurate picture emerges of the events leading up to a killing by State agents, the

[837] Bubbins v. the United Kingdom, application no. 50196/99, judgment on 17th March 2005, para. 155

[838] Ibidem, para. 156

[839] Ibidem, para. 157 – 158

evidence to be gathered to that end must be filtered in accordance with its relevance."[840] In that light, the Court observed the Coroner's decision not to hear Fitzgerald's girlfriend as a witness, finding that it was properly within the Coroner's discretion as an independent judicial officer. It also reminded that since this potential witnesses' information that Michael Fitzgerald had possessed two replica firearms was never communicated to the police during the operation outside his flat, her statement was of no relevance to the fact-finding procedure. In addition to that, considering Superintendent Battle's affirmation before the jury that his approach to telephone contacts with Michael Fitzgerald could be criticized, it was undisputed that things might have been conducted differently had a trained negotiator been present at the scene. Therefore the Court found that the non-attendance of Detective Inspector McCart at the inquest was not a shortcoming.[841]

As for the Coroner's decision not to disclose particular documents or materials to the family of the deceased, the Court found that withhold of the documentation was not based on the unilateral decision of the police and that the family had at its disposal as much information as was needed to protect its interests in the inquest proceedings. The Court went on and explained that since a number of witnesses gave evidence at the inquest and each and every of the key witnesses testified, the non-disclosure of such documents as the report of the investigation carried out into Michael Fitzgerald's death cannot be regarded as to have undermined the fact-finding role of the inquest or denied the family an effective participation in the procedure.[842] The Court also made notice of the fact that the police to made significant efforts to keep the family informed of developments during the PCA investigation.[843]

In overall conclusion, the Court pointed out that during the 4-day inquest a number of witnesses have been heard. The jury made a visit to the scene of the incident. Although

[840] Ibidem, para. 159

[841] Ibidem, para. 160

[842] Same can apply to the non-disclosure of the police radio log of the incident or the computer printouts, since jury was acquainted with all relevant transmissions logged during the incident. – Ibidem, para. 161

[843]Not only were the members of the family invited to give statements, with which request they have complied, but police also gave the brother of deceased an Interim Statement on Mr Davies's report, in which the various materials on which the latter's final conclusions were based have been indicated. – Ibidem, para. 162

the family was refused legal aid, it had legal representation throughout the proceedings by experienced counsel. The Court also considered the proceedings have not been deprived of their effectiveness by Coroner directing the jury to return a verdict of lawful death. The reasoning for such decision was as it follows: "if an independent judicial officer such as a Coroner decides after an exhaustive public procedure that the evidence heard on all relevant issues clearly points to only one conclusion, and does so in the knowledge that his decision may be subject to judicial review, it cannot be maintained that this decision impairs the effectiveness of the procedure." [844]

The Court has tested the inquest procedure against the applicable principles and found that they have been complied with in the circumstances of this case. That together with the above considerations has led the Court to conclusion that there has been no violation of the respondent State's procedural obligations under Article 2 of the Convention.[845]

3.11.2 Huohvanainen v. Finland case

In case of *Huohvanainen v. Finland*[846] the Court has also found no violation of Article 2 ECHR. In the case in question, the applicant's brother J. was shot dead by the police. Namely, in December 1994, following an incident on the previous day when he threatened to a taxi driver with a gun, J. hid in a house which got surrounded by a number of policemen. Police officers engaged at the case have been previously warned that J. is armed, aggressive and paranoid. It was also conveyed that he had a history of psychiatric disease and is especially hostile towards the police. The siege lasted for several hours and J. repeatedly fired shot at the police. Eventually he set the house on fire and policemen decided to take that opportunity to arrest him. Pressured by the heavy smoke, J. crawled out of the house, carrying two weapons. Policemen fired two shots aiming at his shoulder

[844] Ibidem, para.163

[845] Ibidem, para. 164 – 165

[846] *Huohvanainen v. Finland*, application no. 57389/00, judgment on 13th March 2007

and arm, but have missed due to his body position and had hit him in the head instead. He died soon after.

The investigation started immediately and was conducted by the National Bureau of Investigation. Pre – trial documents contained, inter alia, the autopsy report, the results of forensic and other investigations, report on the siege and numerous witness statements. In 1995 the Ministry of the Interior set a permanent investigation team, who conducted its investigation parallel with the National Bureau and submitted a report on its findings one year later.

In the same year the public prosecutor charged Special Task Commander, Superintendent H., for negligent homicide and negligent breach of official duty. Other policemen implicated in the incident have not been prosecuted. In the proceedings against the accused Superintendent H., both forensic and oral evidence was examined. Law enforcement officers who took part in the siege have been questioned. The family had adequate legal representation throughout the proceedings. Their legal representative was allowed to cross – examine all the witnesses and to make submissions. The final outcome of the criminal proceedings has been Superintendent H being acquitted and following the complaint procedure that decision became final.

The Strasbourg Court has found the applicant's claims that the investigation had been faulty unfounded. The siege and its course, as well as actions and decisions taken have been well –documented and recorded.[847] The National Bureau of Investigation carried out the investigation. This independent body that specializes in the investigation of serious crime started to collect evidence immediately after the siege. Although in the press release issued on 2 February 1995 the National Bureau of Investigation confirmed it was investigating whether the suspect had committed suicide, only a week later, having received the report concerning the cause of death, this body initiated the investigation whether anyone involved in the siege had acted in an unlawful manner. In addition to that, the Ministry of the Interior had assembled a special, permanent investigation team which made a thorough hour by hour review of the operation in question, as well as the

[847] During the siege a log was kept of the decisions made and actions taken, that the later part of the siege was recorded on audio tape and that the use of tear gas was also recorded on video tape. Despite the fact that some evidence had been destroyed in the fire, details of the bullet holes in and around the building had been collected. - *Huohvanainen v. Finland*, application no. 57389/00, judgment on 13th March 2007, para.110

decisions made and the actions taken during its course in the report which was finalized within one year of the operation.[848]

As already mentioned, the pre-trial documentation included the autopsy report, the results of all the forensic and other investigations, the reports on the siege and a large number of witness statements. J.'s family and the public prosecutor called for conducting certain additional lines of inquiry, which was done as well. The Court asserted that the family had at its disposal as much information as was commensurate with the defense of its interests in the national proceedings, namely clarifying the facts surrounding the death of J. and securing the accountability of the police officers involved for any alleged acts and omissions.[849]

The public prosecutor timely, in less than a year period, decided to bring charges against the commander of the Special Task Force, Superintendent H. At the same time, charges against the officer in overall charge, the officer in charge at the scene and two officers who fired the bullets had been waived. The legal system provided J.'s family with the possibility of bringing a private prosecution against the officers involved in the incident, and they used that right.[850] As already explained, in the court proceedings against Superintendent H. both forensic and oral evidence was provided. Witness's statements were taken and officers that took part in the events were questioned by all parties and the Court. An experienced counsel was in charge of legal representation of the family throughout the proceedings. The District Court acquitted the defendant. This decision was appealed against by the public prosecutor.[851]

Having regard to all the above stated[852] the Court concluded that the investigation complied with Article 2 requirements.

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[848]Ibidem,

[849]Ibidem, para. 111

[850]Ibidem, para. 112

[851] Ibidem, para. 113

[852]Special emphasis was put on the considerable number of witnesses who gave evidence at the pre-trial investigation, as well that during the investigation appropriate forensic examinations was carried out, that representative of the applicant had the possibility of requesting additional investigations and that the essential witnesses in the first set of criminal proceedings. – Ibidem, para.114

3.11.3 Comment on the criteria the Court has applied when reaching the decision that the Member State has complied with the duty of investigation under Article 2 ECHR

After thoroughly analyzing these two cases in which the Strasbourg Court found no violation of duty of investigation into deaths which arises under Article 2 ECHR, it becomes quite apparent that the Court placed emphasis on the certain main elements of an investigation when assessing its adequacy and efficiency. In both cases the investigation started immediately and was followed by the criminal proceedings. The family of the victim was legally represented and their access to the investigation files was not unilaterally limited, but in case that was necessary an adequate possibility of cross – examination of evidence has been provided. The crime scene was visited by the investigators and reports have been made on it; autopsies have been conducted as well as forensic and other examinations. All the key witnesses and alleged perpetrators have been taken statements from and were subsequently cross – examined during the criminal proceedings. Most importantly, there was no doubt in the institutional and practical independence of the bodies which conducted the investigation.

These judgments show that when a country takes the respect of its obligations under the Convention with utmost seriousness and the individual law enforcement officials conduct their investigation in accordance with human rights law standards, the Court will recommend its efforts and even allow a certain margin of appreciation.

3.12 CONCLUSION: THE DEVELOPMENT AND SIGNIFICANCE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 ECHR

The positive obligation to conduct an effective investigation into the killings of individuals committed by law enforcement officials is not expressly stated in the European Convention on Human Rights. It is an implied obligation, which was constructed by the Strasbourg Court using the method of creative interpretation of ECHR in order to respond to the present – day demands when it comes to respect and protection of the right to life.

The Court was acutely aware that the investigation and prosecution of criminal wrongdoing by law enforcement officials is integral to contracting states' obligations to protect individuals' rights.[853]It was therefore necessary for the court to adjust its practice so that such obligation is established and considered an inalienable part of the guarantees under Article 2 ECHR. That has been done through numerous judgments which pushed the doctrine of positive obligations ever one step further. Through its case law, the Court gradually developed a whole set of requirements which an investigation has to meet in order to be considered adequate and effective. Subsequently, these requirements and related legal standards which ensued were expressed through pinpointing certain main elements the investigation had to be composed of. At the same time, the scope of application of this positive obligation was ever more broadened but in such a manner that does not disturb the balance of conflicting parties' interests. The main goal of this gradual evolution of duty to conduct an effective investigation was to provide the right to life of individuals greater and more complete protection, which can sometimes be a substitute for finding a substantial breach of Article 2 ECHR. In this respect, as A. Mowbray eloquently puts it, "these judgments vividly reflect the ingenuity of the Court in creatively interpreting the Convention so as to seek the actual protection of human life from unlawful killings by State agents and private persons".[854]

[853] Smith G., "Police Complaints and Criminal Prosecutions", Modern Law Review, vol. 64, Issue 3, 2001, 391

[854] Mowbray A., 2005, 78

However, there is always a danger of imposing onerous burden on contracting parties. The Court has been very mindful not to cross that thin line. When discussing this topic, J. Chevalier-Watts reminded that despite the burden placed on the state being significant, one should bear in mind that one of the main purposes of constructing this institution has been to provide an effective remedy in cases of violation of right to life. Same author continued to assess that "any criticism of the effectiveness of Strasbourg must be tempered by the acknowledgment that the Court will always be subject to constraints in its ability to enforce or demand a regime change in liberal democracy. Perhaps, then, the jurisprudence since McCann should be welcomed as progress certainly has been made, despite the not insignificant limitations binding the effectiveness of the Court."[855]

In other words, by development of this particular positive obligation through its jurisprudence the European Court of Human Rights has established an additional pillar of protection of one of the most significant and basic human rights. Its further evolution is yet to be awaited, observed, commented and analyzed.

[855] Chevalier-Watts J., 2010, 721

4 CHAPTER 3 - DUTY TO INVESTIGATE UNDER ARTICLE 3 ECHR

4.1 PROPORTIONALITY OF USE OF FORCE BY THE LAW ENFORCEMENT OFFICIALS IN LIGHT OF ARTICLE 3 ECHR

Article 3 ECHR provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.[856] This right is absolute[857] i.e. unqualified[858] and non-derogable and in order to be breached the treatment or punishment must attain "a minimum level of severity".[859] This standard is not fixed – its assessment depends on circumstances of the particular case.[860] However, it does imply that the treatment in question is to have serious physical or psychological effects on individuals.[861]

[856] While the word "torture" is used to describe inhuman treatment which has a purpose such as obtaining of information or confessions, or infliction of punishment, the Commission has defined "inhuman treatment" as at least such treatment as deliberately causes severe suffering, mental or physical which, in the particular situation, is unjustifiable. On the other hand, according to the same body, "treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience". - Duffy J., "Article 3 of the European Convention on Human Rights", The International and Comparative Law Quarterly, 1983, vol. 32, no. 2, 316-319

[857] In this context it is interesting to read: Mavronicola N., Messineo F., "Relatively absolute? The undermining of Article 3 ECHR in Ahmand v UK", The Modern Law Review, 2013, volume 76, issue 3, 589-619

[858] S. Palmer even points out that proportionality considerations should not be used to introduce qualifications to this right. - Palmer S., "A wrong turning: Article 3 ECHR and proportionality", Cambridge Law Journal, 2006, vol.65, issue 2, 438

[859] *Ireland v. the United Kingdom*, application no. 5310/71, judgment on 18th January 1978, para. 62

[860] This is why some European Court judges, such as Sir Gerlad Fitzmaurice question if it is practicable or right to observe the prohibition under Article 3 as one of absolute character. In his opinion, the absolute nature of right under this article is made questionable by the fact that in practice when assessing if the minimum severity threshold has been reached in order for this provision to be breached, one has to take into consideration all the relevant circumstances of case in question. -Duffy J., 1983, 321

[861] Palmer S., 2006, 438

When assessing if the minimum level of severity has been reached the Court observes numerous factors – how long did the treatment last, what were the physical or psychological effects of it, as well as the victim's sex, age and state of health.[862] Certain treatment can amount to torture or inhuman or degrading treatment in accordance with its severity level and consequences it has on the victim. In other words, there is a certain relativity to this assessment[863] but that concept must be used with caution.[864] Next to proving that severity threshold has been satisfied, the applicant must also prove that the State is responsible for the alleged ill-treatment.[865]

Proportionality is an important aspect of use of force in light of Article 3 ECHR. However, as some authors point out, it is somewhat easier to understand the application of proportionality principle on qualified rights (such as right to life) than on absolute rights (such as prohibition of torture, ill-treatment and degrading treatment) since the former contain express provision for their limitation.[866]

The European Court did do some balancing of rights in *Soering v. The United Kingdom*[867].In this in many ways pioneer case it reminded that the Convention's provisions have to be interpreted and applied so as to make its safeguards practical and effective, in a way that is consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society".[868] Bearing that in mind, as well as that Article 3 ECHR makes no provision for exceptions and no derogation from it is permissible under Article 15, the Court maintained that one Contracting State knowingly surrendering a fugitive to another where there were substantial grounds for believing that he would be in danger of being subjected to torture, inhuman or degrading treatment or punishment would "hardly be compatible

[862]*Ireland v. the United Kingdom*, application no. 5310/71, judgment on 18th January 1978, para. 162

[863]Ibidem and *Tyrer v. the United Kingdom*(application no. 5856/72, judgment on 25th April 1978). para 30.

[864]For example, J. Duffy reminds that while there will be no Article 3 issue raised when a mental patient has been committed to a hospital in order to be treated, while such issue might arise in case a mentally sane person had been subjected to the same confinement. – Duffy J., 1983, 321

[865]Palmer S., 2006, 450

[866]Palmer S., 2006, 447

[867]*Soering v. The United Kingdom*, application no. 14038/88, judgment on 7th July 1989

[868]Ibidem, para. 87

with the underlying values of the Convention" and "would plainly be contrary to the spirit and intendment of the Article."[869]

It is especially important to mention that in this case the Court outlined that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".[870] Taking that into consideration, the Court noted that it is in the interest of all nations for suspected offenders who flee abroad to be brought to justice. Moreover, it expressed its concern that the establishment of safe havens for fugitives would result in danger for the State obliged to harbor the protected person, while effectively undermining the foundations of extradition.[871]

However, the Court also held that "the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention."[872] The Court was very clear in assessing that there that the only liability which could possibly be incurred is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.[873]

In other words, despite admitting that there are some very important state interests at stake, the Strasbourg judges held that the risk of breach of Article 3 ECHR trumps those interests and therefore has priority in the light of absolute nature of the right guaranteed by the aforementioned Article ECHR.

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[869]Ibidem, para. 88

[870]Ibidem, para. 89

[871]Ibidem.

[872]Ibidem, para. 91

[873]Ibidem.

The Court has confirmed this stance numerous times and made quite established case – law in this regard.[874]However, in the case of *Chahal v. The United Kingdom*[875], which also dealt with applicability of Article 3 ECHR in expulsion cases, the Strasbourg Court maintained that from its remarks concerning the risk of undermining the foundations of extradition, it should not be inferred that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining if a State's responsible under Article 3 ECHR.[876]

That is why in this case the European Court refused to consider the Government's allegations about the first applicant's terrorist activities and claims that he poses a threat to national security of The United Kingdom.[877] By doing this, it effectively declined to acknowledge the existence of any implied limitations to the rights envisaged in Article 3 ECHR.[878]

According to commentators, what can be concluded from this is that the limitation of positive obligations implied under this Article of Convention is what can be reasonably expected from the State authorities, taking into consideration the circumstances of the case in question.[879]Since right guaranteed under Article 3 ECHR is an absolute right, a simple proportionality test cannot justify an interference with it. The question which should be posed is if the authorities have provided a practical and effective protection of this right, i.e. have they taken reasonable steps in the specific circumstances to protect it when they had knowledge or ought to have had knowledge of its possible violation.[880]

Namely, as the Court recognized in its jurisprudence, when assessing the scope of positive obligations under ECHR, it is important not to impose an impossible or

[874] See, for example, *Cruz Varas and others v. Sweden* (application no.15576/89, judgment on20th March 1991), para. 69-70 and *Vilvarajah and Others v. the United Kingdom*(application nos.13163/87; 13164/87; 13165/87; 13447/87; 13448/87, judgment on30th October 1991), para. 103.

[875]*Chahal v. The United Kingdom*, application no. 22414/93, judgment on 15th November 1996

[876]Ibidem, para. 81

[877]Ibidem, para. 82

[878]Palmer S., 2006, 448

[879]Ibidem.

[880]Ibidem, 449

disproportionate burden on the State authorities. Therefore the State can be held responsible only if it has not acted with due diligence.[881]

4.2 POSITIVE OBLIGATIONS UNDER ARTICLE 3 ECHR

The negative obligation under Article 3 is the absolute duty to refrain from subjecting a person to torture or to inhuman treatment or punishment. In this way the ECHR is a mean of legal protection of individuals from direct abused of power by the State officials.[882]

In accordance with the "living instrument" doctrine of the ECHR interpretation, as well as interpreting the provisions of the Convention in a manner that makes its safeguards "practical and effective", it is no surprise that a number of positive obligations arose under Article 3 ECHR. The Member States have the obligation to take action to protect individuals from serious maltreatment which infringes the substantive prohibition of this Article,[883] irrespectively of the fact if this maltreatment has been perpetrated by state agents or the private individuals. This has been illustrated by the House of Lords of the United Kingdom in the case of *R.(on the application of Adam, Limbuela and Tesema) v. Secretary of State for the Home Department*[884]: "The fact that an act of positive nature is required to prevent the treatment from attaining the minimum level of severity which engages the prohibition does not alter the essential nature of the article… If the effect of what the state of the public authority is doing is to breach the prohibition in Article 3, it has no option but to refrain from the treatment which results in the breach. This may mean that it has to do something in order to bring that about".[885]

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[881]Ibidem.

[882]Palmer S., 2006, 440

[883]Mowbray A., 2004, 44

[884]*R.(on the application of Adam, Limbuela and Tesema) v. Secretary of State for the Home Department*, application on 21st May 2004, ruling on 3rd November 2005

[885]Ibidem, para. 47

In a similar fashion as when it comes to Article 2 ECHR, this obligation means that an adequate legal framework must be put in place. States are obliged to pass effective criminal laws in order to avert serious breaches of personal integrity.[886]Nevertheless, this positive obligation does not comprise of merely enacting and enforcing criminal law offences which protect the integrity of a person, but also of the Member State's obligation to take reasonable steps to prevent ill-treatment of vulnerable persons whenever the domestic authorities knew or ought to have known of it.[887] In this sense, it mirrors the States' obligation under Article 2 ECHR to take preventive operational measures in cases where there is knowledge that an individual's life is under immediate risk.[888]

The states are also obliged to provide acceptable conditions of detention as well as adequate medical treatment for detainees. As S. Palmer explains: "The issue of lack of foreseeability does not arise: when an individual is in the custody of the State, State authorities have a pre-existing and special responsibility for that individual's welfare".[889]

4.3 PROCEDURAL OBLIGATION UNDER ARTICLE 3 ECHR

Among the positive obligations, the one most relevant in context of this research is the duty to investigate allegations of serious ill-treatment by state agents. Namely this element of the positive obligations is a guarantee of the substantive element of prohibition of torture, inhuman treatment and punishment. It provides procedural safeguards against abuses by State authorities.[890]

[886]Palmer S., 2006, 440

[887] Mowbray A., 2004, 45

[888] Mowbray A., 2004, 46

[889] Palmer S., 2006, 450

[890]Palmer S., 2006, 440

4.3.1 The establishing of an effective investigation obligation – the case of Assenov and others v. Bulgaria

Aksoy v. Turkey[891] was the first case in which the Court explicitly[892]mentioned that "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention".[893] However, the precedent case when it comes to duty to investigate under Article 3 ECHR has been *Assenov and others v. Bulgaria*.[894] In this case the police arrested the first applicant, who was only 14 years old at the time, on suspicion of illegal gambling. He accused the police for hitting him with a toy pistol and with truncheons and pummeling in the stomach while he was in the detention. He also alleged that his mother was beaten with a truncheon.

After young Mr Assenov was released from the detention, his mother filed a complaint with the District Directorate of International Affairs. After a short investigation, they concluded that the perpetrator of the beatings was the boy's father, that the conduct of the police officers had been lawful and that they will therefore not be prosecuted. Her complaint to the Regional Military Prosecution Office ended in the same way. The General Military Prosecution Office also decided against instigating of a criminal prosecution of the police officers in question.

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[891]*Aksoy v. Turkey*, application no. 21987/93, judgment on 18th December 1996

[892]In the somewhat earlier case of *Tomasi v. France* (application no. 12850/87, judgment on 27th August 1992) in its assessment the Court did point out that "the Government acknowledged that they could give no explanation as to the cause of the injuries" (para. 109) which was one of the reasons why the Court concluded there has been a violation of substantive element of Article 3 ECHR. Moreover, in the case *Ribitsch v. Austria* (application no. 18896/91, judgment on 4th December 1995) the Court maintained since Mr Ribitsch's injuries were sustained during his detention in police custody, while he was entirely under the control of police officers, the Government were under an obligation to provide a plausible explanation of the manner in which those injuries were caused. Nevertheless, the Government only referred to the fact that the police officers have not been convicted in domestic criminal and offered an explanation that the applicant's injuries were resulted from his fall against a car door. The Court called this explanation unconvincing and insufficient (para. 34).

[893]*Aksoy v. Turkey,* application no. 21987/93, judgment on 18th December 1996, para 61

[894]*Assenov and others v. Bulgaria,* application no. 90/1997/874/1086, judgment on 28th October 1998

In his complaint, Assenov asserted that Article 3 ECHR had been breached on two separate grounds. First since, as he alleged, he had been severely beaten by police officers.

Secondly, he asked the Court to declare that "whenever there were reasonable grounds to believe that an act of torture or inhuman or degrading treatment or punishment had been committed, the failure of the competent domestic authorities to carry out a prompt and impartial investigation in itself constituted a violation of Article 3."[895]

This interpretation was rather wide and therefore narrowed down by the Court: "*where an individual raises an arguable claim that he has been ill-treated by the police or such agents of State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms in the Convention, requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity*."[896]

Although the applicant's allegations have been investigated by the State authorities, the Court was not persuaded that this investigation was sufficiently thorough and effective to meet the requirements of Article 3. The Court criticized the fact that the DDIA investigator concluded that Mr Assenov's father caused his injuries although there was no evidence that the force used by his father amounted to such force which would have been required to cause the bruising described in the medical certificate. Furthermore, the investigators failed to contact and question numerous witnesses in the immediate aftermath of the incident. Instead, they have taken a statement was taken from only one independent witness, who was unable to recall the events in question.[897] Subsequent examination of two further witnesses did not suffice to rectify the deficiencies in the investigation up to that point.

[895]Ibidem, para. 90

[896]Ibidem, para.102

[897]Ibidem, para. 103

The Court also pointed out numerous shortcomings both in the initial investigation carried out by the regional military prosecution office[898] and that of the general military prosecution office.[899]It describes it as "particularly striking" that the GMPO could conclude, without any evidence that Mr Assenov had not been compliant, and without any explanation as to the nature of the alleged disobedience, that "even if the blows were administered on the body of the juvenile, they occurred as a result of disobedience to police orders".[900]The Court was adamant that "*to make such an assumption runs contrary to the principle under Article 3 that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct is in principle an infringement of his rights.*"[901]

Taking all this into consideration, the Court found that there has been a violation of Article 3 of the Convention, since the investigation into the applicant's arguable claim that he had been beaten by police officers has not been thorough and effective.[902]

Mowbray commented how the judgment in the *Assenov* case is in many aspects similar to the Court's "earlier articulation of an analogous positive investigatory duty under Article 2 from *McCann* onwards".[903] The reasons for this view are as it follows: the duty to undertake an effective investigation is in both cases implied and based on a combination of the substantive ECHR right with the general duty under Article 1. Moreover, the Court established this obligation in order to ensure that state agents both respect and enforce the right to life and freedom for torture.[904]

[898]In further text: RMPO

[899]In further text: GMPO.

[900]*Assenov and others v. Bulgaria,* application no. 90/1997/874/1086, judgment on 28th October 1998, para. 104

[901]Ibidem.

[902]Ibidem, para. 106

[903]Mowbray A., 2004, 61

[904]Ibidem.

4.3.2 Confirming the Court's stand in SevtapVeznedaroğlu v. Turkey and Labita v. Italy

In the case of *Sevtap Veznedaroğlu v. Turkey*[905] the applicant, a research student in public law at Diyarbakır University and the wife of the provincial president of the Diyarbakır Human Rights Association, has been arrested on 4 July 1994, at about 3 p.m. at her home, on suspicion of membership of the PKK.

After being examined by a doctor, she was blindfolded and placed in a cell in an unknown destination. After a certain period of time, she was again blindfolded and taken to another room. There approximately 15 policemen interrogated her, accusing her of being associated to and working for the PKK abroad. They have stripped her down and hung by her arms. The policemen electroshocked her mouth and sexual organs. This lasted for about a half an hour. After she lost consciousness she was taken down and threatened with death and rape if she continues her human rights work. The torture and threats continued for four days. She was not given food during the first two days of her custody and afterwards she was only given a piece of bread and a few olives a day.

During her detention she signed documents stating that she sustained numerous injuries on her body by falling while indicating a place used by the PKK. She did so because the policemen threatened her with torture her and rape if she does not.

Reports about her bruises can be found in both the forensic examination dated on 13th of July 1994 and in a subsequent one from 15th of July 1994. On the latter date she was brought before the public prosecutor at the Diyarbakır State Security Court. She maintained before him that she was forced to sign the confession statement and was tortured while in detention and the public prosecutor recorded in the file that the she did not acknowledge the statement given to the police.

The applicant appeared before a substitute judge on the same day and she gave the same statement, alleging that she had been tortured and held under duress for many days and that the police had held her wrist and forced her to sign the police statement. She was

[905] *Sevtap Veznedaroğlu v. Turkey*, application no.32357/96, judgment on 11th April 2000

released from custody but charges of being a member of the PKK had been raised against her.

Three days after her release the Medical Faculty Hospital of Dicle University issued a certificate indicating that the applicant was suffering from bronchopneumonia and that she was therefore unable to work for 20 days. On 30 October 1995, the applicant was acquitted by the Diyarbakır State Security Court on the ground of lack of evidence.

In this case the Court confirmed its previous stand that, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in the Convention", requires by implication that there should be an effective official investigation capable of leading to the identification and punishment of those responsible. It provided the same reasoning for this stand - the prohibition of torture would become practically ineffective otherwise, and prone to violation by the State agents.[906]

Taking into consideration the applicant's numerous allegations before the public prosecutor and the substitute judge as well as the medical evidence in the file, the Court maintained this evidence should have been sufficient to alert the public prosecutor to the need to investigate the substance of the complaint, especially in view of her being held in custody between 4 July 1994 and 15 July 1994. However, neither the public prosecutor nor the substitute judge have taken any steps to obtain further details from the applicant. They also did not take any statements the police officers at her place of detention about the applicant's claims.[907]

The Court found that since the applicant had laid the basis of an arguable claim that she had been tortured and she did not revoke her allegations right up to the stage of trial, "the inertia displayed by the authorities in response to her allegations was inconsistent with the procedural obligation which devolves on them under Article 3 of the

[906]As for the breach of substantive aspect of Article 3, the Court found it impossible to establish beyond reasonable doubt if the applicant's injuries were caused by the police and if she was tortured to the extent she alleged. – Ibidem, para.30

[907]Ibidem, para. 34

Convention."[908]Consequently, the Court found that Turkey violated its positive duty under that Article to undertake an effective investigation.

The Court also found a violation of the duty to undertake an effective investigation in the *Labita v. Italy* case.[909] The applicant was arrested on 21 April 1992 as a suspected a member of a mafia-type organization in Alcamo. He was believed to be running a financial company on behalf of his brother-in-law, who was believed to be the leader of the main mafia gang in the area.

The applicant spent thirty-five days in isolation at Palermo Prison. Three months after the arrest he was transferred to the prison on the island of Pianosa. He has appealed several times and his appeals have been repeatedly dismissed. The charges were raised against him in October 1993. He was acquitted 13 months later and his release has been ordered. This decision has been confirmed in December 1995.

The applicant claimed that between July and September 1992 in Pianosa prison he had been subjected to numerous acts of violence, humiliation, and debasement, threats and other forms of torture, both physical and mental. His protests were in vain and caused repercussions. The applicant alleged that the government was undoubtedly aware of the incidents at Pianosa Prison and had tolerated them.

Since the applicant has failed to produce any conclusive evidence in support of his allegations of ill-treatment or to supply a detailed account of the abuse to which the warders allegedly subjected him, the medical documentation he submitted did not suffice to fill that gap. Moreover, he did not complain about his treatment until the preliminary hearing on 2 October 1993. Therefore, the Court considered that there was not sufficient evidence for it to conclude that there has been a violation of Article 3 of the Convention on account of the alleged ill-treatment. The same conclusion had been reached and for the same reasons about the conditions in which prisoners were transferred from Pianosa to other prisons possibly constituting a violation of Article 3.

When it comes to the procedural obligation under Article 3 ECHR, the Court maintained that the statements made by the applicant to the investigating judge at the hearing on 2 October 1993 and to the policemen on 5 January 1994 gave reasonable cause for

[908]Ibidem, para. 35

[909] *Labita v. Italy*, application no. 26772/95, judgment on 6th April 2000

suspecting that the applicant had been subjected to improper treatment in Pianosa Prison, especially since the media reported excessively about the conditions of detention at that prison during the period concerned. Also, other prisoners had complained of treatment similar to that described by the applicant.[910]

The Court repeated that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be an effective official investigation. It also maintained that "as with an investigation under Article 2, such investigation should be capable of leading to the identification and punishment of those responsible"[911], so that the general legal prohibition of torture and inhuman and degrading treatment and punishment remains effective in practice.

Despite the fact that certain investigations into the applicant's allegations ensued after the investigating judge had informed the relevant public prosecutor's office about the alleged ill-treatment and torture, the Court did not find that those investigations were sufficiently thorough and effective to satisfy the aforementioned requirements of Article 3.[912]

The Court considered that the investigation by the Livorno public prosecutor's office was very slow: after the police took the applicant's statements on 5 January 1994, it took them fourteen months to make him a further appointment in order to identify those responsible. Yet the file shows that the only action taken during that interval was the obtaining of photocopies (not prints) of photographs of the warders who had worked at Pianosa. It will be recalled that throughout that period the applicant remained a prisoner at Pianosa.

The Court described it as "particularly striking" that although the applicant repeatedly stated on 9 March 1995 that he would be able to recognize the warders in question if he could see them in person, the authorities did nothing to provide him with that opportunity. Moreover, just nine days later, the public prosecutor's office was granted an order to file away the case. It is particularly interesting that this was not done on the ground that there

[910]Ibidem, para. 130

[911]Ibidem, para. 131

[912]Ibidem, para. 132

was no basis to the allegations but with the explanation that those responsible had not been identified.[913]

The Court also took context in question, stating that "the inactivity of the Italian authorities is made even more regrettable by the fact that the applicant's complaint was not an isolated one. The existence of controversial practices by warders at Pianosa Prison had been publicly and energetically condemned even by authorities of the State."[914]

Finding that in this case there was a lack of a thorough and effective investigation into the credible allegation made by the applicant that he had been ill-treated by warders when detained at Pianosa Prison, the Court held that there has been a violation of Article 3 of the Convention.

4.3.3 The case in which the Court considered that a duty of effective investigation can be successfully asserted under Article 3 only in exceptional cases –Ilhan v. Turkey

It was only two months later that the Court passed an equally interesting judgment in the *Ilhan v. Turkey*[915]. Namely, in this case the applicant claimed that the gendarmes had beaten his brother, Abdüllatif Ilhan, with riffles and kicked him numerous times during his apprehension. They allegedly also doused him in the nearby river as a way of reviving him. The applicant also claimed that they failed to provide him the necessary medical treatment, although for his injuries have been life-threatening. In the respective context of this chapter most importantly, the applicant inter alia complained of a lack of effective remedy in respect of these matters.

On the other hand, the Turkish Government claimed that Abdüllatif Ilhan sustained injuries during a fall as he was trying to run away from the gendarmes. However, there

[913]Ibidem, para. 134

[914]Ibidem, para. 135

[915]*Ilhan v. Turkey*, application no. 22277/93, judgment on 27th June 2000

was not enough evidence to support its claim, while the testimonies of Ilhan and other alleged victims have been convincing and credible. In the incident report drawn up by the gendarmes it was stated that Abdüllatif İlhan had failed to stop when ordered and that had fallen down a slope, injuring his left eye and leg. Interestingly enough, this report bore among others the apparent signature of Abdüllatifİlhan. However, Ilhan was illiterate and unable to sign his name, which is why he generally placed his thumbprint on documents. This, and the fact that the report did not correspond to the events as described orally by the gendarmes is why it was subsequently characterized as unreliable and misleading.

After completing the operation at the village, the gendarmes took the men they arrested to the Konaklı station where the interrogation took place. From there, they all left to Mardin, where the applicant's brother and İbrahim Karahan were put in the cafeteria. A doctortook a look at AbdüllatifİlhanAbdüllatifİlhan without examining him and said that he was faking his condition. Subsequently, a doctor and a paramedic examined him and concluded that AbdüllatifİlhanAbdüllatifİlhan was exaggerating his symptoms. There is no proof that he has been treated in any way.

The interrogation continued and Abdüllatif İlhan's condition worsened. Around thirty-six hours after their apprehension, Abdüllatif İlhan and İbrahim Karahan were admitted for treatment at a hospital. His condition was found to be fair, though there was still risk to his life. The applicant took his brother to a clinic, where it was established that he had, *inter alia*, cerebral oedema and left hemiparesis. He was discharged from hospital on 11 January 1993. Six months later, a doctors' report stated that Ilhan was suffering from a 60% loss of function on the left side and scans showed an area of brain atrophy. However, the medical experts testified that the delayed treatment did not appreciably worsen the long-term effects of the head injury.

The public prosecutor had received information about injuries Abdüllatif İlhan sustained during his arrest. Gendarmes provided him with documents concerning this event. In a written report submitted to the public prosecutor it was stated that both AbdüllatifİlhanAbdüllatifİlhan and İbrahim Karahan had run away despite being warned they should stop, that they resisted the security forces and had fallen from the rocks while they were pushing the gendarmes. The public prosecutor had also spoken on the telephone with Şeref Çakmak and received oral explanations, *inter alia*, that İbrahim Karahan had in fact hidden without running away.

However, on 11 February 1993 the public prosecutor issued a decision not to prosecute. Despite not having interviewed Abdüllatif İlhan or İbrahim Karahan or any of the gendarmes involved he came to a conclusion that İlhan's injury was a result of an accident.

On the same day the public prosecutor pressed charges against İlhan with the offence of resistance to officers. In his statement before the Mardin Justice of the Peace Court he had admitted that had not stopped when ordered to and had therefore resisted an arrest. He was sentenced to a fine. The applicant on the other hand claimed that his brother, who spoke Kurdish, was not provided with an interpreter.

In this judgment the Court reiterated that finding of a procedural breach of Article 3 due to the inadequate investigation made by the authorities in the *Assenov and Others* judgment "had regard to the importance of ensuring that the fundamental prohibition against torture and inhuman and degrading treatment and punishment be effectively secured in the domestic system".[916] However, in *Ilhan* case, the Court had not been able to conclude whether the applicant's injuries had in fact been caused by the police as he alleged. This inability has at least partly been caused by the fact that authorities did not react effectively to the applicant's complaints at the relevant time.[917]

It is especially significant that the Strasbourg Court made a comparison between the obligation to provide an effective investigation into the death caused by, inter alios, the security forces of the State and the same obligation under Article 3 ECHR. Since Article 2 contains the phrase everyone's life shall be "protected by law", it may also include cases where the State must have the initiative since the victim is deceased and the circumstances of the death may be largely confined within the knowledge of State officials.[918]

The Court further noted that Article 3 is phrased in substantive terms. Since the practical requirements of the situation will often differ from cases of use of lethal force or suspicious deaths, it was the Court's view that "the requirement under Article 13 of the Convention that a person with an arguable claim of a violation of Article 3 be provided

[916]Ibidem, para. 89

[917]Ibidem, para. 90

[918]Ibidem, para. 91

with an effective remedy will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by State officials. The Court's case-law establishes that *the notion of effective remedy in this context includes the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill-treatment and permitting effective access for the complainant to the investigatory procedure*. Whether it is appropriate or necessary to find a procedural breach of Article 3 will therefore depend on the circumstances of the particular case."[919]

Since in the Ilhan case the Court has found that the applicant has suffered torture at the hands of the security forces, it considered that his complaints concerning the lack of any effective investigation by the authorities into the cause of his injuries fall to be dealt with under Article 13 of the Convention.[920]

A. Mowbray sees this judgment as a "potentially important retreat from Assenov, with applicants only being able to successfully assert a duty of effective investigation in exceptional cases."[921] The conclusion that can be drawn from this ruling is that the procedural obligation under Article 3 may be restricted to cases where the Court did not find a breach of substantive obligation under the said Article due to the lack of conclusive evidence. This conclusion could have been supported by the previous judgments we've analyzed.

Some other authors such as consider that establishing the procedural limb of Article 3 "has allowed the Court to condemn the states in a number of situations where otherwise no violation would have been accepted, because the author of such behavior could not be clearly identified with a state authority or agent. Therefore, as seen concerning Article 2 ECHR, given the essential nature and inderogability of the right complained of, the lack of an appropriate investigation into such behavior, either torture or ill-treatment, has been considered enough for the Court to condemn a respondent state."[922] In other words, they pointed out that the role of procedural obligation under this Article is somewhat

[919]Ibidem, para. 92

[920]Ibidem, para. 93

[921] Mowbray A., 2004, 63

[922] Salinas de Frias A., "Counter-terrorism and human rights in the case law of the European Court of Human Rights", Strasbourg, 2013, 48

subsidiary, almost saying that only in case there is not enough evidence that the substance of the right has been violated the Court will focus on examining if this duty has been complied with.

4.3.4 The case in which the Court found breaches of both substantive and procedural element of Article 3 ECHR - Satik and others v. Turkey

The conclusion about exceptional nature of duty to investigate under Article 3 ECHR has been debunked by the judgment in case *Satik and others v. Turkey*[923] which has been passed half a year after the judgment in *Ilhan* case.

In this case the applicants claimed that they were severely beaten by around 30 members of prison staff and approximately fifty gendarmes because they've refused to submit to a search procedure before being taken to court.[924]The attackers allegedly used truncheons and wooden planks. One of the applicants had one of his ribs broken and the liver of another one was damaged, while other applicants sustained injuries to their bodies.[925]The Government on the other hand claimed that more than twenty prisoners refused to be searched, linked themselves together, started going towards the prison exit and fell down the stairs on top of one and another. The injuries they've sustained were the consequence of that fall.[926]

The complaints against the assaulters have been made at the hearing before the İzmir State Security Court. The court postponed the proceedings and ordered a medical examination of the applicants. It also informed the Office of the İzmir Public Prosecutor. This office has also been informed about the incident on 20 July 1995 by the father of one of the applicants, Abdulkadir Eraslan. On the same day the public prosecutor requested a

[923]*Satik and others v. Turkey*, application no. 31866/96, judgment on 10th October 2000

[924]Ibidem, para. 3

[925]Ibidem, para. 13

[926]Ibidem, para. 14

statement from Abdulkadir Eraslan to be taken, a medical examination performed and both the statement and the medical report to be sent to him.

The İzmir public prosecutor went to the prison on 20 July 1995 and took statements from several of the victims, including eight of the ten applicants.[927] On the same day all the detainees have been examined by the prison doctor and the ones with serious injuries were taken to hospital.[928]

While some of the applicants gave the names of the warders involved in the incident, others gave their ranks or offered to identify those responsible for the assault. Abdülkadir Eraslan also stated that on the day of the incident he and other prisoners had been beaten by a number of warders and gendarmes with batons and wooden sticks. The beating followed prisoners' protests about being subjected to inhuman treatment.[929]

The public prosecutor questioned three prison officials on the same day as the prisoners. The questioned members of prison staff claimed that despite their numerous warnings the prisoners declined to submit to a search procedure. They also refused to be taken to court. When there was an attempt to lead them by the arms down the stairs of the prison, the prisoners formed a chain and subsequently crashed on the stairs. The injuries they've sustained are the result of them hitting the walls, the stairs and the iron railings. Several warders have also been injured in this incident.

According to the medical reports, all of the prisoners had been hit on the head and/or other parts of the body. However, the reports do not explain what caused these injuries. The hospital discharge report for one of the applicants indicated that he suffered "general body trauma as a result of battery",[930] which has been confirmed for this and another applicant in a medical report dated on 17 November 1995. Furthermore, a doctor from the Forensic Medicine Institute did a thorough examination of one of the applicants on 18 August 1995. As a result, he submitted a detailed reported to the Office of the Public

[927]Since two of the applicants had to be taken to hospital, their statements were taken on 14 August 1995. - Ibidem, para. 19

[928] Ibidem.
[929] Ibidem, para. 20 – 24

[930]Ibidem, para. 27

Prosecutor. In this report he stated that that applicant's body and face have been bruised, but those injuries were not life threatening.[931]

It was on 9 April 1996 when the public prosecutor decided not to prosecute the Director of Buca Prison and his staff for alleged ill-treatment of the prisoners. The complaint against this decision was rejected two months later.[932] Moreover, the Office of the İzmir Public Prosecutor considered it had no jurisdiction to pursue the investigation against the gendarmes, so the investigation file was transferred to the Administrative Council of İzmirin April 1996. However, the case file subsequently went astray after it was sent to the Divisional Gendarme Command at Buca Prison. It was 4 years later, in April 2000, that an inspector has been sent by the Ministry of the Interior to clarify this matter. Three gendarme officers have been prosecuted in connection with the missing case file. On 1 May 2000 the İzmir Administrative Council decided that no investigation should be opened against the gendarme officers responsible involved in the alleged incident on 20 July 1995.[933]

The Ministry of Justice requested information on the incident. On 29 July 1997 the İzmir Public Prosecutor wrote to the Ministry and gave the same explanation of how the incident occurred as the Government of Turkey subsequently submitted to the European Court of Human Rights.[934]

After assessing all the evidence and in the absence of a plausible explanation on the part of the authorities, the Court concluded that the applicants were beaten and injured by State agents as alleged. Therefore, it found a violation of Article 3 of the Convention in its substantive aspect.

When it comes to the alleged violation of the Article 3 under its substantive aspect, the Court considered that existence of the potential for violence in a prison setting cannot be ignored, nor the threat that disobedience on the part of inmates may become a bloodshed, which would require the prison authorities to enlist the help of the security forces. However, the Court was adamant that "when prison authorities have recourse to such

[931]Ibidem, para. 26 – 29

[932]Ibidem, para. 31

[933]Ibidem, para. 32

[934]Ibidem, para. 33

outside help to deal with an incident within the confines of the prison there should exist some form of independent monitoring of the action taken in order to ensure accountability for the force used including the issue of its proportionality."[935]

In the instant case, the Court criticized the public prosecutor's reply of 29 July 1997 to the Minister of Justice's inquiry as to what occurred at Buca Prison, since it was "entirely inconsistent" with his duties and functions at a time when an investigation was being conducted into the involvement of gendarme officers in the incident.[936]

Furthermore, the Court commented on the İzmir Administrative Council's May 2000 decision not to authorize the opening of a criminal investigation into the gendarmes' behaviour at Buca Prison at the time of the incident. Namely, since this decision was reached more than four years after the case file was transferred to the Council, during which time the case file disappeared after it was sent to gendarme officials at Buca Prison, the Court maintained that "the authorities' failure to secure the integrity of important case documents must be considered a most serious defect in the investigative process"[937] and it must cast doubt on the merits of the decision finally reached by the İzmir Administrative Council on 1 May 2000.

Moreover, the Court pointed out the administrative councils were made up of civil servants who acted under the Governor orders. At the same time, the Governor was the one responsible for the behavior of members of security forces. In addition to that, in the majority of the cases gendarmes were the ones undertaking the investigations which the administrative councils instigated. In other words, they were investigating actions and conduct of their colleagues with whom they have been hierarchically linked. That was the reason why the Strasbourg Court found that the decision to entrust the İzmir Administrative Council with an investigation of the gendarmes' responsibility for the injuries caused to the applicants at Buca Prison "must call into question the possibility of making any independent determination on what happened at the material time."[938]

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[935]Ibidem, para. 58

[936]Ibidem, para. 59

[937]Ibidem, para. 60

[938]Ibidem.

The Court maintained that there were some serious shortcomings in the investigation into the incident, which made it inadequate. Therefore, Turkey has failed to comply with its duty under Article 3 ECHR to initiate an investigation into an arguable claim that an individual has been seriously ill-treated at the hands of its agents, which investigation should be capable of leading to the identification and punishment of those responsible.[939]

What makes this case interesting is that it showed that the fact that the Court found a substantive violation of Article 3 ECHR does not in all cases exclude it finding there was a breach of procedural obligation under this Article as well.[940] Therefore the finding of a breach of procedural duty cannot be seen as a "consolation prize" in cases when a violation of the substantive limb of Article 3 ECHR has not been established, as it is sometimes declared in the legal commentary.

4.3.5 The cases in which THE Court did not deem it necessary to make a separate finding about the alleged violation of procedural obligation under Article 3 ECHR - Aydin v. Turkey, Denizci and others v. Cyprus and Anguelova v. Bulgaria

The Court's jurisprudence has been far from consistent in this respect. In a number of cases the Court reviewed the question if the State authorities have carried out an effective investigation under Articles 6 or 13 ECHR. One of the earliest cases where the Court took this approach was *Aydin v. Turkey*[941].

The applicant, Mrs Şükran Aydın, a Turkish citizen of Kurdish origin, claimed that in June 1993, when she was a 17-year-old, she and her parents were forcibly taken from their home by gendarmes. According to her, at the gendarmerie headquarters the gendarmes separated her from her family members and took her upstairs to what she

[939]Ibidem, para. 62

[940]Mowbray A., 2004, 63

[941]*Aydin v. Turkey*, application no. 57/1996/676/866, judgment on 25th September 1997

referred to as the "torture room". They took off her clothes, put her into a car tire and spun round and round, beat her and sprayed with cold water from high-pressure jets. She was subsequently blindfolded to and taken to an interrogation room where she was raped by an individual wearing military clothing. He left her in severe pain and covered in blood. Somewhat later, in the same room, several people beat her for around an hour. They also warned her not to report what happened.[942] She was subsequently released.[943] The Government denied that these events happened and pointed out several inconsistencies in her testimony about the alleged rape and beatings.[944]

In July 1993 the applicant, her father and her sister-in-law filed complaints to the public prosecutor about the treatment they all allegedly had been submitted to while in detention. The public prosecutor took their statements and sent them to at Derik State Hospital to be examined by medical expert Dr Deniz Akkuş.

In his report dated 8 July 1996, Dr Akkuş noted that the applicant's hymen was torn but could not date when has that happened due to his lack of qualification in this field. He noticed widespread bruising around the insides of her thighs but made no conclusions on the reason for the bruising.[945]

A day later the public prosecutor had the applicant additionally examined by a gynecologist. In the doctor's report, dated July 9th, it was only stated that defloration had occurred more than a week prior to her examination. The doctor failed to take any swab, he did not take the applicant's account of what had happened to her and did not comment if the results of the examination were consistent with that account. He also failed to comment on the bruising on her inner thighs.[946]In August 1993 the public prosecutor took a further statement from the applicant. He referred her to additional examination which

[942] Ibidem, para.20

[943] Ibidem, para.22

[944] Ibidem, para.21-22

[945]In separate reports he noted that there were wounds on the bodies of the applicant's father and sister-in-law. – Ibidem, para. 24

[946] Ibidem, para. 25

confirmed earlier findings that the hymen had been torn but that after seven to ten days defloration could not be accurately dated.[947]

On 13 July 1993 the public prosecutor wrote to Derik gendarmerie headquarters asking for information if the applicant and her relatives had been held in custody there and, if so, to be sent a list with dates and duration of the detention and the names of those who carried out the interrogations. Only a day later the commander of the gendarmerie headquarters replied that they had not been taken into custody. On 21 July 1993, he submitted to the public prosecutor a copy of the entries for 1993 which contained only six entries for that year. A subsequently sent custody register for the months June-July 1993 contained no entries.[948]

The public prosecutor also sent the applicant's file to the Forensic Medicine Institute in Ankara and in December 1993 the applicant has been invited to attend for an examination. Also, in period from January to April 1994 he repeatedly asked the applicant, her father and her sister-in-law to be brought to the office of the Attorney-General but has received no reply.

In his report dated 13 May 1994 the public prosecutor informed the office of the Attorney-General that he found no evidence to support the applicant's claims but that the investigation continued. Five day later he took two further statements from the applicant's father. He repeated what he stated earlier of the events of 29 June 1993 and also declared that the applicant and her husband had left the district in March 1994 to find work elsewhere. He claimed he did have any knowledge of their whereabouts.[949]

In May of the same year the public prosecutor interviewed a former PKK activist who claimed that the applicant's home has been used as a PKK members' shelter around April and May 1993 and that the applicant has been sexually intimate with two PKK members.[950] In May 1995, after the Commission declared the applicant's complaint admissible, the public prosecutor took a statement from a man who has been Derik gendarmerie headquarters commander from 1992 to 1994. He claimed to have suffered a

[947] Ibidem, para. 26

[948] Ibidem, para 27-28

[949]Ibidem, para. 30-32

[950]Ibidem, para. 33

memory loss as a result of a road accident and denied having recollection of any incident of rape or torture at the time in question. He also stated he has not been involved in such an incident.[951]

The applicant on the other hand claimed that she and her family have been intimidated and harassed after the Commission of her application informed the Government about her application.[952] She claimed, inter alia, that she was made to sign a statement of the contents of which she is ignorant. Her husband was taken into custody two times in December 1995. On the first occasion, three police officers slapped, kicked and severely beat him with truncheons, breaking one of his teeth. Second time he was in custody, same men have severely beaten him again.[953] In 16 January 1996, the applicant, her husband, father and father-in-law were called to Derik police station from where they were sent to the public prosecutor who questioned them. They found that to be intimidating, together with the police calling their home very often. The applicant also stated that her father-in-law's house has been stoned and his neighbors claimed this was done by the security forces.[954]

The Government on the other hand claimed that both police and the public prosecutor behaved in accordance with the provisions of Turkish criminal procedure. They have acted with the sole purpose of investigating the facts of the allegations and assembling the evidence and have not intimidated or harassed the applicant or her family members in any way. The Government also submitted a letter from the Ministry of the Interior (Gendarmerie Department) stating that no search took place at the applicant's house.[955]

This case was also interesting because the Commission explained that it had reached its conclusions on the basis of a meticulous assessment of the evidence by applying the evidentiary test enunciated by the Court in the case of Ireland v. the United Kingdom for finding a violation of Article 3 of the Convention, namely whether the evidence proved

[951]Ibidem, para. 34

[952]While the police and public prosecutor repeatedly asked her father about her address, she and her husband were called to the police station numerous times for no apparent reason, their house had been searched three times in 2 months of 1995 and they were questioned about her application to the Commission. – Ibidem, para. 35

[953] Ibidem.

[954] Ibidem, para. 36

[955] Ibidem, para. 37

the applicant's claims beyond reasonable doubt.[956] On the basis of "strong, clear and concordant evidence"[957] the Commission concluded that the applicant had in fact been detained over the relevant period and while in detention raped and ill-treated. The Court accepted its assessment.

The Strasbourg Court pointed out, inter alia, that "rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim."[958] We argue that this assessment can be applied to every case of ill-treatment, degrading treatment or torture perpetrated by state agents. It is the nature of their position, the power they yield over the citizens and the weakened state and heightened vulnerability of victims that makes their actions even more horrifying and even less acceptable.

Based on everything the applicant went through during her detention, the Court found that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention.[959]

However, regarding the applicant's contention that the failure of the authorities to carry out an effective investigation into her treatment while in custody constituted a separate violation of Article 3 the Court considered that it would be appropriate to examine this complaint in the context of her complaints under Articles 6 and 13 of the Convention.[960] This is especially interesting since the Court finding a breach of substantive aspect of Article 3 ECHR can in our view amount to existence of an "arguable claim" of ill-treatment which should invoke the procedural obligation under the same Article.

[956]Ibidem, para. 63

[957]Ibidem.

[958]Ibidem, para. 83

[959]Ibidem, para. 86

[960]Ibidem, para. 88

This was further illustrated in the *Denizci and others v. Cyprus*[961] case. Seven applicants claimed that Cypriot police officers arrested them between 4 and 22 April 1994, took them to the police station and ill-treated. They claimed that the police officers had beaten them with hands, sticks and clubs. Some applicants claimed they have been slapped as well while other alleged that the police officers stamped on their feet of some applicants and hit them with an electric baton and a pistol butt. After being forced to sign statements saying that they were leaving for the northern part of Cyprus of their own free will, they were expelled to Northern Cyprus. They claimed that the police officers threatened them by death if they returned to the south. When certain applicants did return to the south some time later, the police forced them to give statements to the effect that they had been ill-treated by the authorities of the "Turkish Republic of Northern Cyprus"[962]. According to these statements, they were forced by TRNC authorities to sign application forms to the Commission. When one of the applicants' son returned to south in June 1994 he was shot and killed. The perpetrators remained unknown.

Based on the medical and other evidence, the Court was satisfied that there has been a violation of substantive element of Article 3 ECHR, since the police officers had intentionally subjected them to ill-treatment serious enough to be considered inhuman in respect of each applicant.[963]

What makes this case especially interesting is that not only the Court did not deem it necessary to make a separate finding under Article 3 of the Convention in respect of the alleged lack of an effective investigation[964] but also offered no explanation as to why it decided not to examine the complaint in that respect. This approach is in legal theory seen as "inexplicable" even more so because the Court did not examine if there was an effective domestic inquiry as required by Article 13 ECHR.[965]

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[961] *Denizci and others v. Cyprus*, application nos. 25316-25321/94 and 27207/95, judgment on 23rd May 2001

[962] In further text: the "TRNC".

[963] *Denizci and others v. Cyprus*, application nos. 25316-25321/94 and 27207/95, judgment on 23rd May 2001, para. 384-387

[964] Ibidem, para. 388

[965] Mowbray A., 2004, 64

A very similar thing occurred in the already mentioned case of *Anguelova v. Bulgaria*.[966] In this instance, the Court did not examine if there has been an effective investigation under Article 3 with the explanation that it had inspected that issue under Article 2.[967]

4.4 CONCLUSION

The Court's practice in this regard has been somewhat inconsistent. While it has consistently recognized an implied positive obligation to conduct an effective investigation into credible claims that state officials seriously ill-treated the applicant or applicants, the Court's application of this obligation has been characterized as "problematic".[968]

It is not quite clear under which circumstances the Court will examine domestic investigation under Article 3 and under which conditions it will consider its analysis falls under Article 13 ECHR, or some of the other Articles of the same Convention we've referred to.

The European Court's jurisprudence is equally inconsistent when it comes to decisions in cases when the applicant complains of violations of both substantive and procedural elements of Article 3 ECHR. While in some cases the Court seems to have taken a stand that procedural limb of this Article is of an exceptional nature and its breach can be assessed only in cases when the violation of the substantive limb cannot be established beyond reasonable doubt, we have showcased that in the *Ilhan* case the Court found that both violations exist simultaneously.

These uncertainties and inconsistencies in the Court practice are reason why Mowbray considers that "the effective investigation obligation under Article 3 ECHR is less well-developed and more uncertain in its application at Strasbourg Court than the

[966] *Anguelova v. Bulgaria*, application no. 38361/97, judgment on 13th June 2002

[967] Ibidem, para. 150

[968] Mowbray A., 2004, 64

corresponding obligation created vie Article 2."[969] We can agree with this view. Namely, there is not such an abundance of the case-law compared to the duty to conduct an effective investigation if the right to life has been violated and the existing case-law does not contain as many breakthroughs. Moreover, it lacks consistency and clear rules when the obligation ensues, under which conditions and which are the detailed requirements fulfillment of which the Court has to assess in order to establish if the procedural obligation in question has been breached.

In our view, as we will explain in more detail in the next chapter, in the respect of criteria against which the effectiveness of the investigation will be examined, analogy with the ones established in case-law concerning the same duty under Article 2 ECHR could and should be used. Also, the Court is to further develop this obligation and make its application easier and its rules more clear. That will result both in an increase in legal certainty and in a greater number of people obtaining more well-rounded protection of one of the most fundamental human rights, which belongs to the ius cogens and is guaranteed to everyone without exception and limitations.

[969] Ibidem.

5 CHAPTER 4 - CONCLUSION

5.1 ABOUT THE JUDICIAL CREATIVITY OF THE STRASBOURG COURT IN THE DOMAIN OF POSITIVE OBLIGATIONS IN GENERAL AND THE IMPACT IT HAD

Development of positive obligations in the European Court's case law has been one of the most important achievements in providing a fuller and all-round protection of human rights. It showcased the creativity of the Strasbourg judges in rising up to the challenge developing the Court's practice in a way that fully reflects the evolving and ever higher present-day human rights standards, while at the same time being mindful of the Court's subsidiary role in European human rights protection system[970] as well as the necessity to allow the Contracting State a certain margin of appreciation in this respect.[971] This is why it is hard to disagree with L. Urbaite's assessment that "judicial activism of the Court resulted in procedural and substantive development of the Convention rights. The doctrine of positive obligations is a sphere where the greatest progress might be observed."[972]

The ECHR has been seen by the Strasbourg judges as an object of interpretation that is developing and evolving in accordance with present day conditions and a gradual change of human rights standards which are broadly accepted in the Contracting States. Simultaneously, the effectiveness principle has an important role in development,

[970] As S. Greer explains: "The twin principles of subsidiarity and review indicate that the role of the Court is subsidiary to that of the member states and is limited to considering Convention-compliance rather than acting as final court of appeal of fourth instance." - Greer S., 2003, 409

[971] It is easy to conclude that there is a close connection between the issue of margin of appreciation and the competence of the Court to review Member States' action. Namely, the Court has the competence to judicially review only such actions which do not fall within the margin of appreciation, and vice versa. - Klatt M., 2011, 714

[972] Urbaite L., 2011, 212

content[973] and assessment of positive obligations. This is because, firstly, hey resulted from the 'practical and effective' method of interpretation. Moreover, in words of D. Xenos, "in all circumstances, positive obligations are evaluated by the standard of effectiveness that provides an objective base to determine both the general and the more specific content of positive obligations in whichever level and stage are examined. This standard serves to set the minimum level of protection that can reasonably be required under the circumstances in view of the limited availability of the state's resources."[974]

At the same time, when creating positive obligations the Court was aware of the necessity of efficiently balancing different interests at stake, which is why its interpretation of the scope of positive obligations remained as narrow as possible. Due regard was taken to observing the proportionality principle in this regard as well. However, at times this proved to be a challenging task. Some critics have expressed their dissatisfaction with the development of the Court's case law in this regard, since they consider that the interpretation of positive obligations has become too extensive.[975] In their view, this trend can be worrisome because, to quote, "positive obligations present one of the biggest opportunities ever. As with other worthwhile projects in the past, the opportunity of positive obligations can be lost through a trivial and ever-available use. In the current crucial juncture of development of positive obligations, the main challenge is to prove scientifically that the open-ended scope of positive obligations can be legally managed and controlled."[976] In order for positive obligations to be effective, it is therefore necessary to develop two types of expertise: legal, in order to manage their open-ended scope and technical, with the task of securing the distinctive nature of positive obligations.[977]

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[973] X. Denos holds that it is the standard of effectiveness that guides both the general and detailed content of positive obligations. Furthermore, if this standard has been complied with is assessed against the aim of prevention of human rights violations that constitutes the practical meaning of the active protection of human rights. - Xenos D., 2012, 207

[974]Ibidem, 141

[975]D. Xenos, for example, very harshly concludes that" due to a fashionable excitement or deliberate choice, positive obligations are often used as a buzzword for every measure of compliance with human rights standards", which in his view leads gradually to their dilution. -Xenos D., 2012, 205

[976]Ibidem,2012, 214

[977]Ibidem, 205

In that context, great emphasis in the legal commentary has been put on the necessity to establish a proper legal framework at the national level. Authors such as C. de Than consider that "positive obligations have created unavoidable duties to uphold victims' rights. They may be patchy, underdeveloped and unclear as to their extent because so many of the cases that have dealt with positive obligations have in fact been decided on other reasoning or are technical victories only, but the concept has great potential as an argument in many aspects of criminal justice. Arguably the focus should be upon the consolidation of these existing rights so that they apply throughout criminal law and justice rather than only when a victim of crime happens to be able to argue his right."[978]

The nature of some positive duties is preventive. Others refer to providing proper information and establishing a range of institutions of providing advice and remedy to the victims of human rights violations. The Contracting States are also obliged to provide an effective remedy in case that a breach of a human right envisaged in the ECHR occurs.

It is also important to mention that despite the constant development of positive obligations doctrine through its case law, the Court has not always made clear distinctions between the positive and negative obligations of the States. At times it even stated that the principles which are being applied are fairly similar and that the boundaries between the two cannot be precisely defined. Although this is a valid argument, it is our view that the Court ought to make its practice in this respect more clear-cut in order to further the advancement of the positive duties doctrine under the Convention.

The legal theorists, on the other hand, have established a number of criteria for differentiation of positive and negative obligation. These criteria are based on the different requirements on the State (not to interfere with a right or to actively protect it), their legal foundation and justification as well as the application of proportionality principle.

The focus on this research has been on the rights guaranteed by the ECHR. This is no coincidence. The ECHR system of protection of human rights has proven to be highly effective, with the judges displaying an impressive degree of innovation and creativity but at the same time exercising caution and respect for the Contracting States' sovereignty.

[978] De Than C., 2003, 182

This model has proven to be very successful which is why it was an inspiration for shaping other regional human rights protection systems.

5.2 POSITIVE OBLIGATIONS OF THE LAW ENFORCEMENT OFFICIALS UNDER ARTICLES 2 AND 3 ECHR

The importance of reviewing positive obligations of Contracting States under Articles 2 and 3 ECHR is hardly disputable. These two ECHR Articles contain rights which are in the opinion of a great majority of experts among the most important ones – the right to life, which can be characterized as a pre-requirement for enjoyment of all the other rights and the prohibition of torture, inhuman or degrading treatment which is an absolute right considered to be iuscogens.

It is the State's agents whose role is to respect and protect human rights, so the cases in which they are the perpetrators of their breaches should be thoroughly examined. This even more so if we take into consideration that States very often have incentives to "cover up" in such instances in order to protect their officials, their reputation or to simply avoid the negative publicity and paying retribution to the victims of said violations. For these reasons, the role of the European Court of Human Rights is even more important, as its impact on the national courts and law enforcement institutions, as well as legislative organs has been significant and profound.

5.2.1 The legal standard of "absolutely necessary force" in the context of Article 2 ECHR

In this context, it is quite important to analyze the Strasbourg Court's case law in order to assess the meaning of use of "absolutely necessary" force as a legal standard used in the ECHR, as well as to showcase the application of principle of proportionality when it comes to the positive obligations arising under these ECHR Articles. This was what this research set out to do.

When it comes to the circumstances in which the taking of life by a public authority might be permitted, even in the early case-law of both the European Commission and the Strasbourg Court it was outlined that they must be limited, exhaustive and narrowly interpreted.

5.2.2 The definition of the term "absolutely necessary" in the Strasbourg Court's case-law

When assessing the meaning of the term "absolutely necessary", in the late 1970s[979] and early 1980s[980] the Commission first established that this term is synonymous with "indispensable"[981] and the Court subsequently clarified that the term "necessary" implies the pressing social need in the context of paragraphs 2 of Articles 10 and 8 ECHR. The European Commission's view in the *Stewart v. The United Kingdom* case was that the word "necessary" in Article 2 paragraph 2 by the adverb "absolutely" points to the

[979] See: *Handyside v. the United Kingdom*, application no. 5493/72, judgment on 7th December 1976

[980] See: *The Sunday Times v. the United Kingdom*, application no. 6538/74, judgment on 26th April 1979 and *Dudgeon v. the United Kingdom*, application no. 7525/76, judgment on 22nd October 1981

[981] *Handyside v. the United Kingdom*, application no. 5493/72, judgment on 7th December 1976, para. 16

application of a stricter and a more compelling test of necessity.[982] This has been confirmed by the European Court in the case *McCann and others v. United Kingdom*[983].

In the same case, the Strasbourg judges compared the standard ”reasonably justifiable" force contained in the Gibraltar Constitution with the term "absolutely necessary" used in Article 2 ECHR. It concluded that the substance of right to life has been indeed protected in the national law, but it also established that “absolutely necessary force” implies a stricter and more compelling necessity than “reasonably justifiable use of force”. Again, in order for absolutely necessary force to exist it has to be reasonably justifiable, but not vice versa.

One of the simplest definitions of this legal standard has been given by the Judge Jungwiert who stated that the concept of “absolutely necessary” must be understood as meaning that there is no other possible course of action.[984]

5.2.3 Proportionality and legitimacy of the aim pursued as elements of the legal standard “absolutely necessary force”

The case of *The Sunday Times*[985]was pivotal since in this case the link between the necessity and proportionality was instituted. The Commission simply stated that “the test of necessity includes an assessment as to whether the interference with the Convention right was proportionate to the legitimate aim pursued”.[986]We could even argue that proportionality of the interference with the human right in question is condition sine qua non for it being absolutely necessary. At the same time, from this formulation, we can

[982]*Stewart v. The United Kingdom*, application no. 10044/82, decision on 10th July 1984, para.18

[983]*McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995

[984]*Partly concurring, partly dissenting opinion of judge Jungwiert*in case of Andronicou and Constantinou v. Cyprus, application No. 25052/94, judgment on 9th October 1997

[985]*The Sunday Times v. the United Kingdom*, application no. 6538/74, judgment on 26th April 1979

[986]Ibidem, para. 62

conclude that it is one of the conditions for the "absolutely necessary" force to exist - such a condition that is necessary, albeit not sufficient.

The case *Stewart v. the United Kingdom* was important for other reasons as well. Namely, in this case Commission expressly outlined the criteria which are to be used when assessing if the force used has been proportionate. The Court was to consider three main things: the nature of the aim pursued, the dangers to life and limb inherent in the situation and the degree of risk that the force employed may result in the loss of life.[987] In other words, its role is to thoroughly and impartially analyze the situation the law enforcement officers have been confronted with, the degree of force they have employed and the risk that it would result in the deprivation of life.[988] These criteria have been used in the subsequent case-law, good example of which was the case *Wolfgram v. Germany*.

Moreover, in the Northern Ireland cases the Court took into consideration the loss of a significant number of lives due to a continuous public disturbance and frequent rioting. It has also shown understanding for the complex security situation in Chechnya at the relevant time. While it did accept that it called for exceptional measures by the State, at the same time it clearly stated the necessity to achieve a balance between the aim pursued and the means employed to achieve it.[989] Basically, the Court assessed that the existence of an extraordinary situation in terms of safety does not allow the State to disrupt the balance of interests and rights of all the parties concerned.

In the *McCann* judgment, the Court emphasized that the force used must be "strictly proportionate" to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2.[990] That is numerus clausus of legitimate aims for use of lethal force which are contained in the ECHR. At the same time, in *Güleç v. Turkey*[991] the Court again held that a balance must be struck between the aim pursued and the means employed to achieve it."[992]

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[987]Ibidem, para.19

[988]Ibidem, para. 26

[989]*Isayeva v. Russia*, application no. 57950/00, judgment on 24th February 2005, para. 181

[990]Ibidem, para. 149

[991]*Güleç v. Turkey*, application no. 54/1997/838/1044, judgment on 27th July 1998

[992]*Güleç v. Turkey*, application no. 54/1997/838/1044, judgment on 27th July 1998, para. 71

What we can deduct after examining the case-law in this respect is that different factors have been taken into consideration when assessing if the force used has been absolutely necessary.

As for the nature of the aim pursued, in accordance with the second paragraph of Article 2 ECHR the use of lethal force is allowed when the force is absolutely necessary in defense of any person from unlawful violence, in order to effect a lawful arrest or to prevent the escape of a person lawfully detained and in action lawfully taken for the purpose of quelling a riot or insurrection.

Under the term "the unlawful violence" the Court has subsumed violence on a larger scale such as terrorist attack,[993] violent demonstrations,[994] as well as smaller-scale individual criminal acts such robbery (both intended[995] and performed[996]), kidnapping,[997] escaping from a military prison[998] and many others.

The use of force in order to effect a lawful arrest was in many cases interlinked with defending someone from unlawful violence. In this context, the Court took into consideration if the person in stake followed the police instructions[999] and did he or she resist arrest[1000]or not. It also examined if the person was armed[1001] and posed a threat to the ones performing arrest. As the Court pointed out in the famous *Nachova and Others v. Bulgaria* case, there can be no absolute necessity 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

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[993]See: *McCann and others v. the United Kingdom*, application No.18984/91, judgment on 27th September 1995

[994]See: *Güleç v. Turkey*, application no. 54/1997/838/1044, judgment on 27th July 1998

[995] See: *Wolfgram v. Germany*, application no. 11254/84, Commission's decision on 6th October 1986

[996]*Ramsahai and Others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007)

[997]See: *Andronicou and Constantinou v. Cyprus*, application No. 25052/94, judgment on 9th October 1997

[998]*Nachova and Others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005

[999]*Bubbins v. the United Kingdom*, application no. 50196/99, judgment on 17th March 2005, para. 28-19

[1000] See:*Wolfgram v. Germany*, application no. 11254/84, Commission's decision on 6th October 1986

[1001]*Nachova and Others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005, para. 106

offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.[1002]

When it comes to the legal terms contained in the same paragraph, it is undisputed that their implied content and interpretation vary in Contracting States. However, these concepts have their autonomy. This means that the European Court of Human Rights (as well as the European Commission before it was abolished) can give its own interpretation of these terms. For example, in the *Stewart v. The United Kingdom* case the Commission found that 150 people gathered and throwing missiles at a soldier patrol to the point they risked serious injury undoubtedly constitute a riot.[1003] The number of people gathered, their violent behavior and danger they present to both civilians and law enforcement officials has obviously been taken into consideration.

The power of the weapon used has been assessed in each case as well. In *Isayeva v. Russia*[1004] the Court criticized the indiscriminate use of bombs and other non-guided heavy combat weapons and reminded that the primary aim of the operation should be protection of lives from unlawful violence. The Strasbourg judges pointed out that such massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.[1005]

Additional criterion which has repeatedly been used has been the number of casualties in proportion to the number of bullets fired. So in the case of *Stewart v. The United Kingdom* the Commission compared the number of casualties with the number of fired baton rounds in order to assess how dangerous was the weapon used.[1006] In *Andronicou and Constantinou v. Cyprus*[1007]it was pointed out that only two of the security officers' bullets actually struck the hostage. Despite them unfortunately proving to be fatal, the

[1002]*Nachova and Others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005, para.95

[1003]*Wolfgram v. Germany*, application no. 11254/84, Commission's decision on 6th October 1986, para. 25

[1004]*Isayeva v. Russia*, application no. 57950/00, judgment on 24th February 2005

[1005]*Isayeva v. Russia*, application no. 57950/00, judgment on 24th February 2005, para. 191

[1006]*Wolfgram v. Germany*, application no. 11254/84, Commission's decision on 6th October 1986, para. 28

[1007]*Andronicou and Constantinou v. Cyprus*, application no. 25052/94, judgment on 9th October 1997, para.192

number of bullets that hit her in comparison to a large number of bullets fired (despite the fact the accuracy of the officers' fire was impaired through Lefteris' clinging on to her) was seen as a sign of the security officers' high regard and intention and conscious effort to preserve her life.[1008] On the other hand, in *Isayeva, Yusupova and Bazayeva v. Russia*[1009] it was held that the pilots used extremely powerful weapons, placing everyone on the road in that time in mortal danger. Namely, during the several-hours-long attacks from air twelve S-24 non-guided air-to-ground missiles were fired.[1010] As a consequence, there were several explosions on a relatively short stretch of the road filled with vehicles, which resulted in a very high number of victims. The Court found that to be one of the factors taken into consideration when establishing a breach of right to life under ECHR.

When it comes to the dangers to life and limb inherent in the situation, the Court did not have regard only to the factual dangers, but also considered the ones which were perceived as valid by law enforcement officials based on the information they've received from their superiors or obtained in a different way. The Court therefore concluded that "the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken" since "to hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others."[1011]

This is why, for example, the Court did not find that the force used by the soldiers in the *McCann* case was disproportionate to the aim of protecting persons against unlawful violence, despite finding a breach of Article 2 paragraph 2 ECHR on different grounds. The same reasoning was given in *Andronicou and Constantinou v. Cyprus*[1012] where the Court found no violation of right to life since the officers honestly believed in the

[1008]Ibidem.

[1009]*Isayeva, Yusupova and Bazayeva v. Russia*, application nos. 57947/00, 57948/00 and 57949/00, judgment on 24th February 2005

[1010]Ibidem, para. 194 – 195

[1011]*Mc Can and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 200

[1012]*Andronicou and Constantinou v. Cyprus*, application No. 25052/94, judgment on 9th October 1997

circumstances that it was necessary to kill Lefteris Andronicouin order to save the life of Elsie Constantinou and their own lives and to fire at him repeatedly in order to remove any risk that he might reach for a weapon, i.e. to effect a lawful arrest within the meaning of the same Article and paragraph.[1013] In the recent Court practice, the case of *Huohvanainen v. Finland*[1014] the Court pointed out numerous reasons why the police officers evaluation of situation was more relevant than the Court's subsequent one.[1015] Generally, this was done in order not to put an additional burden the law enforcement officials whose assessment of the situation has been considered valid in the circumstances.

The Court reached the opposite conclusion in the case of *Gül v. Turkey*.[1016] In this case it found that the firing of at least 50-55 shots at the door was not justified by any reasonable belief of the officers that their lives were at risk from the occupants of the flat, nor by any consideration of the need to secure entry to the flat as it placed in danger the lives of anyone in close proximity to the door.[1017] Taking into consideration that Mehmet Gül lived in his flat with his family, including children, the Court held that the force used was grossly disproportionate and cannot be regarded as "absolutely necessary" for the purpose of defending life.[1018]

In the case of *Andronicou and Constantinou v. Cyprus*[1019] the Court also reminded that officers were forced to take split-second decisions to avert the real and immediate danger for them and others. Their decision to use lethal force under such circumstances was well-founded and based on an honest belief of its necessity.[1020] The Strasbourg judges found it unacceptable to replace the officers' evaluation of the situation in which they are to save

[1013] *Andronicou and Constantinou v. Cyprus*, application No. 25052/94, judgment on 9th October 1997, para. 192

[1014] *Huohvanainen v. Finland*, application no. 57389/00, judgment on 13th March 2007

[1015] *Huohvanainen v. Finland*, application no. 57389/00, judgment on 13th March 2007, para. 97

[1016] *Gül v. Turkey*, application no. 22676/93, judgment on 14th December 2000

[1017] *Gül v. Turkey*, application no. 22676/93, judgment on 14th December 2000, para. 82

[1018] It is interesting that the Court itself stressed that no comparison can be made with the *Andronicou* case, where there was a shooting at the man in his flat, but a man who had a hostage, was known to possess a gun and fired twice, both at the Special Forces' officers and at the hostage. – Ibidem.

[1019] *Andronicou and Constantinou v. Cyprus*, application No. 25052/94, judgment on 9th October 1997

[1020] Ibidem, para. 192

life and to react as promptly and efficiently as possible with the Court's detached reflection. This view has been restated numerous times.[1021]

In this context, in the famous case of *Ramsahai and Others v. the Netherlands*[1022]the Court concluded that the incidental use of lethal force in an operation mounted in pursuit of one of the said aims does not violate Article 2 of the Convention if the assessment that a threat to life exists actually turns out to be correct".[1023]

In this context, it is also important to point out that the Court considered that provisions of Article 2 paragraph 2 cannot be applied only to cases of intentional killing since "this provision extends to, but is not concerned exclusively with, intentional killing.[1024] Both the Commission and the Court agreed that the text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life.[1025]

Nevertheless, the Court did not always deem it necessary to assess if the killing was intentional. In *Gül v. Turkey*[1026], the Court held it "does not find it necessary to determine whether the police officers had formulated the intention of killing or acted with reckless disregard for the life of the person behind the door", but is satisfied that the police officers used a disproportionate degree of force in the circumstances.[1027]

It is also important to point out that when assessing the evidence in cases when the Court is to establish if the force used was "absolutely necessary" the repeatedly demanded the standard of *proof "beyond reasonable doubt"* to be complied with. It has held that "such

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[1021] See, for example: *Bubbins v. the United Kingdom*, application no. 50196/99, judgment on 17th March 2005

[1022]*Ramsahai and Others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007)

[1023]Ibidem, para. 382

[1024]*Stewart v. The United Kingdom*, application no.10044/82, decision on 10th July 1984, para. 14 – 15

[1025]*McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 148

[1026]*Gül v. Turkey*, application no. 22676/93, judgment on 14th December 2000

[1027]Ibidem, para.80

proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.[1028]

The burden of proof lies on the applicant or applicants. However, in cases "where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation".[1029]

An additional situation in which the burden of proof shifts is in such cases where the applicant makes out a *prima facie* case and the Court is not presented with the necessary documents. Namely, the Government is then to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred. The burden of proof is thus shifted to the Government and in case they fail in their arguments, issues will arise under Article 2 and/or Article 3.[1030]

Another interesting question the Court was to answer was if a physical ill-treatment by State officials which does not result in death may disclose a breach of Article 2 of the Convention. The answer from the Court was: yes, but only in exceptional circumstances, since in the majority of cases the Court will examine such complaints under Article 3 ECHR.[1031] The condition for such case to fall under scope of Article 2 ECHR is that "the degree and type of force used and the unequivocal intention or aim behind the use of force may, among other factors, be relevant in assessing whether in a particular case the State agents' actions in inflicting injury short of death must be regarded as incompatible with the object and purpose of Article 2 of the Convention."[1032] In the context of aim for use the force, the distinction was made between cases which are to be examined under Article 2 ECHR and those which fall under the scope of Article 3: for Article 3 to be

[1028] *Avşar v. Turkey*, application no. 25657/94, judgment on 10th July 2001, para.282

[1029] *Anguelova v. Bulgaria*, application no. 38361/97, judgment on 13th June 2002, para.111

[1030] *Bitiyeva and X v. Russia*, application nos. 57953/00 and 37392/03, judgment on 21st June 2007, para.132

[1031] Avşar v. Turkey, application no. 25657/94, judgment on 10th July 2001, para.282

[1032] *Ilhan v. Turkey*, application no. 22277/93, judgment on 27th June 2000, para. 76

involved, it is necessary to be inferred from the police officers' conduct an intention to inflict pain, suffering, humiliation or debasement on their victim.[1033]

In other words, the Strasbourg judges will assess in each particular case the intensity and type of force which the law enforcement officials applied, the motivation and aim behind it and all the other relevant circumstances of the case. In the case of *Ilhan v. Turkey*[1034]the Court found that despite the life-threatening nature of the injuries the applicant sustained, the force used for their infliction in the circumstances of this case was not of such a nature or degree as to breach Article 2 ECHR.

However, as S.Krähenmann reminds, "it is notoriously difficult for the applicants to prove their allegations that state forces resorted to excessive force, in particular before the European Court which has adopted the high standard of "proof beyond reasonable doubt". However, the recent practice of the European Court indicates an emerging duty to account for the use of force, accommodating to some extent the criticism with respect to its high burden of proof in such cases."[1035]The same author outlines the evolving approach of the European Court in this respect when it comes to certain types of cases. Therefore in cases where individuals died or sustained injuries in the area of military operations, but the state denied being involved and put the blame on the rebels, the European Court shifted the burden of proof to the state under the condition that the applicants could make a prima facie case that military operations took place.

Furthermore, "in cases where it is not contested that individuals died or were injured by state agents, the European Court is increasingly stringent with its assessment of the facts and the justification for the use of force. Hence the European Court not only started to draw negative inferences from both the failure to investigate and the failure to submit documentary evidence but also requested the state 'to account for the use of force' and 'to demonstrate that the force was used in pursuit of one of the aims set out in paragraph 2 of Article 2 of the Convention and that it was absolutely necessary and therefore strictly proportionate to the achievement of one of those aims. Therefore, states have to submit operations reports on the planning and execution of an operation. Arguably, the burden of

[1033]*Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004, para. 53

[1034]*Ilhan v. Turkey*, application no. 22277/93, judgment on 27th June 2000

[1035]Krähenmann S., "Positive obligations in human rights law during armed conflicts", Research handbook on human rights and humanitarian law (ed. Kolb R., Gaggioli G.), 2013, Chentelham, 174

proof to account for the "absolute necessity" of the use of force is thus shifted to the state. (…) These cases indicate that the duty to account might be more extensively relied upon in other situations than detention where it is equally difficult for the applicants to prove their allegations. Moreover, it provides an incentive for states to take the duty to investigate seriously."[1036]

We can only agree with such an assessment, since the Court has been very careful in developing its case-law regarding this issue not to set too high of a standard of proof which would make the protection of right to life inefficient in practice. Although the burden of proof primarily lies on the applicants, in the situations where the State had the control over the situation and has the access to the necessary documents and evidence the Court shifted the burden of proof to the State authorities. This was done to make the position of the applicants better and to provide them with a more complete protection of the rights envisaged in the ECHR.

The notions of proportionality and absolute necessity are deeply intertwined and both play a major role in examining has the right to life been unlawfully breached or not.

5.2.4 Training and instruction of law enforcement officials; planning and control of the operation as parts of assessment if the force used was absolutely necessary

In the McCann case it was explained that when assessing if the force used was strictly proportionate the Court has to examine not only the actions of the agents of the State who actually administer the force, but also to take into consideration all the surrounding

[1036]Ibidem.

circumstances including such matters as the planning and control of the actions under examination.[1037]

According to the Court's practice, the operation had to be planned in such a way to avoid risks for third persons. Recourse to lethal force should be minimized to the greatest extent possible[1038]and every foreseeable element of unnecessary risk to life on account of the use of force eliminated. In words of judge Pikis, the operation has to be planned and controlled so as to limit the circumstances in which force is used and, if the use of force is unavoidable, to minimize its effects.[1039]

This was done in the case of *Bubbins v. the United Kingdom*[1040] in which the police acted out of the fear for Michael Fitzgerald's safety. There were reports of a man in his house pointing a gun at the police officers. A great police operation ensued. It was controlled by senior officers and tactical advisers were the ones reviewing and approving the deployment of the armed officers.[1041]Adequate measures were taken to protect the public. During the siege the man held the firearm in a threatening manner, taking up a firing position at times. There were long negotiations in which he was repeatedly called to drop his weapon and surrender. It was never positively established that the man in question was indeed Michael Fitzgerald and there was even information proving otherwise. There was an efficient chain of command throughout the operation. The police did not act in a rash manner. Quite contrary, they attempted to resolve the situation without recourse to lethal force or to tactics which might provoke a violent response from the man inside the flat. The domestic law which regulated the use of firearms by the police as well as the conduct of police operations of the kind at issue contained adequate and effective safeguards to prevent arbitrary use of lethal force.[1042] All these reasons motivated the

[1037]*McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 150

[1038]*Mc Can and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 193

[1039]*Dissenting opinion of judge Pikis* in case of Andronicou and Constantinou v. Cyprus, application no. 25052/94, judgment on 9th October 1997

[1040]*Bubbins v. the United Kingdom*, application no. 50196/99, judgment on 17th March 2005

[1041]Ibidem, para. 143

[1042]Ibidem, patra. 150

Court to conclude that the operation was planned and controlled in accordance with Article 2 ECHR.

As the Court pointed out in *Ergi v. Turkey*[1043]the responsibility of the State also exists when the State agents planning and controlling the operation fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimizing, incidental loss of civilian life.[1044] This has been repeatedly confirmed in the Court's subsequent case-law.[1045] In *Isayeva v. Russia*,[1046] the Court clearly called for "comprehensive evaluation of the limits of and constraints on the use of indiscriminate weapons within a populated area". It criticized the fact that dangers of military deployment of aviation equipped with heavy combat weapons within the boundaries of a populated area have not been considered in advance, i.e. during the planning phase. In *Cangöz and others v. Turkey*[1047], as well as previously in the McCann case, the Court criticized the security forces' decision not to perform arrest at much earlier stages, although they knew the details of the terrorists' arrival to the area well in advance. The decision to arrest the terrorist after they went to the countryside has not been properly substantiated and it has not been in accordance with the requirements under the ECHR.[1048]

Moreover, when providing the soldiers, policemen or other law enforcement officials with the information and instructions regarding the use of lethal force, the authorities are obliged to adequately take into consideration the right to life of the people the lethal force will be administered against. They have to provide them with as complete and thorough information as possible about all the circumstances of the case in question and the operation which will be undertaken. For example, one of the reasons why the Strasbourg Court found Turkey to have breached Article 2 ECHR was the failure of its Government to provide any evidence that clear instructions had been issued by those planning the

[1043]*Ergi v. Turkey*, application no.66/1997/850/1057, judgment on 28th July 1998

[1044]*Ergi v. Turkey*, application no.66/1997/850/1057, judgment on 28th July 1998, para.79

[1045]See:*Isayeva v. Russia*, application no. 57950/00, judgment on 24th February 2005, para. 176

[1046]*Isayeva v. Russia*, application no. 57950/00, judgment on 24th February 2005, para. 189

[1047]*Cangöz and others v. Turkey*, application no. 7469/06, judgment on 26th April 2016

[1048]*Cangöz and others v. Turkey*, application no. 7469/06, judgment on 26th April 2016,para. 109 – 111

operation as to how to capture and detain the suspects alive or as to how to negotiate a peaceful surrender. That failure, stated the Court, must have increased the risk to the lives of any who might have been willing to surrender.[1049]

They also have to evaluate the information at their disposal with the greatest of care before transmitting it to the law enforcement officials[1050], especially if according to their training they are shooting to kill.[1051] As the Grand Chamber pointed out,a crucial element in the planning of an arrest operation must be the analysis of all the available information about the surrounding circumstances, including, as an absolute minimum, the nature of the offence committed by the person to be arrested and the degree of danger – if any – posed by that person. The question whether and in what circumstances recourse to firearms should be envisaged if the person to be arrested tries to escape must be decided on the basis of clear legal rules, adequate training and in the light of that information."[1052]

In this context it is interesting to mention the case of *Isayeva, Yusupova and Bazayeva v. Russia*[1053] in which the Court found that the operation has not been planned or controlled in accordance with the requirements under Article 2 ECHR. Among the shortcomings which the Court addressed in its judgment, it outlined that the air controller was informed about the operation on the evening before. Moreover, nor he nor the pilots had been informed that the "safe passage" has been announced and that there were massive

[1049]*Cangöz and others v. Turkey*, application no. 7469/06, judgment on 26th April 2016, para. 109

[1050] This was very obvious in the *McCann* case, where the soldiers were informed that the suspects have a car bomb which they intend to detonate means of a radio-control device. They were also told that any of the suspects might have the detonator concealed on his or her body and that in order to activate the bomb it would be enough for them to simply press a button. It was transmitted that there is a high likelihood that the suspects were armed and would resist arrest. Most importantly, the soldiers have been told that there is a high probability of suspects detonating the bomb if challenged, which would have devastating consequences. The Court found that the State authorities did not evaluate the information properly before transmitting it and that it was one of the weak points in the planning and control of the operation which suggested a lack of appropriate care and thereby constituted a breach of Article 2 paragraph 2 ECHR.- *McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 211

[1051]*McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 211

[1052]*Nachova and Others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005, para.103

[1053]*Isayeva, Yusupova and Bazayeva v. Russia*, application nos. 57947/00, 57948/00 and 57949/00, judgment on 24th February 2005

numbers of refugees on the road, going to Grozny.[1054]Due to the absence of the forward air controller the permission to use weapons had to be obtained from a controller at the control center. This person was not able to see the road nor to evaluate the targets independently. The Court therefore concluded that "this lack of information had placed the civilians on the road at a very high risk of being perceived as suitable targets by the military pilots".[1055]

If there were negotiations, they have to be led in a reasonable manner[1056] and if possible by qualified officials.[1057] The force can be used only when there are clear indications that negotiations failed and it is reasonably believed that the action is necessary in order to pursue one of the legitimate aims envisaged in the Convention.

During the assessment of the way the operation in question has been planned and controlled, the Court also examined if the authorities adequately reflected on alternative possibilities and made provision for margin of error. It was the Court's view that it is the authorities' obligation "to anticipate all possible eventualities".[1058] According to the case-law, it meant, inter alia, to be properly armed and equipped[1059] when dealing with armed and dangerous people, or when the weather and field conditions are such that lack of

[1054]Ibidem, para. 187

[1055]*Isayeva, Yusupova and Bazayeva v. Russia*, application nos. 57947/00, 57948/00 and 57949/00, judgment on 24th February 2005, para.188

[1056] For example, in the *Andronicou* case, the authorities clearly understood that they were dealing with a young couple and not with hardened criminals or terrorists;they were persistent in their attempts to end the incident through persuasion and dialogue until the last possible moment andopted for the deployment of MMAD officers only as last resort. For these reasons the Court found that the negotiations were in general conducted in a reasonable manner. -*Andronicou and Constantinou v. Cyprus*, application No. 25052/94, judgment on 9th October 1997, para.183

[1057] In the Court criticized the fact that no trained negotiator was present at the scene of the incident. However, it also pointed out that it is necessary to be cautious about revisiting the events with the wisdom of hindsight. Namely, due to a high amount of alcohol found in Michael Fitzgerald's system, the Court deemed it is hard to claim thatwithout any doubts a trained negotiator would have been any more successful in resolving the issue in a peaceful manner. –*Bubbins v. the United Kingdom*, application no. 50196/99, judgment on 17th March 2005, para. 146-147

[1058]*Andronicou and Constantinou v. Cyprus*, application No. 25052/94, judgment on 9th October 1997, para.185

[1059]In the *Güleç v. Turkey*casethe Court calls "unacceptable" and "incomprehensible" the fact that gendarmes were not properly equipped to deal with the demonstrants (they lacked equipment such as truncheons, riot shields, water cannon, rubber bullets or tear gas) but used very powerful weapons instead. – *Güleç v. Turkey*, application no. 54/1997/838/1044, judgment on 27th July 1998, para. 71

proper equipment can make the fatal outcome more likely.[1060] Also, in a number of cases the Court also questioned if the ambulance was alarmed in advance[1061] and took into consideration how much time after the shooting did it arrive to the scene.

The applicants often claimed that the murders have been premeditated or represented a result of a plot. The Court analyzed such accusations thoroughly, based on the evidence presented. It examined whether the law enforcement officials have received any form of encouragement or instruction to use the lethal force even with no justification, or had decided on their own initiative to do so.[1062] It also analyzed if based on the information presented to them and the instructions given, their decision to use force which might be lethal could be justified and reasonable under the circumstances.

However, not all the Strasbourg judges share the same strict views on what the duty to plan and control the operation in accordance with the Article 2 ECHR encompasses. In their Dissenting opinions, some of the judges urged the Court to "resist the temptations offered by the benefit of hindsight"[1063]when assessing if and to what extent has the Contracting State complied with this duty. They reminded that the authorities had no other choice but to plan and make decisions on the basis of incomplete information, and were thereby obliged to act within the constraints of the law which in many cases the other side did not do.

The Court also took into consideration the challenges the law enforcement officials are facing during the planning and controlling of the operation phase. Therefore in *Makaratzis v. Greece*[1064]it stated that "bearing in mind the difficulties in policing modern

[1060]In the case *Öğur v. Turkey* the Court held that the fact that the members of the security force have taken up positions around fifty meters apart from each other, the fact they were not linked by radio must necessarily have made it difficult to transmit orders and control the operations. That was one of the grounds why the Court held that the operation has not been planned nor controlled in accordance with the requirements of Article 2 ECHR. - *Öğur v. Turkey*, application no. 21594/93, judgment on 20th May 1999, para. 83

[1061]This can be observed in *McCann and others v. United Kingdom*, (application No.18984/91, judgment on 27th September 1995) *,Andronicou and Constantinou v. Cyprus*(application No. 25052/94, judgment on 9th October 1997)

[1062]See: *McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 179 – 180

[1063]*Joint dissenting opinion of judges Ryssdal, Bernhardt, ThórVilhjálmsson, Gölcüklü, Palm, Pekkanen, Sir John Freeland, Baka and Jambrek* in case of McCannand others v. United Kingdom, application No.18984/91, judgment on 27th September 1995, para 8

[1064]*Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004

societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible burden on the authorities".[1065] Some of the Strasbourg judges also considered that "there must be room for the unpredictability of life and the subsidiarity of the Convention system. Such difficult decisions, taken in the heat of the action, should properly be reviewed by the national courts and our Court should only depart from such findings with reluctance."[1066]

The dissenting judges in some cases allowed that the state authorities might have taken different decisions at times, but they opted for what seemed more practical in that particular instance based on the information previously obtained.

When it comes to the training and instruction, the Strasbourg judges reviewed if the law enforcement officials in stake have been trained to shoot to kill. It also examined the national laws, guidelines on use of force as well as instructions given to the officials prior the operation. The Court insisted that these legal acts have to reflect adequate standard of care. In *Nachova and Others v. Bulgaria*[1067] the Strasbourg judges explained that Contracting States have the obligation to secure the respect for the right to life by putting in place an appropriate legal and administrative framework, which defines the limited circumstances under which their agents may use force and firearms, in the light of the relevant international standard. The national legal framework regulating arrest operations has to makes recourse to firearms dependent on a careful assessment of the surrounding circumstances.[1068] This is essential since, as the Strasbourg judges put it, "security forces should not be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous."[1069]

[1065] *Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004, para.69

[1066] *Partly dissenting opinion of judge Wildhaber joined by judges Kovler and Mularoni* in case of *Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004

[1067] *Nachova and Others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005

[1068] *Nachova and Others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005, para. 95

[1069] *Akpinar and Altun v. Turkey*, application no. 56760/00, judgment on 27th February 2007, para. 51

On the other hand, the training of law enforcement officials must contain the obligatory evaluation of existence of absolute necessity to use firearms, with due regard to respect for human life as a fundamental value.[1070]

In other instances, the Court pointed out that there is a "degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects"[1071] and it has expected that personnel to act in accordance with it.

What can be concluded is that the Court has been quite creative in this respect and has established a whole set of well-developed obligations of State authorities. According to the Court practice, planning and control of a law enforcement operation has to be performed in such a way to make the risk of the loss of life as minimal as possible. The ones responsible for these phases of such an operation have to take all feasible precautions in the choice of means and methods of a security operation. That also means that the authorities have to take into consideration alternative possibilities and make provision for margin of error.

Moreover, they have the duty to transmit to the participants the information about all the circumstances of the case in question and the operation which will be undertaken as completely and as thoroughly as possible. This has to be done after the information at hand has been properly evaluated. If negotiations are necessary, there are rules about their conducting and a strong preference for that being done by qualified officials.

At the same time, the Strasbourg judges made reference to the challenges that law enforcement officials face and have pointed out the difficulties of making decisions based on incomplete information. Therefore they did consider that certain margin of appreciation has to be allowed and that the role of the Court has to remain a subsidiary one. That can be seen as another attempt of the judges at the European Court to establish a balance of interest and not to impose too much of a burden on the law enforcement officials, in order to enable their maximum effectiveness when making decisions that are often a split-of-a-second-life-or-death ones.

[1070] *Nachova and Others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005, para.97

[1071] *McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para. 212

When it comes to training and instruction of the state officials involved in law-enforcement operations, the Strasbourg Court took an equally firm approach. It noted that they are obliged to act in accordance with the national legislation, which also means that the Contracting States are obliged to out in place such a legislation that properly reflects legal standards of protection of life and rules of absolute necessity when it comes to the use of force in this context. Moreover, both training and instruction of state security agents has to encompass rules of careful evaluation of the necessity of the use of force in the circumstances of the case in question. Part of their training has to be dedicated to importance of protection of right to life and a very narrow space for exceptions of this principle.

5.2.5 Proportionality principle in light of Article 3 ECHR

Throughout the Court's early practice, it has been pointed out that balancing of rights and interests is an essential part of assessing if the Article 3 ECHR has been breached or not. This may come as a surprise in the light of absolute nature of prohibition of torture, but as early as in *Soering v. The United Kingdom* when assessing if the aforementioned Article has been breached the Strasbourg Court established that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[1072]

In this particular case, the Court therefore found the Contracting State would be considered to have breached Article 3 ECHR if it took action which had as a direct consequence the exposure of an individual to proscribed ill-treatment.[1073]

In the subsequent case of *Chahal v. The United Kingdom* the European Court repeated its stance and added that there is not any room for balancing the risk of ill-treatment against

[1072] *Soering v. The United Kingdom*, application no. 14038/88, judgment on 7th July 1989, para. 89

[1073] Ibidem, para. 91

the reasons for expulsion in determining if a State's responsible under Article 3 ECHR.[1074] In that light, it refused to take into consideration the Government's allegations that the first applicant was a terrorist who poses a threat to national security of The United Kingdom.[1075]In that way, the Strasbourg judges actually established that there are no implied limitations to the rights envisaged in Article 3 ECHR.[1076]

Accordingly, the balancing of interests has only a limited impact. The question that the Court is to answer is if the authorities took all the reasonable to protect this right in a manner that is practical and effective when they had knowledge or ought to have had knowledge of its possible violation.[1077]At the same time, it is essential not to impose an impossible or disproportionate burden on the State authorities, which is why the State can be held responsible for breach of Article 3 ECHR only if its organs have failed to act with due diligence.[1078]

What we can conclude from this is that there is a substantial difference in application of proportionality principle when it comes to qualified rights (example being the right to life) than in its application when an absolute right (such as prohibition of torture, ill-treatment and degrading treatment) is at stake. Namely, qualified rights contain express provision for their limitation which makes balancing of interests much easier. On the other hand, proportionality does not play as much of a role in the case of absolute rights, since they are, theoretically speaking, unlimited.

The Court has in its practice through setting the threshold of "minimum level of severity" implicitly recognized the necessity of balancing certain interests and not categorizing every behavior as "serious ill-treatment". It can be argued that this wording can be seen as an acknowledgement of proportionality principle in the substantive element of Article 3 ECHR.

[1074]*Chahal v. The United Kingdom*, application no. 22414/93, judgment on 15th November 1996, para. 81

[1075]Ibidem, para. 82

[1076]Palmer S., 2006, 448

[1077]Ibidem, 449

[1078]Ibidem.

5.3 THE OBLIGATION TO UNDERTAKE AN EFFECTIVE INVESTIGATION IN LIGHT OF ARTICLES 2 AND 3 ECHR

5.3.1 The duty to conduct an effective investigation under Article 2 ECHR

Next to the above-mentioned duties, the Strasbourg judges created also a procedural obligation under the Article 2. Namely, States are obliged to conduct an effective official investigation into the killings. This obligation was based on reading the obligation to protect the right to life under this provision (art. 2) in conjunction with the State's general duty under Article 1 ECHR to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.[1079]

This obligation has been established in the *McCann* case, where the Court stated that "a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities."[1080]In *Güleç v. Turkey* it further added that "the procedural protection for the right to life inherent in Article 2 of the Convention means that agents of the State must be accountable for their use of lethal force."[1081]

When developing the duty to investigate, the Court once again had to have regard to the fair balance principle. On one hand, it was clearly essential that in cases of use of lethal force by the Contracting State's officials, authorities conduct an effective investigation. On the other hand, the Court had to be careful in order not to jeopardize the state

[1079]Ibidem, para 161

[1080]*McCann and others v. United Kingdom*, (application No.18984/91, judgment on 27th September 1995), para. 161

[1080]*McCann and others v. United Kingdom*, (application No.18984/91, judgment on 27th September 1995), para. 161

[1081]*Güleç v. Turkey* (application no. 54/1997/838/1044, judgment on 27th July 1998), para.78

sovereignty. The States are primarily the ones enforcing their national legislature, and it is their obligation to efficiently protect rights guaranteed by the ECHR as well.[1082]

In case of *Kelly and Others v. The United Kingdom*, for example, the Court assessed that the available procedures have not struck the right balance between taking into account other legitimate interests such as national security or the protection of the material relevant to other investigations and the necessary safeguards. The same conclusion has been reached in *McKerr v. The United Kingdom*.[1083]

All in all, the aim of establishing this obligation has been to make the protection of life even more effective. The Court strived to ensure both the accountability of State agents for their actions and to maintain its subsidiarity, which is why it has set up a number of criteria for assessing if this obligation has been complied with.

5.3.2 The criteria for the effective investigation in cases in which the law enforcement officials used lethal force in light of Article 2 ECHR

5.3.2.1 Independence

The Court also developed several criteria for assessing if the investigation has been effective. The first one has been independency, which denotes not only a lack of hierarchical or institutional connection but also a practical independence.

In many instances the Court found the breach of the duty to investigate because of lack of independency of the organs conducting the investigation. In such cases the investigation officers were members of the gendarmerie service and thereby hierarchically connected to

[1082] Chevalier-Watts J., 2010, 704

[1083] *McKerr v. The United Kingdom*, application no. 28883/95, judgment on 4th May 2001, para. 159

the gendarmes under scrutiny.[1084]An obvious example has been in the *Avşar v. Turkey* case where the investigation was entrusted to the members of gendarmerie who were implicated in the course of events. The Court found that not to be acceptable.[1085] The same conclusion has been reached in *Cangöz and others v. Turkey*, where the initial and critical phases of the investigation were carried out by the soldiers who killed the applicants' relatives and who were therefore supposed to be under investigation.[1086]In the Court's view, allowing such an active involvement of those soldiers in the investigation into the killing tainted the independence of the entire criminal proceedings and entailed the risk that crucial evidence implicating the soldiers in the killing would be contaminated, destroyed or ignored. Moreover, a huge majority of the actions taken in the investigation were based on the information contained in the incident reports prepared by the same soldiers.[1087]

The Strasbourg judges were more than clear that there can be no institutional or personal connection between the decision-makers and the State agents in question. For example, in *Öğur v. Turkey* the Court found that the investigation has not been independent as required under Article 2 ECHR, since the investigating officer appointed by the governor was member of gendarmerie. That made him subordinate to the same chain of command as the security forces he was investigating. Moreover, the chair of Administrative Council, in charge of deciding whether the State should institute proceedings against the law enforcement officials involved in the shooting was the governor, who was administratively in charge of the operation under investigation. Its members were senior officials from the province. Moreover, the ones who had opposed the chairman had been replaced.[1088]

Similarly, in *Finucane v. the United Kingdom* the Court noted that since the ones investigating the murder were actually the members of RUC who were suspected to be behind threats against Patrick Finucane and since they were under command of the Chief Constable of the RUC, the lack of independence attaching to this aspect of the

[1084]*Güleç v. Turkey* (application no. 54/1997/838/1044, judgment on 27th July 1998), para. 439

[1085]*Avşar v. Turkey*, application no. 25657/94, judgment on 10th July 2001,para. 399

[1086]*Cangöz and others v. Turkey*, application no. 7469/06, judgment on 26th April 2016, para. 126

[1087]Ibidem.

[1088]*Öğur v. Turkey*, application no. 21594/93, judgment on 20th May 1999, para. 91

investigative procedures raised serious doubts as to the thoroughness or effectiveness with which the possibility of collusion was pursued."[1089] In other words, the Court outlined that independence of the investigative organ is an important precondition for the investigation to be thorough and effective.

However, the independence must be practical as well. For example, in the case of *Ergı v. Turkey*[1090] the Court has found violation of Article 2 based on that exact ground. Namely, the public prosecutor who was investigating the death of a girl during an alleged clash mostly relied on the information provided by the gendarmes implicated in the incident. In *Kelly and Others v. The United Kingdom* the Strasbourg judges criticized the fact that the investigation has been for all practical purposes conducted by police officers connected, albeit indirectly, with the operation under investigation. Namely, the operation in question was conducted jointly with local police officers and with the co-operation and knowledge of the RUC in that area.[1091] Similarly, in *Ramsahai and others v. the Netherlands* the Court found that the investigation did not comply with the independency requirement since its most important parts were carried out by police force to which officers who used lethal force belonged and which acted under its own chain of command. Moreover, the same police force conducted other investigations in this case at the behest of the State Criminal Investigation Department.[1092] The Court reminded that it has found a violation of Article 2 in its procedural aspect in previous cases where an investigation into a death in circumstances engaging the responsibility of a public authority was carried out by direct colleagues of the persons allegedly involved. In this context, supervision by another authority, however independent, has been found not to be a sufficient safeguard for the independence of the investigation.[1093]

[1089] *Finucane v. the United Kingdom*, application no. 29178/95, judgment on 1st July 2003, para. 76

[1090] *Ergı v. Turkey*, application no.66/1997/850/1057, judgment on 28th July 1998

[1091] *Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para. 114

[1092] *Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007), para. 406-407

[1093] *Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007), Grand Chamber judgment, para. 337

Referring to this particular case, the Court did admit that obliging the local police to remain passive until independent investigators arrive may result in the loss or destruction of important evidence. However, the Strasbourg judges noted that the Government has not pointed to any special circumstances that necessitated immediate action by the local police force in the present case going beyond the securing of the area in question.[1094] Furthermore, they compared this case to one involving the same respondent Party, where the National Police Internal Investigations Department appeared four and a half hours after a fatal shooting had taken place. Taking that into consideration, as well as the fact that according to the Minister of Justice to Parliament, the National Police Internal Investigations Department are able to appear on the scene of events within, on average, no more than an hour and a half, the Court was clear in assessing that a delay of no less than fifteen and a half hours which occurred in this particular case cannot be regarded as acceptable.[1095]

The police force conducted investigations even after the National Police Internal Investigations Department took over. For that reason, the Court concluded that the Department's subsequent involvement "cannot suffice to remove the taint of the force's lack of independence".[1096]

Furthermore, if the official version of events has been questioned is also an important factor to take into consideration. In *Güleç v. Turkey* it was pointed out that the investigating officer completely accepted the official version of events and did not ask for a reconstruction or any form of examining the origin and trajectory of the bullet who killed the applicant's son. Similar criticism was evident in the *Ergi v. Turkey,*[1097]*Yasa v. Turkey*[1098]and *Kaya v. Turkey*.[1099]In *Akpinar and Altun v. Turkey* the public prosecutor did launch an investigation of the killing of Seyit Külekçi and Doğan Altun of his own motion, but investigated the deceased and the four people who had fled after the clash,

[1094] Ibidem, para. 338

[1095] Ibidem, para. 339

[1096] Ibidem, para. 334

[1097]Mowbray A., 2002, 440

[1098]*Yaşa v. Turkey*, application no. 63/1997/847/1054, judgment on 2nd September 1998, para. 105–106

[1099]*Kaya v. Turkey*, application no. 158/1996/777/978, judgment on 19th February 1999

under the charges that they belonged to a terrorist organization. Only after received the applicants petitioning a second investigation has been launched, focusing solely on the alleged mutilation of Külekçi's and Altun's bodies.[1100]

Even more extreme was the case of *Isayeva, Yusupova and Bazayeva v. Russia* in which the investigation has been ended solely and exclusively because the military initially denied that any military aviation flights taking place in the vicinity on that day.[1101]

On the other hand, the Court commended the authorities in the McCann case because they reviewed the events surrounding the killings in a very detailed manner.[1102] In other words, they did not take the officials' version of events as final, but collected and examined evidence in a way that was both highly independent and thorough.

In this context, according to the Court's case-law, it was essential that State agents which were facing such serious charges be suspended from duty while being investigated or tried and be dismissed if convicted. The lack of the State to do so has been pointed out as one of the lacks of the investigation in *Mahmut Kaya v. Turkey*.

The Strasbourg judges were aware of the importance of independence in all phases of the investigation, which also includes the phase of making decision if the prosecution should take place. This is why the Court asserted that "where the police investigation procedure is itself open to doubts as to its independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making."[1103]

In this context, it is interesting to mention the Court's view in *Ramsahai and others v. the Netherlands*. Namely, in this case the Amsterdam public prosecutor was both the supervisor of the police investigation and the one deciding against the prosecution of

[1100] *Akpinar and Altun v. Turkey*, application no. 56760/00, judgment on 27th February 2007 , para. 40

[1101] *Isayeva, Yusupova and Bazayeva v. Russia*, applications nos. 57947/00, 57948/00 and 57949/00, judgment on 24th February 2005, para. 210

[1102] *McCann and others v. United Kingdom*, (application No.18984/91, judgment on 27th September 1995), para. 162

[1103] *Finucane v. the United Kingdom*, application no. 29178/95, judgment on 1st July 2003, para. 82

officers.[1104] Despite not being fully independent, the Public Prosecution Service has a separate hierarchy and gives orders to the police in operational matters of criminal law and the administration of justice.[1105]

The Court also concluded that "public prosecutors inevitably rely on the police for information and support. This does not in itself suffice to conclude that they lack sufficient independence *vis-à-vis* the police. Problems may arise, however, if a public prosecutor has a close working relationship with a particular police force."[1106]

In the case in question, the Court found it would have been better if the investigation had been supervised by a public prosecutor unconnected to the Amsterdam/Amstelland police force, since its members were under investigation. However, the Court took into consideration the degree of independence of the Netherlands Public Prosecution Service and the fact that the person ultimately responsible for the investigation was the Chief Public Prosecutor. Furthermore, not only was it possible that an independent tribunal reviews the case, but also the applicants actually made use of that possibility. For these reasons the Court concluded that there has been no violation of Article 2 ECHR.

A good example of the investigation being entrusted to an independent organ has been the *Huohvanainen v. Finland* case. The organ carrying out the investigation was The National Bureau of Investigation, an independent body specialized for investigating serious crimes. It started to collect evidence immediately after the siege. The Court found no indication that the investigators were not independent from those taking part in the police operation. Although at first the case was investigated as a possible suicide, after receiving the report about the cause of death, the investigation shifted to establishing whether anyone involved in the siege had acted in an unlawful manner. Moreover, a special, permanent investigation team was set by the Ministry of the Interior with the task

[1104] *Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007), Grand Chamber judgment, para. 342

[1105] Ibidem, para. 343

[1106] Ibidem, para. 344

to make a thorough hour by hour review of the operation in question. Its report was finalized within one year of the operation.[1107]

To summarize, the Court deemed that independence has to be both institutional and practical. It has found that this requirement has not been met in cases when the investigation was entrusted to the same organs suspected of violating the right to life, as well as in cases when they were involved in some phases of the investigation under supervision of other state bodies. Moreover, it was also not acceptable to assign the investigation to organs which are subordinate to the same chain of command as the law enforcement officials under the investigation.

The Court also outlined the importance of the official version of the events being questioned and examined. It also found it essential that the suspects are suspended and removed from their job during the course of the investigation. In that way, not only does the general public get the feeling of safety and enhanced trust in the rule of law, but also they are effectively prevented from affecting the investigation.

The Court has very positively reacted in cases where the investigation has been conducted by organs specialized in serious crimes, that had no territorial or institutional connections to the law enforcement units or individuals being under investigation.

5.3.2.2 The capability to lead to a determination of whether the force used was justified in the circumstances and to the identification and punishment of those responsible

The investigation must be capable of leading to a determination of whether the force used was justified in the circumstances.[1108] It also has to be capable to lead to the identification and punishment of those responsible. The Court pointed out, however, that is an

[1107] *Huohvanainen v. Finland*, application no. 57389/00, judgment on 13th March 2007, para. 110

[1108] See: *Kaya v. Turkey,* application no. 158/1996/777/978, judgment on 19th February 1999

obligation of means, not result.[1109]As A. Mowbray explains, that means that if the Member State complied with this obligation if it has provided adequate resources for an effective investigation, even if it did not result in persons responsible for unlawful killings being identified and/or punished.[1110]

In this context, in *Kelly and Others v. The United Kingdom* it criticized the practice of persons suspected of causing the death being allowed to simply submit written statements or transcripts of interviews. The Court explained that "detracts from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force and thereby to achieve one of the purposes required by Article 2 of the Convention."[1111] The same practice has been criticized in *McKerr v. The United Kingdom*[1112] and *Hugh Jordan v. The United Kingdom*.[1113]

Moreover, since the inquest may have relevance to a possible prosecution only in exceptional cases, and even in such cases it is not obligatory for a prosecution to ensue, the Court found that it could play no effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Article 2.[1114] The same criticism has been echoed in *McKerr v. The United Kingdom*[1115] and *Hugh Jordan v. The United Kingdom*.[1116]

Since in *Avşar v. Turkey* four village guards and Mehmet Mehmetoğlu have been convicted for abduction and Ömer Güngör has been found guilty of murder, the Court outlined that in cases when suspects have been convicted and sentenced for their

[1109]*Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para.96

[1110] Mowbray A., 2005, 78

[1111] *Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para. 121

[1112]*McKerr v. The United Kingdom*, application no. 28883/95, judgment on 4th May 2001, para. 144

[1113]*Hugh Jordan v. The United Kingdom*, application no. 24746/94, judgment on 4th May 2001, para. 127

[1114]*Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001,, para. 123 – 124

[1115]*McKerr v. The United Kingdom*, application no. 28883/95, judgment on 4th May 2001, para. 142 - 145

[1116]*Hugh Jordan v. The United Kingdom*, application no. 24746/94, judgment on 4th May 2001, para. 129

participation in the killing under investigation the procedure has proved capable of identifying and punishing the perpetrators.[1117]

On the other hand, in *Finucane v. the United Kingdom* the Court found that the inquest procedure fell short of the requirements of Article 2 as it failed to address serious and legitimate concerns of family and the public. For those reasons, in the Court's view, it could not be regarded as providing an effective investigation into the incident or a means of identifying or leading to the prosecution of those responsible. Namely, it was concerned only with the immediate circumstances of the shooting and disregarded the allegations of collusion by the security forces as well as supposed threats the victim has received. Subsequently, however, it has been shown that there were indications of some branches of security forces knowing or assisting in the attack on the victim, which supported suspicions that the authorities knew about or connived in the murder.[1118]

Disregard for allegations that security forces have possibly had a premeditated plan to kill the applicants' relatives which is why they did not arrest them at earlier stages, as well as for claims that more than absolutely necessary force has been used was criticized in *Cangöz and others v. Turkey* as well.[1119] The Government only offered a succinct explanation that "the intention of the security forces was to arrest the terrorists and hand them over to justice" and that the security forces "had planned to have as little as possible recourse to lethal force in order to minimize incidental loss of life on both sides."[1120] This in Court's view was not enough to conclude that Turkey acted in accordance with its obligation under Article 2 ECHR.

In a similar manner, in *Isayeva, Yusupova and Bazayeva v. Russia* the Court criticized the fact that no inquiry was made about the declaration of the "safe passage" for civilians for the day of the incident and no attempts for made to identify representatives of the military or civil authorities who would be responsible for it. The investigators took no investigative steps to explain why on the one hand there were the public announcements of a "safe exit" for civilians and on the other hand the military did not take any regard of

[1117] *Avşar v. Turkey*, application no. 25657/94, judgment on 10th July 2001, para. 403

[1118] *Finucane v. the United Kingdom*, application no. 29178/95, judgment on 1st July 2003, para. 78

[1119] *Cangöz and others v. Turkey*, application no. 7469/06, judgment on 26th April 2016, para. 110-111

[1120] Ibidem, para. 111

it in planning and executing their mission.[1121]Moreover, the steps taken in order to identify other victims and possible witnesses of the attack have not been sufficient.[1122] These shortcomings effectively hindered the determination of whether the force used was justified in the circumstances.

On the other hand, in *Akpinar and Altun v. Turkey* although there was a number of bullet wounds in various parts of deceased's bodies it was not investigated whether the force used by the security forces was justified in the circumstances of the case.[1123] The Court found that this important fact being overlooked represents a breach of Article 2 ECHR.

In *Nachova and others v. Bulgaria* what hindered the effectiveness of the investigation in the narrower sense of the word have been omissions to investigate why was one of the victims shot in the chest if both victims were running away according to the official version of the events, and why have there been used cartridges in the proximity of the body.[1124] Moreover, the fact that the victims have been unarmed and did not pose a threat to the soldiers has been overlooked. The fact that the force which was used has been grossly disproportionate has been disregarded since its use was in accordance with the Bulgarian regulation, which in the Court's view displayed obvious disregard of the right to life.[1125]

This case represented an important breakthrough for other reasons as well. Namely, in this case the applicants alleged that the killings of their relatives were racially motivated. The Chamber found that the evidence that Major G's potentially had discriminatory motives has not been adequately investigated. Therefore, the burden of proof was shifted to Bulgaria. The Court made it clear that in cases where it is suspected that racial attitudes induced a violent act the official investigation is to be pursued with vigour and impartiality. Moreover, when investigating deaths at the hands of State agents, the Court concluded that State authorities have the additional duty to take all reasonable steps to

[1121]*Isayeva, Yusupova and Bazayeva v. Russia*, applications nos. 57947/00, 57948/00 and 57949/00, judgment on 24th February 2005, para. 211

[1122] Ibidem, para. 224

[1123]*Akpinar and Altun v. Turkey*, application no. 56760/00, judgment on 27th February 2007, para. 40

[1124]*Nachova and others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005, para. 116

[1125] Ibidem, para. 114

unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.[1126]

The Strasbourg judges were aware that certain difficulties are undoubtedly connected with proving that violence has been racially motivated, so they established this requirement as one of means, not a result. The authorities are therefore obliged to do what is "reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence."[1127]

Similar rules apply to cases when someone's death occurred while in police custody. The State is obliged to provide a plausible explanation of the events leading to his death.[1128] In other words, the burden of proof (which has to comply with the "beyond reasonable doubt" standard) will shift to the Member State, because "where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention."[1129]

After reminding that the investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible, in *Anguelova v. Bulgaria* the Court concluded that any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.[1130] There have been several omissions in the investigation in this particular case which led the Court to conclusion that by failing to effectively establish the cause of death of the victim who dies in the police custody, the Contracting State violated Article 2 ECHR.

[1126] *Nachova and others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment on 6th July 2005, para. 160

[1127] Ibidem.

[1128] *Anguelova v. Bulgaria*, application no. 38361/97, judgment on 13th June 2002, para.110

[1129] Ibidem, para. 111

[1130] Ibidem, para. 139

We will not repeat ourselves here by going into details of all the shortcomings of this particular investigation, but we will mention especially important ones: firstly, the fact that the testimony of the police officers was considered fully credible despite their suspect behavior. Moreover, notwithstanding the obvious contradiction between the two medical reports, the authorities accepted the conclusions of the second report without seeking to clarify the discrepancies. Furthermore, the Court heavily criticized the fact that authorities decided to end the investigation based exclusively on the opinion in the second medical report about the timing of the injury, although such an opinion had been based on a questionable analysis.[1131]

In this case the Court outlined that prerequisites of an effective investigation are the requisite objectivity and thoroughness. It also noted that its effectiveness cannot, therefore, be gauged on the basis of the number of reports made, witnesses questioned or other investigative measures taken.[1132] This stand is important because Contracting States in some cases might provide quantitative evidence of its compliance with the effective investigation requirements, but substantially there were omissions which led to lack on the quality of the investigation. In other words, although the procedure and numbers might tell one story, under a more thorough inspection the Court may reveal another one – a story of the investigation which, despite the "smoke curtain" of impressive numbers of witnesses questioned, reports submitted and evidence obtained, actually lacks objectivity and thoroughness.

What we can infer is that the Court has interpreted the requirement that the investigation must be capable of leading to a determination of whether the force used was justified in the circumstances, as well as to lead to the identification and punishment of those responsible as an obligation of means. However, this obligation implies an honest and proven effort to examine both the necessity of the use of force and to find the perpetrators and bring them to the face of justice. Such an effort can be reflected in questioning all the witnesses, identifying the perpetrators, examining claims of existence of premeditated plan as well as other serious and legitimate concerns of family and the public. That is also valid for potential racial motives behind the use of lethal force. The investigative

[1131] Ibidem, para. 143

[1132] Ibidem, para. 142

authorities are also obliged to pay special attention to certain findings which could point out to events occurring differently than it was claimed by the law enforcement officials, such as the position of gun wounds, or the fact that the victims have not been armed.

5.3.2.3 All the reasonable steps had been taken to secure the evidence concerning the incident

The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident.[1133]This is especially valid for forensic evidence.[1134]In assessing if the abovementioned criteria have been met, numerous factors have been taken into consideration. One of them was if the crime scene has been inspected immediately or shortly after the incident, and how thorough.[1135] For example, in *Mahmut Kaya v. Turkey* the Court criticized the fact that the scene was not forensically examined.[1136] In other cases, such as *Gül v. Turkey*,[1137]it noted that one of the lacks of investigation has been that the authorities failed to collect the crucial evidence and to testing victim's hands for traces of gun powder and the gun for the fingerprints. At the same time, the evidence found at the scene has not been recorded in a proper manner.[1138] The rifles allegedly found next to the bodies of the applicants' relatives have not been checked for fingerprints in *Cangöz and others v. Turkey* either and the applicants have not been given an explanation for this failure. The Court found that in the light of all the circumstances of the case, and especially since there was an actual possibility of transfer of gunpowder residue from the soldiers' hands, a search for fingerprints should have been

[1133]*Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para.96

[1134] Ibidem.

[1135]*Tanrikulu v. Turkey*, application no. 23763/94, judgment on 8th July1999, para. 104

[1136]*Mahmut Kaya v. Turkey*, application no. 22535/93, judgment on 28th March 2000

[1137]*Gül v. Turkey*, application no. 22676/93, judgment on 14th December 2000

[1138]*Gül v. Turkey*, application no. 22676/93, judgment on 14th December 2000, para. 79

the logical starting point in the investigation.[1139] Moreover, the Court found the fact that the victims' clothes have been removed and destroyed, especially since there was no valid explanation given for such an action.[1140]

In *Anguelova v. Bulgaria* there was no record of any timely visit of the investigator to the scene of the victim's arrest. The site was visited in the morning hours of the day of the incident by a police officer from the same police station as the implicated officers.[1141] That in the Court's view was a significant omission in the course of the investigation. In *Ramsahai and others v. the Netherlands* the Court criticized numerous omissions in this context: the prosecutors not even attempting to determine the precise trajectory of the bullet, no testing of the hands of Officers Brons and Bultstra for gunshot residue being ordered and no examination of Officer Brons' service weapon and unspent ammunition being performed. The Court also noted that there was no reconstruction of the incident.[1142]

On the other hand, in *Kelly and Others v. The United Kingdom* it was commended that the authorities carried out all the necessary scene of the incident procedures and secured the evidence. Moreover, the appropriate forensic examinations were conducted.[1143] The Court noted in *Finucane v. the United Kingdom* that the police took all the necessary steps to secure evidence at the scene and managed to locate both the car and gun used in the incident as an example of the State complying with requirements under Article 2 ECHR in this aspect.[1144]In *Bitiyeva and X v. Russia* the Court commended the expert crime scene examination, as well as the fact that statements were taken from both the witnesses[1145] and from around 20 servicemen of the law-enforcement bodies. The prosecutors also investigated the possible involvement of the United Group Alliance

[1139]*Cangöz and others v. Turkey*, application no. 7469/06, judgment on 26th April 2016, para. 135

[1140] Ibidem, para. 133

[1141]*Anguelova v. Bulgaria*, application no. 38361/97, judgment on 13th June 2002, para.142

[1142]*Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007), para. 401

[1143]*Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para. 113

[1144]*Finucane v. the United Kingdom*, application no. 29178/95, judgment on 1st July 2003, para. 74

[1145]*Bitiyeva and X v. Russia*, application nos. 57953/00 and 37392/03, judgment on 21st June 2007, para. 147

members in an operation in the district and even reviewed the log records of the vehicles belonging to the military units which were stationed in the district.[1146]

Similarly, in *Huohvanainen v. Finland* the Strasbourg Court pointed out that the siege and its course, as well as actions and decisions taken by the law enforcement officers have been well – documented and recorded both on video and audio tape. The investigators also collected details of the bullet holes in and around the building.[1147]The investigation also included the appropriate forensic examinations, which was outlined as one of the reasons why the Court concluded that the investigation complied with Article 2 requirements.[1148]

In *Khashiev and Akayeva v. Russia* the Court did not find it acceptable, among other things, that the investigator did not obtain the plan of the military operations conducted in the relevant district of Grozny at the material time[1149], nor did he identify and question other victims and possible witnesses of the crimes in a timely manner.[1150]

Similarly, in *Makaratzis v. Greece* the Court criticized domestic authorities because they failed to identify all the policemen who took part in the chase[1151] and they never attempted to establish the identity and exact number of policemen who were on duty in the area when the incident took place. In addition to that, they collected only three bullets at the scene where a great number has been fired and failed to find or identify the bullets which injured the applicant, except for the bullet which was removed from the applicant's foot and the one which is still in his buttock.[1152] All these shortcomings pointed to an obvious breach of the duty to investigate and more precisely to take all the reasonable steps to secure the evidence concerning the incident.

[1146]Ibidem, para. 57

[1147]*Huohvanainen v. Finland*, application no. 57389/00, judgment on 13th March 2007, para.110

[1148] Ibidem, para. 114

[1149]*Khashiev and Akayeva v. Russia*, applications nos. 57942/00 and 57945/00, judgment on 24th February 2005, para. 159

[1150] Ibidem, para. 160

[1151]*Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004, para. 75 – 76

[1152]*Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004, para. 75 – 76

Have the eyewitnesses been questioned, and to which extent, has also been reviewed by the Strasburg judges. They considered the great number of witnesses questioned in the *McCann* case to be one of the elements of thorough investigation. The same practice was outlined as positive in *Bubbins v. the United Kingdom*.[1153] In *Finucane v. the United Kingdom* it has been outlined as a positive characteristic of the police investigation that a number of possible suspects has been interviewed in its course.[1154] This was outlined in *Huohvanainen v. Finland* as well as an example of a positive practice.[1155]

On the other hand, in *Güleç v. Turkey* the Court criticized the fact that the investigator did interviews with only a few people and left out some of the key witnesses. Similar shortcomings have been pointed out in *Khashiev and Akayeva v. Russia*.[1156]Among the key witnesses who have to be examined are, as it was pointed out in *Yasa v. Turkey*, the state agents who took part in the incident with the lethal outcome.[1157] If they were not questioned, it almost automatically constituted a breach of duty to investigate, as showcased in *Kaya v. Turkey*[1158],*Öğur v. Turkey*[1159]and *Isayeva, Yusupova and Bazayeva v. Russia*.[1160]

Similarly, in *McKerr v. The United Kingdom* the Court observed that the police officers who shot the applicant's father were not obliged to attend the inquest as witnesses, which they ultimately declined to do and submitted their statements to the coroner instead. In the Court's view, that disabled any satisfactory assessment of either their reliability or credibility on crucial factual issues. As a result, the inquest's capacity to establish the

[1153]*Bubbins v. the United Kingdom*, application no. 50196/99, judgment on 17th March 2005, para. 163

[1154]*Finucane v. the United Kingdom*, application no. 29178/95, judgment on 1st July 2003, para. 74

[1155]*Huohvanainen v. Finland*, application no. 57389/00, judgment on 13th March 2007, para. 112 – 113

[1156]*Khashiev and Akayeva v. Russia*, applications nos. 57942/00 and 57945/00, judgment on 24th February 2005, para. 161

[1157]*Yaşa v. Turkey*, application no. 63/1997/847/1054, judgment on 2nd September 1998, para. 106

[1158]*Kaya v. Turkey*, application no. 158/1996/777/978, judgment on 19th February 1999, para. 89

[1159]*Öğur v. Turkey*, application no. 21594/93, judgment on 20th May 1999, para. 89

[1160]*Isayeva, Yusupova and Bazayeva v. Russia*, applications nos. 57947/00, 57948/00 and 57949/00, judgment on 24th February 2005, para. 211

facts relevant to the death has been detracted from, which hindered it to achieve one of the purposes required by Article 2 of the Convention.[1161]

In *Cangöz and others v. Turkey* the Court criticized the prosecutor for not even attempting to question any of the law enforcement officials who participated in the operation. It added that one of the common features of investigations conducted by prosecutors in Turkey into killings by members of the security forces is failure to question the perpetrators in a timely manner or to question them at all.[1162]The Court further pointed out that not only that represented a serious failure to comply with one of the most important tenets of an effective investigation required by the procedural obligation under Article 2 of the Convention, but also had negative repercussions on establishing the truth. It was an example of the prosecutor accepting the information given by the military and relying solely on information contained in the military reports.[1163] Moreover, by failing to question the soldiers, the prosecutor did not use that chance to establish the truth regarding the contradictory evidence contained in military reports and to ask them other important questions, for example about the weapons they've used, the role of Cobra helicopters, as well as about their location during the operation.[1164]As a direct result of this omission on the prosecutor's side, there has been an appearance of collusion between the judicial authorities and the military, which led the victims' relatives as well as the general public "to form the opinion that members of the security forces operate in a vacuum in which they are not accountable to the judicial authorities for their actions."[1165] For the same reasons, the Court criticized the prosecutor's decision not to question the wounded soldier and examining the object he was wounded with.[1166]

However, the Court did not only examine if the suspects have been questioned, but also in which time span. Namely, in case of *Ramsahai and others v. the Netherlands*the Court

[1161]*McKerr v. The United Kingdom*, application no. 28883/95, judgment on 4th May 2001, para. 144

[1162]*Cangöz and others v. Turkey*, application no. 7469/06, judgment on 26th April 2016, para. 127

[1163] Ibidem, para. 128

[1164] Ibidem, para. 129 - 130

[1165] Ibidem, para. 132

[1166] Ibidem, para. 136

found that it was an omission to question the two officers only several days after the incident, because it considered that the delay in question has enabled them to discuss the incident with others and with each other.[1167]Despite the fact that no evidence pointed to actual collusion of the two officers colluded with each other or with other police officers to obstruct the proper course of the investigation, in the Court's view the mere fact that appropriate steps were not taken to reduce the risk of such collusion amounts to a significant shortcoming in the adequacy of the investigation.[1168]

In this context, it is interesting to mention that quite often the emphasis has been placed on the autopsy – has it been performed[1169], how thorough[1170] and by whom, i.e. was it conducted by forensic specialists.[1171] In this sense, a bit drastic example was the case of *Khashiev and Akayeva v. Russia*, where no order has been given to conduct autopsies of the victims' bodies. Instead, the forensic reports were made on the basis of the photographs of the bodies taken by the first applicant as well as descriptions of the prepared by the officers of the local Department of the Interior without removing the clothes from the bodies.[1172]

In *Kaya v. Turkey* it was established that the autopsy report has to be complete in certain crucial respects so that it could lay the basis for any effective follow-up investigation or satisfy even the minimum requirements of an investigation into a clear-cut case of lawful killing.[1173] In *Mahmut Kaya v. Turkey* the Court pointed out that although two autopsies were performed, the investigation in that sense has not been effective. Namely, in the first autopsy report it was stated that there were no marks of ill-treatment on the bodies, despite the fact they have been apparent. The second report has been more detailed and it noted that there were marks on both bodies, but failed to explain visible signs of torture.

[1167]*Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007), para. 401

[1168]*Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007), Grand Chamber judgment, para. 330

[1169]*Öğur v. Turkey*, (application no. 21594/93, judgment on 20th May 1999), para. 89

[1171]*Tanrikulu v. Turkey*, application no. 23763/94, judgment on 8th July1999, para. 105-106

[1172]*Khashiev and Akayeva v. Russia*, applications nos. 57942/00 and 57945/00, judgment on 24th February 2005, para. 163

[1173]*Kaya v. Turkey*, application no. 158/1996/777/978, judgment on 19th February 1999, para. 89

In *Gül v. Turkey* it was assessed that the autopsy report failed to provide a full record of the injuries on Mehmet Gül's body. From it one could also not find a detailed and objective analysis of clinical findings.[1174] From this we can conclude that one of the conditions for concluding that the authorities have taken all the reasonable measures is that there was an autopsy which provided a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.[1175]

In *Ramsahai and others v. the Netherlands* as one of the inadequacies of the investigation it was pointed out that the autopsy report did not comprise any drawings or photographs showing the entry and exit wounds caused by the fatal bullet.[1176] In this case the autopsy again failed to provide a complete and accurate record of injury, which was a significant failure.

It is, however, important to point out that not all of the evidence possibly attainable must be collected in order to consider that the Contracting State complied with this obligation under Article 2 ECHR. That would put too much pressure on the State's investigative and law enforcement organs and in a way "tie their hands" when it comes to evaluating obtaining which evidence is relevant and which simply isn't. The European Court has shown to be aware of this in *Bubbins v. the United Kingdom* where it stated: "whilst it is of the utmost importance that a complete and accurate picture emerges of the events leading up to a killing by State agents, the evidence to be gathered to that end must be filtered in accordance with its relevance."[1177]

For those reasons, in that particular case the Court found that the Coroner's decision not to hear Fitzgerald's girlfriend as a witness was within his discretion as an independent judicial officer, especially since there was no evidential evidence of hear statement. Moreover, the decision not to have one of the inspectors at the inquest was justified by previous witness, a Superintendent, confirming that things might have been conducted

[1174] *Gül v. Turkey*, application no. 22676/93, judgment on 14th December 2000, para. 79

[1175] *Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para.96

[1176] *Ramsahai and others v. the Netherlands*, application no. 52391/99, judgment on 10th November 2005 (Grand Chamber delivered judgment in the case on 15th May 2007), Grand Chamber judgment, para. 330

[1177] *Bubbins v. the United Kingdom*, application no. 50196/99, judgment on 17th March 2005, para. 159

differently had a trained negotiator been present at the scene. That would make the testimony of the latter superfluous.[1178]

This stance has been confirmed in *Huohvanainen v. Finland.* The Strasbourg judges once more outlined the importance of J.'s family obtaining as much information as was commensurate with the defense of its interests in the national proceedings, namely clarifying the facts surrounding the death of J. and securing the accountability of the police officers involved for any alleged acts and omissions.[1179]

Securing the evidence is the basis for an effective investigation. It is a foundation for reaching a fair and just verdict and identifying and punishing the ones who violated the right to life envisaged in Article 2 ECHR. Therefore the Court put a lot of emphasis on this requirement of an effective investigation, which is illustrated by the abundance of case-law in this respect.

In order to secure the evidence, the authorities of the Contracting States are obliged to, inter alia, promptly and thoroughly examine the scene of the incident and record everything of significance that was found, as well as to protect that evidence from contamination; to identify and question all the eyewitnesses as well as perpetrators in person and in the immediate aftermath of the incident while their memory is still fresh; to prevent any colluding among the suspects; to order for a thorough autopsy to be performed by an expert.

The Court also showed understanding for the national investigative and law enforcement organs' right to evaluate which evidence is relevant and thereby worth collecting and securing. It would be counterproductive and time-consuming to expect that all these actions have to be taken in every single case in order for this requirement to be met. However, if the evidence in question is evidently relevant in the circumstances of the case, it is an obligation of the State organs in charge of the investigation to gather and secure it.

[1178] Ibidem, para. 160

[1179] *Huohvanainen v. Finland*, application no. 57389/00, judgment on 13th March 2007, para. 111

5.3.2.4 Promptness and reasonable expedition

Quite logically, effective investigation ought to be prompt. The sooner it begins, the better are the chances for the evidence to be saved and not tampered with. Moreover, the eyewitness' accounts will be more accurate since the incident will be more recent and fresh in their memory. In addition to that, the Court pointed out that promptness of the investigation is necessary in order to maintain public confidence that State authorities respect the rule of law. At the same time, if the investigation is prompt it prevents any appearance of collusion or tolerance of unlawful acts.[1180]

In *Kelly and Others v. The United Kingdom* the Court commended that the investigation started immediately after the operation ended.[1181]In *Finucane v. the United Kingdom*, the Court also commended the fact that the police investigation was initiated immediately after the death.[1182] Same is valid for *Bitiyeva and X v. Russia*[1183]and *Huohvanainen v. Finland*.[1184]

Quite opposite, in *Isayeva v. Russia* the Court found that the promptness requirement has not been met due to the considerable delay in opening the investigation that was not explained nor justified in any way.[1185]

The Court also took notice of the duration of investigation, i.e. if its expedition has been reasonable. Although there are no fixed rules, we will note that the in the *McCann* case Court considered that the investigation has been thorough enough, and one of the factors taken into consideration was the duration of public inquest proceedings – whole 19 days. That is one of the reason why in the subsequent cases the Strasbourg judges reminded that

[1180] Ibidem, para. 97

[1181]*Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para. 113

[1182]*Finucane v. the United Kingdom*, application no. 29178/95, judgment on 1st July 2003, para. 74

[1183]*Bitiyeva and X v. Russia*, application nos. 57953/00 and 37392/03, judgment on 21st June 2007, para. 147

[1184]*Huohvanainen v. Finland*, application no. 57389/00, judgment on 13th March 2007, para.110

[1185]*Isayeva v. Russia*, application no. 57950/00, judgment on 24th February 2005, para. 216 - 217

"the promptness and thoroughness of the inquest in *McCann and Others* left the Court in no doubt that the important facts relating to the events had been examined with the active participation of the applicants' highly competent legal representative."[1186] It is however important to mention that what is considered to be "reasonable expedition" varies from case to case.

In *Bubbins v. the United Kingdom*, for example, the Court found it satisfactory that the inquest was held over a four-day period.[1187]Similarly, in *Kelly and Others v. The United Kingdom* it noted that interviews with soldiers accused for unlawful killings were concluded within three days, which in the Court's vies was "not unreasonable period of time considering the numbers involved".[1188]However, the inquest itself opened more than eight years after the deaths occurred, after a series of adjournments.[1189]Although they were often requested by the applicants, that in the Strasbourg judges' view does not dispense the authorities from ensuring compliance with the requirement for reasonable expedition.[1190]The Court also noted that even in the periods unrelated to the adjournments the inquest did not progress with diligence, since there has been a significant delay in commencing the inquest and a lot of time lapsed in scheduling the resumption of the inquest after the adjournments.[1191]

Therefore the Court came to the conclusion that the time taken in this inquest cannot be regarded as compatible with the State's obligation under Article 2 of the Convention to ensure that investigations into suspicious deaths are carried out promptly and with reasonable expedition.[1192]

[1186]*Finucane v. the United Kingdom*, application no. 29178/95, judgment on 1st July 2003, para. 77

[1187]*Bubbins v. the United Kingdom*, application no. 50196/99, judgment on 17th March 2005, para. 163

[1188]*Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para. 113

[1189]*Kelly and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para. 130

[1190] Ibidem, para. 132

[1191] Ibidem, para. 133

[1192] Ibidem, para. 134

It is also necessary to point out that it was not enough that the investigation lasted for a certain number of days or months. Even more important was that it gave result. As the Court pointed out in *Mahmut Kaya v. Turkey*: "where there are serious allegations of misconduct and infliction of unlawful harm implicating State security officers it is incumbent on the authorities to respond actively and with reasonable expedition".[1193]

Therefore it found a breach of procedural duty under Article 2 ECHR in the *Yaşa v. Turkey* case where the investigation has been open for five years, but with no outcome.[1194] In other words, it lacked efficiency i.e. tangible results. In *Tanrikulu v. Turkey* he Court also evaluated the fact that the Turkish Government did not provide any concrete information on the progress of the investigation although the Courts requested it.[1195]

Despite its well-established stand that the obligation under Article 2 to conduct an effective investigation is an obligation of means, in *Bitiyeva and X v. Russia* the Court was clear in stating that cannot be used as an excuse for the observed lack of progress for a long period of time (in this particular case over two and a half years from the start of the investigation).[1196]Namely, the investigation into killings was never completed nor were the people responsible identified nor indicted. The Court found that to be a violation of positive obligation to perform an effective investigation under Article 2 ECHR since it pointed to, inter alia, an obvious disregard for the promptness requirement.

On the other hand, in *Huohvanainen v. Finland* the public prosecutor brought charges against the officers less than a year after the incident.[1197] That was outlined in the Strasbourg Court's case-law as a good example of reasonable expedition.

When it comes to the promptness of commencing an investigation, its importance is clear both in the context of collecting and securing the evidence and in the context of transparency and public trust in efficiency of the investigation itself. The immediate start

[1193]*Mahmut Kaya v. Turkey*, application no. 22535/93, judgment on 28th March 2000, para. 107

[1194]*Yaşa v. Turkey*, application no. 63/1997/847/1054, judgment on 2nd September 1998, para. 103

[1195]*Tanrikulu v. Turkey,* application no. 23763/94, judgment on 8th July1999, para. 109

[1196]*Bitiyeva and X v. Russia*, application nos. 57953/00 and 37392/03, judgment on 21st June 2007, para. 148

[1197]*Huohvanainen v. Finland*, application no. 57389/00, judgment on 13th March 2007, para. 112

has been outlined as a quality of an effective investigation numerous times by the Strasbourg judges. What is considered under "reasonable expedition" varies from case to case, especially since the speedy expedition should not be obtained at the expense of its thoroughness. What can be inferred from the Court's practice is that long adjournments are not considered to be compatible with the reasonable expedition requirement. Also, this legal standard is defined not only by the duration of the investigation, but also by the investigative actions taken in this time and their outcome.

5.3.2.5 Sufficient public scrutiny

In order to secure accountability in practice as well as in theory, there must be a sufficient element of public scrutiny of the investigation or its results. The Court was clear that in any event the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.[1198]

For that reason the Court examined if the relatives of deceased had access to the case file during the investigation,[1199] if they have been informed of the proceedings and given an opportunity to share their version of what happened, in case they have been present.[1200] For example, in *Güleç v. Turkey*[1201] the father of the victim was not informed of the decisions not to prosecute and in *Öğur v. Turkey*[1202] the family of the victim had no access to the investigation and court documents. This is why the Court found that the requirements of the effective investigation have not been complied with.

[1198] *Güleç v. Turkey*, application no.54/1997/838/1044, judgment on 27th July 1998, para. 82

[1199] See: *Öğur v. Turkey*, application no. 21594/93, judgment on 20th May 1999

[1200] *Gül v. Turkey*, application no. 22676/93, judgment on 14th December 2000, para. 94

[1201] *Güleç v. Turkey*, application no. 54/1997/838/1044, judgment on 27th July 1998

[1202] *Öğur v. Turkey* application no.21594/93, judgment on 20th May 1999

Similarly, in *McKerr v. The United Kingdom* the Court observed that witness statements were not revealed to the applicant's family before they appeared at the inquest. As a result, that prejudiced the ability of the applicant's family to participate in the inquest and undoubtedly contributed to long adjournments in the proceedings.[1203] The same occurred in *Hugh Jordan v. The United Kingdom*.[1204]

In *Cangöz and others v. Turkey* the Court found that the prosecutor asking the Magistrates' Court to restrict the applicants' access to the file because they were related to "the deceased members of the terrorist organization effectively prevented the applicants from taking any meaningful part in the investigation. The Court continued to describe obstacles placed in the way of the applicants' efforts to safeguard their legitimate interests. Namely, they had not had the opportunity to have access to any of the evidence or the information in the prosecutor's file,[1205] except for the autopsy reports and subsequently the documents concerning the forensic examination of the clothes of four of their deceased relatives, since the prosecutor classified the investigation as confidential. It was only some three years after the investigation was closed, that those documents were made available to the applicants.[1206] Moreover, a huge majority of pertinent requests made by the applicants to collect evidence has been ignored by the prosecutor.[1207] This all pointed to the conclusion that the national authorities failed to carry out an effective investigation into the killing of the applicants' relatives.[1208]

In the *Hugh Jordan v. The United Kingdom* case, the Court also considered that Article 2 ECHR in its procedural aspect has been breached, inter alia, by the absence of legal aid for the representation of the victim's family.[1209]

[1203] *McKerr v. The United Kingdom*, application no. 28883/95, judgment on 4th May 2001, para.147-148

[1204] *Hugh Jordan v. The United Kingdom*, application no. 24746/94, judgment on 4th May 2001, para. 134

[1205] *Cangöz and others v. Turkey*, application no. 7469/06, judgment on 26th April 2016, para. 145

[1206] Ibidem, para. 146

[1207] Ibidem, para. 147

[1208] *Cangöz and others v. Turkey*, application no. 7469/06, judgment on 26th April 2016, para. 148

[1209] Ibidem.

Quite opposite, in the McCann case, the Court pointed out that the applicants were legally represented and the lawyers acting on their behalf were able to examine and cross-examine key witnesses, and to make their submissions in the course of the proceedings.[1210] That was in accordance with the State's obligation under Article 2 ECHR combined with Article 1 ECHR.

Similar observations have been made in Kelly *and Others v. The United Kingdom*. Namely, six of the families were represented by counsel at the inquest. Legal aid was also available. However, the Court found that the applicants' lack of access to copies of any witness statements until the witness concerned was giving evidence caused several long adjournments before the inquest opened and hence contributed significantly to prolonging the proceedings. Undoubtedly that has placed them at a disadvantage in terms of preparation and ability to participate in questioning.[1211]

The Court considered that "the right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events."[1212]

On the other hand, in the same case the Court noted that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2. Therefore, the requisite access of the public, or the victim's relatives, may be provided for in other stages of the available procedures.[1213]

The European Court commended the United Kingdom in *Bubbins v. the United Kingdom* for enabling the applicant with a sufficient measure of participation in the investigation. Namely, the family was legally represented throughout the proceedings by experienced

[1210] *McCann and others v. United Kingdom*, application No.18984/91, judgment on 27th September 1995, para.162

[1211] Kelly *and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para. 127-128

[1212] Ibidem, para. 128

[1213] Kelly *and Others v. The United Kingdom*, application no. 30054/96, judgment on 4th May 2001, para. 115

counsel.[1214]The State provided him with an appropriate forum in order to ensure the public accountability of the State and its agents for their alleged acts and omissions leading to the death of his brother.[1215] Namely, the decision to grant anonymity to the officers in question was a result of a careful consideration of the competing interests at stake. It was only after the representations from the family's lawyers have been heard and all the risks in stake have been evaluated that the Court decided to hide the officers' identity.[1216]The effectiveness of the inquest was not undermined on that account since the officers did give evidence at the inquest. Furthermore, the family's legal representative, the family's lawyers and the jury all had the right to cross-examine them.[1217]

In the same case the Court continued to assess that the Coroner's decision to withhold particular documents or materials to the family of the deceased was not formed solely on the decision of the police. In its view, the family had access to enough information to protect its interests in the inquest proceedings. In the light of numerous witnesses testifying at the inquest, and all the key witnesses being examined, the non-disclosure of related documents could not undermine the fact-finding role of the inquest or deny the family an effective participation in the procedure.[1218] The Court outlined that there were significant efforts by the police to keep the family informed of the course and results of the investigation, such as asking them to give statements and giving them access to the report containing a number of materials crucial for making final conclusions.[1219]

The Court commended the authorities in the *Huohvanainen v. Finland* case because the pre-trial documentation contained the autopsy report, the results of all the forensic and other investigations, the reports on the siege as well as numerous witness statements. In accordance with requests of both public prosecutor and the deceased's family there were some additional lines of inquiry.[1220] Moreover, the Finish legal system provided J.'s

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[1214]*Bubbins v. the United Kingdom*, application no. 50196/99, judgment on 17th March 2005, para. 163

[1215]Ibidem, para. 156

[1216] Ibidem, para. 155

[1217] Ibidem, para. 157 – 158

[1218] Ibidem, para. 161

[1219] Ibidem, para. 162

[1220]*Huohvanainen v. Finland*, application no. 57389/00, judgment on 13th March 2007, para. 111

family with the possibility of bringing a private prosecution against the officers involved in the incident, and they used that right.[1221]The Court therefore noted that since the family of the deceased had access to the case file and the important investigation – related documents, since they had the possibility to cross-examine the witnesses and the officers accused for use of excessive force, and since they have been legally represented during the proceedings,[1222] there has been a sufficient amount of public scrutiny in this particular case.

The Court also discussed the interlink between the promptness and reasonable expedition of the investigation and the access of the victim's family to the investigation files, as well as the court proceedings. In *McKerr v. The United Kingdom* it concluded that "the frequent and lengthy adjournments call into question whether the inquest system was at the relevant time structurally capable of providing for both speed and effective access for the deceased's family."[1223]

The lack of public scrutiny has been outlined as a shortcoming of an investigation in a number of cases, inter alia *Hugh Jordan v. The United Kingdom*.[1224]

All in all, the requirement of public scrutiny is a very important one. Both the family of the victims and the general public have the right to be involved in and informed about the investigation to the extent necessary to safeguard their legitimate interests. This means that the relatives of deceased should be allowed access to the case file during the investigation and to receive information of its course. Moreover, in case they have been present during the incident in question, they have to be enabled to share their version of events. They also have the right to legal aid and/or legal representation. They also have the right to examine and cross-examine key witnesses, to make their submissions in the course of the proceedings and propose certain additional lines of inquiry. On the other hand, the investigative authorities are not obliged to accept the proposed inquiries if they find that it would not be relevant for the proceedings in question.

[1221]Ibidem, para. 112

[1222] Ibidem, para. 113

[1223]*McKerr v. The United Kingdom*, application no. 28883/95, judgment on 4th May 2001, para. 155

[1224]*Hugh Jordan v. The United Kingdom*, application no. 24746/94, judgment on 4th May 2001, para. 121

However, this requirement is in no way without any restrictions. The Court was aware of the inherent, both legal and practical limitations of such approach and possible negative consequences of allowing the case file to be completely available to the family members and general public under all circumstances. That is why it outlined that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations. The Court considered that for these reasons it cannot be regarded as an automatic requirement under Article 2. As an alternative, the Court reminded that the public, or the victim's relatives, may access the case file in other stages of the available procedures in which such danger is not incumbent.

When establishing if this criteria has been met, the Court analyzed if the amount of access the family of the victim has been granted was sufficient for them to protect their interests and to make their participation in the procedure effective.

5.3.3 The cases when it has not been established beyond reasonable doubt that the killings were caused by the state agents and the obligation to conduct an effective investigation

The Court has also stated numerous times that the obligation to investigate is not confined to cases where it has been established that the killing was caused by an agent of the State. That covered the cases where there was a lack of evidence that the law enforcement officials were the ones who committed the killings or that the disappeared people have been killed. Even in the cases of missing persons, where there is no proof that any of them have been unlawfully killed, the procedural obligation under Article 2 ECHR can arise if certain conditions are met: if there is proof of an arguable claim that an individual, who was last seen in the custody of agents of the State, subsequently disappeared in a life-threatening context.[1225]

[1225] *Cyprus v. Turkey*, application no. 25781/94, judgment on 10th May 2001, para. 132

Additionally, the Court widened the scope of the investigation obligation to include killings where perpetrators are both private persons and state personal.[1226]

In this context, is it also not decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority or not. Namely, whatever mode of investigation is employed, the authorities have the duty to act of their own motion, once the matter has come to their attention, and not to wait for the next of kin either to lodge a formal complaint[1227] or to take responsibility for the conduct of any investigative procedures. In the Courts words, "the mere knowledge of the killing on the part of the authorities gave rise ipso facto to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death."[1228]

Moreover, regardless of whether the applicant had formally identified the security forces as being the assailants or not, the authorities had to take into consideration the possibility of State agents being implicated in the attacks.[1229]

This is why in *Akpinar and Altun v. Turkey* the Court pointed out that although the victims' relatives had their objective reasons not to file a complaint, they could legitimately have expected that the necessary investigation would have been conducted.[1230]The Court in this case also reminded that the applicants lacked knowledge how to challenge the lawfulness of the killings. However, they did submit a petition to the public prosecutor's office, thereby taking steps in respect of their relatives' death as far as their knowledge of the surrounding circumstances would allow.[1231]

[1226]Mowbray A., 2002, 438

[1227]See: *Isayeva, Yusupova and Bazayeva v. Russia*, applications nos. 57947/00, 57948/00 and 57949/00, judgment on 24th February 2005, para. 209

[1228]*Ergi v. Turkey*, application no.66/1997/850/1057, judgment on 28th July 1998, para. 82

[1229]*Akpinar and Altun v. Turkey*, application no. 56760/00, judgment on 27th February 2007, para. 107

[1230]*Akpinar and Altun v. Turkey*, application no. 56760/00, judgment on 27th February 2007, para. 41

[1231]*Akpinar and Altun v. Turkey*, application no. 56760/00, judgment on 27th February 2007, para. 42

What can be concluded from this is that the Court once again pointed out that it is the role of the authorities to conduct an investigation, regardless of the existence of the victims' relatives' activity in that respect. The same judicial organ reminded that "neither the prevalence of armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an independent and impartial official investigation is conducted into deaths arising out of clashes involving the security forces."[1232]

5.3.4 The cases in which the Court established a breach of procedural obligation under Article 2 ECHR, but not the substantive one

Moreover, it should be pointed out that in a number of cases the breach of duty to investigate has been established although the Court has not been satisfied beyond reasonable doubt that there has been a breach of substantive aspect of the right to life.[1233]

A good example of such case was the highly disputed *Makaratzis v. Greece.*[1234] In this case, the seven police officers accused for using a force which amounted to lethal against a victim that nevertheless survived the attack have subsequently been acquitted on the ground that it had not been shown beyond reasonable doubt that it was they who had injured the applicant. In other words, it has not been established in accordance with the abovementioned standard that the substantive aspect of Article 2 ECHR has been breached.

However, the Court concluded that the domestic authorities could have done more to obtain evidence concerning the incident.[1235] In the light of numerous omissions,

[1232] The same argument has been used in *Kaya v. Turkey*, application no.,158/1996/777/978, judgment of 19th February 1998, para. 91

[1233] Such examples are, inter alia,*Ergi v. Turkey* (application no.66/1997/850/1057, judgment on 28th July 1998) and *Yaşa v. Turkey* (application no. 63/1997/847/1054, judgment on 2nd September 1998).

[1234]*Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004

[1235] Ibidem, para. 77

deficiencies and shortcomings in the investigation, which have been previously discussed in more detail, the Court concluded that the authorities failed to carry out an effective investigation into the incident, thereby violating Article 2 of the Convention.[1236]

Another example is the case of *Akpinar and Altun v. Turkey*.[1237] In this case due to its unclear circumstances, the Court was unable to establish "beyond reasonable doubt" that there has been a violation of Article 2 of the Convention under its substantive limb.[1238]On the other hand, the Court found nothing that indicates that the steps taken by the gendarmerie authorities after the incident were part of an administrative investigation supervised by an independent authority. No evidence pointed to these measures being initiated in order to assess whether the force used during the clash had been necessary at the time of the mutilation of the bodies of Seyit Külekçi and Doğan Altun.[1239]

Cases like these are the reason why some authors see finding of a breach of procedural aspect of Article 2 as a form of a "consolation prize". In the scientific commentary one may find an opinion that the Court decided to find a violation of obligation to conduct an effective investigation in cases where there was not enough evidence that there has been a breach of the substantive aspect of right to life, in order to provide the applicants, which are members of the victims' families, some form of satisfaction or "justice". Same authors argue that the violation of the duty to investigate is considered to be a "milder" breach of the ECHR than violating right to life in its core by use of excessive force.

However, we do not tend to agree with such view. The procedural aspect of the positive duties under Article 2 ECHR should be observed and assessed independently from the substantive one which is, inter alia, showcased by the fact that the Court developed different criteria for the examination if they have been breached. They also deserve the same "stigma" in the eyes of both Court and the Contracting Parties and the procedure and legal consequences of finding a breach of both aspects of right to life under ECHR are identical.

[1236] Ibidem, para. 78 - 79

[1237] *Akpinar and Altun v. Turkey*, application no. 56760/00, judgment on 27th February 2007

[1238] Ibidem, para. 55-56

[1239] Ibidem, para. 39

The conclusion about the significance of effective investigation of alleged violations of Article 2 ECHR by the State agents

The right to life is one of the fundamental rights and it can be referred to as the right whose enjoyment is precondition of enjoyment of all the other rights. In order to provide its full protection, it is essential not only not to violate it, but also to conduct an effective investigation in cases its violations nevertheless occur. If they have not been in accordance with the law or the ECHR standard, it is essential to identify, prosecute and punish the ones responsible. That not only provides redress to the victims' families, but also shows the general public that the State in question respects the sanctity of life and invests maximum effort to protect it.

The Court explained why the duty to investigate under Article 2 ECHR represents such an important obligation for the Contracting States: "Since often, in practice, the true circumstances of the death in such cases are largely confined within the knowledge of State officials or authorities, the bringing of appropriate domestic proceedings, such as a criminal prosecution, disciplinary proceedings and proceedings for the exercise of remedies available to victims and their families, will be conditioned by an adequate official investigation, which must be independent and impartial."[1240]

To this, we may add that the investigation must also be prompt and its expedition reasonable; that it should be capable to lead to a determination of whether the force used was justified in the circumstances and to the identification and punishment of those responsible; that all the reasonable steps had to be taken to secure the evidence concerning the incident; that there should be enough public scrutiny about the investigation course and results. Only if all these requirements have been met, the investigation can be considered as effective.

The Court's activity in this respect is of utmost importance. By showcasing creativity in establishing an obligation which has not been explicitly mentioned in the ECHR, by combining the general duty under Article 1 and what was envisaged under Article 2 ECHR, the Court has shown that it is ready to make its interpretation progressive and more up-to-date in order to face challenges of protecting the human rights in ever-

[1240] *Makaratzis v. Greece*, application no. 50385/99, judgment on 20th December 2004, para. 73

evolving European societies. It has provided a more complete protection of one of the most basic rights of every human being and also have set an important precedent for a further creative interpretation of the European Convention in the future.

5.4 THE DUTY TO CONDUCT AN EFFECTIVE INVESTIGATION UNDER ARTICLE 3 ECHR

The duty to investigate allegations of serious ill-treatment by state agents has been established for similar reasons as the same obligation under Article 2. It makes the prohibition of torture, inhuman treatment and punishment practical and effective. At the same time, it presents the right-holders with procedural safeguards against their rights being violated by State authorities.[1241]

This obligation has been developed gradually, from establishing an obligation to provide a plausible explanation as to the causing of the injury in such cases where an individual is taken into police custody in good health but is found to be injured at the time of release[1242] to finding that "where an individual raises an arguable claim that he has been ill-treated by the police or such agents of State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms in the Convention, requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in

[1241] Palmer S., 2006, 440

[1242] *Aksoy v. Turkey,* application no. 21987/93, judgment on 18th December 1996, para 61

some cases for agents of the State to abuse the rights of those within their control with virtual impunity."[1243]

From this extract we can reach several conclusions. Firstly, the legal basis for establishing the procedural duty is same as with the Article 2: the Strasbourg judges read Article 1, containing the general duty of Contracting States to secure to everyone within their jurisdiction the rights and freedoms in the Convention, in conjunction with Article 3 ECHR and concluded that arguable claims that someone has been ill-treated by the police or such agents of State unlawfully and in breach of Article 3 ought to be effectively and officially investigated.

In other words, the Court again showed judicial creativity and assessed that there is an "implied" obligation to conduct an effective investigation under Article 3 ECHR. The method of judicial interpretation has been "practical and effective" and the "living instrument" doctrine have been applied.

Secondly, there has to be an arguable claim of ill – treatment for this obligation to ensue. This will be explained in more detail later. What can be concluded from it is that the applicants are expected to actively claim that the ill-treatment took place through some kind of an official channel. In addition to that, that claim has to be supported by evidence and to be plausible in the circumstances.

The treatment in question has to be unlawful and in breach of Article 3 ECHR. In other words, it has to attain a minimum level of severity.[1244] If this has been the case the Court will establish based on circumstances of the particular case,[1245] by reviewing the duration of the treatment in question, the physical or psychological effects it had on the victim, as well as the victim's sex, age and state of health.[1246] If the Court finds that the severity minimum criterion has been met, then it continues to assess if the State is responsible for the alleged ill-treatment.[1247]

[1243] *Assenov and others v. Bulgaria,* application no. 90/1997/874/1086, judgment on 28th October 1998, para.102

[1244] *Ireland v. the United Kingdom*, application no. 5310/71, judgment on 18th January 1978, para. 62

[1245] Duffy J., 1983, 321

[1246] *Ireland v. the United Kingdom*, application no. 5310/71, judgment on 18th January 1978, para. 162

[1247] Palmer S., 2006, 450

Finally, the aim of establishing this duty is to prevent the state agents from abusing their powers and violating individuals' rights. The Court in its case-law explained that examining if there has been a procedural breach of Article 3 due to the inadequate investigation made by the authorities into the applicant's complaints that he had been severely ill-treated by the law enforcement officials is important in order to ensure that the fundamental prohibition against torture and inhuman and degrading treatment and punishment is effectively secured in the domestic system.[1248]

More specifically, the Court has in numerous cases outlined that where an individual is taken into police custody in good health but is found to be injured at the time of his release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3.[1249] This explanation is to be given by conducting an effective investigation into the circumstances of the case. In this respect, one might argue that the arguable claim already exists and is reflected in injuries sustained during a period in which the individual was under the authority and even control of the state officials. Therefore the obligation to investigate ensues somewhat automatically, similar to one under the Article 2 ECHR.

It is important to point out that the Strasbourg Court has nevertheless not been consistent in its practice when it comes to this obligation. Even if all the conditions we've listed have been met for procedural investigation under Article 3 ECHR to ensue, in a number of cases it considered it more prudent to examine the applicant's complaint under Articles 6 and 13 of the Convention (for example in *Aydin v. Turkey*[1250]), or under Article 2 ECHR (*Anguelova v. Bulgaria*[1251]). In some cases the Court even went one step further and offered no explanation why it did not deem it necessary to make a separate finding under Article 3 of the Convention in respect of the alleged lack of an effective investigation (such as in *Denizci and others v. Cyprus*[1252]).

[1248] *Ilhan v. Turkey*, application no. 22277/93, judgment on 27th June 2000, para. 89

[1249] *Satik and others v. Turkey*, application no. 31866/96, judgment on 10th October 2000, para. 54

[1250] *Aydin v. Turkey*, application no. 57/1996/676/866, judgment on 25th September 1997, para. 88

[1251] *Anguelova v. Bulgaria*, application no. 38361/97, judgment on 13th June 2002, para. 150

[1252] *Denizci and others v. Cyprus*, application nos. 25316-25321/94 and 27207/95, judgment on 23rd May 2001, para. 388

5.4.1 The existence of an arguable claim of ill – treatment as a condition for conducting an effective investigation

What makes these cases somewhat different from the ones dealt under Article 2 ECHR is that the Court explicitly outlined the existence of an arguable claim of ill – treatment as a precondition for assessing if the claim of breach of Article 3 ECHR. On the other hand, as we've pointed out, the Contracting State's duty to investigate under Article 2 ensues automatically, as soon as its organs find out about a death as a result of use of lethal force by law enforcement officials.[1253]

The term "arguable" should, in our opinion, be interpreted as substantiated by evidence and plausible in the circumstances of the case in question. In the case of *Labita v. Italy*[1254]the Court explained that such claims are the ones that "gave reasonable cause for suspecting that the applicant had been subjected to improper treatment".[1255] Only if that condition has been met, the Contracting States' authorities are obliged to conduct an investigation which has to meet certain criteria, which will we discuss in more detail.

An element of the existence of an arguable claim has been examined in *Sevtap Veznedaroğlu v. Turkey.*[1256] Namely, in this case the applicant alleged before both the public prosecutor and the judge that she had been tortured. Her claim has been supported by the evidence from the file presented to the public prosecutor, which contained the results of the medical examinations carried out on her.[1257] Therefore the Court assessed that the fact that the applicant insisted on her complaint of torture taken with the medical evidence in the file should have been sufficient to alert the public prosecutor to the need to investigate the substance of the complaint. However, the public

[1253]*Satik and others v. Turkey*, application no. 31866/96, judgment on 10th October 2000, para. 91

[1254] *Labita v. Italy*, application no. 26772/95, judgment on 6th April 2000

[1255] Ibidem, para. 130

[1256]*Sevtap Veznedaroğlu v. Turkey*, application no.32357/96, judgment on 11th April 2000

[1257] Ibidem, para. 33

prosecutor didn't take any steps to further question the applicant or the police officers at her place of detention about her allegations. Moreover, the substitute judge dismissed her allegations without further enquiry.[1258]

Since the applicant had laid the basis of an arguable claim that she had been tortured and stood by her allegations right up to the stage of trial, the Court found that the inertia displayed by the authorities in response to her allegations was inconsistent with the procedural obligation which devolves on them under Article 3 of the Convention. Therefore, it concluded that in this case that Article has been violated on the account of the failure of the authorities of the respondent State to investigate the applicant's complaint of torture.[1259]

The criteria for credibility of the applicant's claims have been widened in the *Labita v. Italy*, where hearing of the applicant and the police officers, as well as the media reports and testimonies of other prisoners in this regard.[1260] Also, it was pointed out that even the State authorities publicly and energetically condemned controversial practices by warders at Pianosa Prison.[1261]

From these examples it is clear that the Court in its practice took into consideration if the claim has been supported by medical evidence and the witness testimonies, if the applicant has been consistent with it, have there been media reports confirming the issue and other relevant evidence pointing to the torture having taken place.

5.4.2 The criteria for the effective investigation in cases in which the law enforcement officials used lethal force in light of Article 3 ECHR

[1258] Ibidem, para. 34

[1259] Ibidem, para. 35

[1260] *Labita v. Italy*, application no. 26772/95, judgment on 6th April 2000, para. 130

[1261] Ibidem, para. 135

5.4.2.1 Independence

The independence criterion has been pointed out as one of the most important ones in cases related to Article 2 ECHR. This has also been the case with the procedural limb of Article 3 ECHR. The independence has to be not only institutional, but also practical.

As for institutional independence, the lack thereof can be observed in *Satik and others v. Turkey*. Namely, as the Court previously assessed, administrative councils were made up of civil servants. They responded to and took the orders from the Governor. At the same time, the Governor was responsible for the security forces whose conduct was examined by the administrative councils.[1262] In addition to that, if the administrative councils would open the investigations, they were often carried out by gendarmes linked hierarchically to the units concerned in the incident. Therefore the Court found that the decision to entrust the İzmir Administrative Council with the investigation if the gendarmes were responsible for the injuries caused to the applicants at Buca Prison "must call into question the possibility of making any independent determination on what happened at the material time".[1263]

One of the main indicators of practical independence is that the organs in charge of the investigation do not accept the official version of events, despite the evidence proving the contrary. Not complying with this requirement has therefore been found in *Satik and others v. Turkey*, where after a careful reconstruction of the events at issue on the basis of the examination of the applicants, other prisoners and three prison officials the public prosecutor was convinced that the official account of what transpired on the day in question has been credible. That was also what he replied to the Minister of Justice's inquiry on 29 July 1997 as to what occurred at Buca Prison. In the Court's opinion "this statement was entirely inconsistent with the duties and functions of a public prosecutor at a time when an investigation was being conducted into the involvement of gendarme officers in the incident."[1264]

[1262] *Kiliç v. Turkey*, application no. 22492/93, judgment on 28th March 2000, para. 72

[1263] *Satik and others v. Turkey*, application no. 31866/96, judgment on 10th October 2000, para. 60

[1264] Ibidem, para. 59

To conclude, in order for this requirement to be met, the Court emphasized that there can be no institutional, hierarchical link between the investigating organs and the ones under the investigation. Moreover, the official version of events has to be carefully examined. The investigating authorities cannot simply accept the law enforcement officials' statements and close the investigation, despite existence of the evidence pointing to contrary.

5.4.2.2 The capability to lead to a determination of whether the force used was justified in the circumstances and to the identification and punishment of those responsible

In *Assenov and others v. Bulgaria* the Court clearly stated that an effective investigation should be capable of leading to the identification of those responsible. In its view, this is essential in order for the general legal prohibition of torture and inhuman and degrading treatment and punishment, to be effective in practice. Another reason is to prevent the agents of the State to abuse the rights of those within their control with virtual impunity.[1265] This could be seen as the effectiveness in the narrower sense of the word.

In this particular case, the Court found that Bulgarian authorities failed to comply with this requirement. It is illustrated by the DDIA investigator's conclusion that Mr Assenov's father caused his injuries despite an absolute lack of evidence that the force used by Mr Assenov's father amounted to the one which would have been required to cause the bruising described in the medical certificate.[1266] Moreover, the Court criticized the GMPO for making a conclusion, unsupported by any evidence, that Mr Assenov had been disobedient to the police, and that "even if the blows were administered on the body of the juvenile, they occurred as a result of disobedience to police orders".[1267] This was in

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[1265]*Assenov and others v. Bulgaria,* application no. 90/1997/874/1086, judgment on 28th October 1998, para.102

[1266]Ibidem, para. 103

[1267]Ibidem para. 104

the Court's view contrary to the principle under Article 3 that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct is in principle an infringement of his rights.

In *Labita v. Italy* the Court noted that not only were the applicant's claims not investigated for 14 months, but also despite his repeated claims that he would be able to recognize the warders concerned if he could see them in person, no steps were taken to enable him to do so. Moreover, the case was filed away on the ground not that those responsible had not been identified.[1268]

Likewise, in *Satik and others v. Turkey* not only did the public prosecutor accept the official version of events despite numerous witness accounts claiming otherwise,[1269] but also the decision of İzmir Administrative Council on 1 May 2000 not to open the investigation was reached although the case file has been absent, i.e. it disappeared. Therefore the Court found that this fact must cast doubt on its merits.[1270] All this undoubtedly pointed to the main requirement of an effective investigation, its capability of leading to a determination of whether the force used was justified in the circumstances and to the identification and punishment of those responsible, not being fulfilled.

We can deduce that the main characteristic of an investigation which complies with this requirement is a careful assessment of the evidence provided, especially against the standard of absolute necessity of use of force. Moreover, a serious effort had to been made in order to identify and punish the perpetrators of an alleged breach of Article 3 ECHR.

5.4.2.3 All the reasonable steps had been taken to secure the evidence concerning the incident

Similarly as in cases of alleged breaches of procedural obligation under Article 2 ECHR, the Strasbourg Court out a lot of emphasis on taking all the reasonable steps to secure the

[1268] *Labita v. Italy*, application no. 26772/95, judgment on 6th April 2000, para. 134

[1269] *Satik and others v. Turkey*, application no. 31866/96, judgment on 10th October 2000, para.59

[1270] Ibidem, para. 60

evidence. The most striking example of failure to do so can be found in *Satik and others v. Turkey*, where the İzmir Administrative Council, the organ in charge of deciding if the criminal investigation should be opened, sent the case file to gendarme officials at Buca Prison where it disappeared. The case file has been lost for four years. The Court was adamant that "The authorities' failure to secure the integrity of important case documents must be considered a most serious defect in the investigative process."[1271]

In *Assenov and others v. Bulgaria* the Strasbourg judges heavily criticized the authorities because they despite the very public place nature and location of the incident, and the fact that around 40 people witnessed it, did not attempt to contact and question them immediately after the incident, when memories would have been fresh. Instead, only one independent witness has been questioned in the immediate aftermath of the events in question, and by that one unable to recall anything.[1272] The subsequent examination of two further witnesses, one of whom had only a vague recollection of the incidents in question, did not suffice to rectify the deficiencies in the investigation up to that point.[1273] This was one of the reasons why the Court concluded that the investigation in question has not been thorough and effective enough and that therefore there has been a violation of Article 3 of the Convention.[1274]

As an example, in *Labita v. Italy* whole 14 months passed between the two questionings of the applicant about his allegations, and in the meantime only photocopies of photographs of the warders who had worked at Pianosa have been obtained.[1275] Despite the applicant's repeated claims that he was able to identify the people who subjected him to treatment contrary to Article 3 ECHR, he was not in any way enabled to do so.[1276]

To conclude, the examples of Court's practice in this regard show that it, similar as in cases relating to Article 2 ECHR, considered that the place of the incident has to be visited and the forensic evidence obtained and secured, that the eyewitnesses and the

[1271] *Satik and others v. Turkey*, application no. 31866/96, judgment on 10th October 2000, para. 60

[1272] *Assenov and others v. Bulgaria,* application no. 90/1997/874/1086, judgment on 28th October 1998, para.103

[1273] Ibidem, para. 104

[1274] Ibidem, para. 106

[1275] *Labita v. Italy*, application no. 26772/95, judgment on 6th April 2000, para. 133

[1276] Ibidem, para. 134

accused law enforcement officials have to be questioned in a timely and detailed manner and that forensic, medical and photographic evidence has to be obtained and preserved in a proper manner.

5.4.2.4 Promptness and reasonable expedition

The importance of promptness and reasonable expedition of the investigation have been already tackled. The same reasoning can be applied under Article 3 ECHR. The Court established this requirement implicitly but constantly through its case law.

For example, in *Labita v. Italy* it found the slowness of the outset that the investigation by the Livorno public prosecutor's office not to be acceptable. Namely, whole fourteen months passed between the applicant being interviewed by the *carabinieri* and the time he was given a further appointment with a view to identifying those responsible. In those 14 months the expedition has not been reasonable either: the only action investigative authorities took during that interval was the obtaining of photocopies of photographs of the warders who had worked at Pianosa prison. This was even less acceptable taken into consideration that the applicant remained a prisoner in the same prison during that whole time.[1277]

The prompt beginning of an investigation, which usually means it should start immediately after the incident took place, is as important as its reasonable expedition. From the case-law examined, one might conclude that in this respect the Court took the same approach as in cases under Article 2 ECHR, criticizing the long adjournments and assessing the quantity and importance, as well as the expedition of the steps taken during the duration of the investigation

5.4.2.5 Sufficient public scrutiny

[1277] *Labita v. Italy*, application no. 26772/95, judgment on 6th April 2000, para. 133

The cases of alleged torture, especially a systematic one are bound to attract public attention. We've already mentioned that in the *Labita v. Italy* case media reported about the torture taking place in the Pianosa Prison.[1278] It is quite logical that the authorities have an obligation to allow the victim the access to the case file, as well as to be informed about its course and to participate in the amount necessary to protect their legitimate interests.

At the same time, since by prohibition of torture and other forms of serious ill – treatment in actuality some of the core human values are protected, and since the right envisaged in Article 3 ECHR is such an important, basic, absolute right which cannot be limited under any circumstances, it is inherent in its nature that the general public has the right to be informed what has been done for allegations of its breach to be investigated and the ones responsible brought to criminal conviction.

As in the cases under Article 3 ECHR, this obligation is not absolute and is limited by the protection of state interests and the interests of effectiveness of the investigation itself.

5.5 CONCLUSION AND AN OBSERVATION ABOUT THE DIFFERENCES BETWEEN THE DUTIES TO CONDUCT AN EFFECTIVE INVESTIGATION UNDER ARTICLES 2 AND 3 ECHR

The Court undoubtedly once again showed its creativity when establishing a procedural obligation under Article 3 ECHR. It was one important step further in the development of positive obligations and in reaching a more complete protection of one of the fundamental human rights.

[1278] *Labita v. Italy*, application no. 26772/95, judgment on 6th April 2000, para. 130

There are undoubtedly, as legal commentators point out, many similarities between this procedural obligation and the one that arises related to right to life. As we've already pointed out, in both cases this duty is not explicitly mentioned in the Article in question, but it is implied. The Court founded it on a combination of the substantive ECHR right with the general duty under Article 1. The aim behind establishing this duty was to ensure that state agents both respect and enforce the right to life and freedom for torture.[1279] In other words, the goal of Strasbourg judges was to provide a more thorough and complete protection, respect and fulfillment of rights guaranteed under the ECHR.

Moreover, in both cases the key requirement of an effective investigation is that it should be capable of leading to the identification and punishment of those responsible.[1280]

In *Ilhan v. Turkey* the Court made a differentiation between the procedural obligation to provide an effective investigation into the death caused by, *inter alios*, the security forces of the State implied under Article 2 ECHR which guarantees the right to life and the same obligation which ensues under Article 3 ECHR.

Namely, the provision of Article 2 includes the requirement that the right to life be "protected by law". It may also concern situations where the initiative must rest on the State for the practical reason that the victim is deceased and the circumstances of the death may be largely confined within the knowledge of State officials.[1281]

On the other hand, Article 3 is phrased in substantive terms. Furthermore, as the Court pointed out, the practical exigencies of the situation will often differ from cases of use of lethal force or suspicious deaths. Since the Article 13 of the Convention provides for a person with an arguable claim of a violation of Article 3 with an effective remedy, the Court found that it provides both redress to the applicant and the necessary procedural safeguards against abuses by State officials. According to the Court's case-law, the notion of effective remedy in this context includes the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill-treatment and permitting effective access for the complainant to the

[1279] Mowbray A., 2004, 61

[1280] *Labita v. Italy*, application no. 26772/95, judgment on 6th April 2000, para. 131

[1281] *Ilhan v. Turkey*, application no. 22277/93, judgment on 27th June 2000, para. 91

investigatory procedure. Whether the procedural obligation under Article 3 ECHR has been breached will therefore depend on the circumstances of the particular case.[1282]

However, there is another important difference – while in the cases concerning the right to life the Court has been rather consistent when it comes to both establishing the procedural obligation and criteria for examination if the Contracting State complied with it, in the cases related to duty to undertake an effective investigation under Article 3 ECHR this has not been the case.

Namely, while from cases such as *Ilhan v. Turkey*[1283] one might conclude that applicants are able to successfully assert a duty of effective investigation in exceptional cases[1284], in the cases such as *Satik and others v. Turkey*[1285]the Court seems to have deluded from such practice, effectively finding violations of both substantive and procedural aspect of Article 3 ECHR.

At the same time, the development of the obligation to conduct an effective investigation under Article 2 has undoubtedly been an inspiration for the Court when it comes to developing the same obligation under Article 3 ECHR. This can be in its establishment and legal foundations, as well as the criteria for the effective investigation which are basically the same. Although the case-law in this regard is still underdeveloped, it can be expected that the evolution of the duty to conduct an effective investigation under Article 3 will in many aspects follow the evolution of the same obligation under Article 2 ECHR.

We can only hope that this will result in providing firmer foundations for this duty, as well as more consistent approach in its establishment and assessment of its potential breach. The Court has shown certain hesitance in this regard, maintaining its traditional approach at times and showing caution not to take the development of positive obligation under the ECHR too far.

We can conclude this Chapter by reminding that "the broadening of positive obligations in international human rights law is significant and potentially far reaching. It signals that states have duties beyond simple non-interference as conceived in traditional liberal

[1282]Ibidem, para. 92

[1283] *Ilhan v. Turkey*, application no. 22277/93, judgment on 27th June 2000

[1284] Mowbray A., 2004, 63

[1285]*Satik and others v. Turkey*, application no. 31866/96, judgment on 10th October 2000

theories and have to actively consider the impact of policies and measures, or lack thereof, on human rights protection. This duty has resulted in streamlining of human rights, the extent of which is still being developed in the ever-growing jurisprudence of human rights bodies on positive obligations."[1286]

And an important chapter in this area of human rights law has definitely been the development of positive obligations under Articles 2 and 3 ECHR in cases when the ones violating these rights have been those in charge of their protection. By establishing these obligations, the Court took a firm stand against the abuse of power and impunity of the law enforcement officials and has made it clear that everyone is equal in the eyes of the law when it comes to protection of human rights and at the same time, core values of our societies.

[1286]Bantekas I., Oette L., "International human rights, law and practice", Cambridge, 2014, 77

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McKerr v. The United Kingdom, application no. 28883/95, judgment on 4th May 2001 (Art.2)

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Denizci and others v. Cyprus, application nos. 25316-25321/94 and 27207/95, judgment on 23rd May 2001

Avşar v. Turkey, application no. 25657/94, judgment on 10th July 2001 (Art. 2, Art.3)

Anguelova v. Bulgaria, application no. 38361/97, judgment on 13th June 2002 (Art.2, Art.3)

Finucane v. the United Kingdom, application no. 29178/95, judgment on 1st July 2003 (Art.2)

Aktaş v. Turkey, application no. 24351/94, judgment on 24th April 2003 (Art.2, Art.3)

Makaratzis v. Greece, application no. 50385/99, judgment on 20th December 2004 (Art.2, Art.3)

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Bitiyeva and X v. Russia, application nos. 57953/00 and 37392/03, judgment on 21st June 2007 (Art.2, Art.3)

Nikolova and Velichkova v. Bulgaria, application no. 7888/03, judgment on 20th December 2007 (Art. 2, Art.3)

Leonidis v. Greece, application no. 43326/05, judgment on 8th January 2009 (Art.2)

Cangöz and others v. Turkey, application no. 7469/06, judgment on 26th April 2016 (Art.2, Art.3)

7 SUMMARY – ABSTRACT

This research answers a number of questions related to development of the doctrine of positive obligation under Articles 2 and 3 in cases of excessive use of force by law enforcement officials. Such questions are: upon what jurisprudential foundations have these obligations been constructed? What methodology was used by the Court in order to determine their existence, scope and breach? How did they evolve and what are the reasons for it? What are their precise contents, explicit and implicit?

Through thorough analysis of the relevant case law this research showcased the way the European Court of Human Rights balanced the demand of showing judicial creativity in order to respond to the present-day demands and respect for the role of Member States in determining the scope of rights which the European Convention on Human Rights guarantees in cases of excessive use of force by the law enforcement officials in light of Article 2 of the ECHR.

One part of this research is dedicated to the relationship between the proportionality of use of force and States´ obligation to exercise appropriate care when planning, conducting and controlling certain operations involving law enforcement officials and to minimize, to the greatest extent possible, recourse to lethal force. The obligations of Contracting States to provide these officials with proper training and instructions in accordance with the protection of right to life guaranteed by the Article 2 ECHR has also been examined in detail.

The second part focuses on the positive obligation of Member States to conduct an effective investigation into the killings of individuals committed by law enforcement officials. Special emphasis is placed on showcasing the European Court´s creativity when developing this obligation, as well as the criteria which are to be met for an investigation to be considered ”effective” in accordance with the Article 2 of the European Convention on Human Rights.

The third part of the research is dedicated to the procedural obligation under Article 3 ECHR. A number of questions have been answered through legal analysis of the Court´s case law - what are the conditions for its existence, which are the key requirements for an investigation to be considered effective in accordance with Article 3 ECHR and what are the main differences between the procedural obligation ensuing under this Article ECHR and the one ensuing under Article 2 ECHR.

It can be concluded that the contemporary Court has been rather cautious when developing and applying positive obligations. However, their gradual yet constant evolution can be seen as an expression of Strasbourg Court´s recognition of their significance, as well as its firm stand against the abuse of power and impunity of the law enforcement officials in the Contracting States.

8 ZUSAMMENFASSUNG

Die vorliegende Arbeit beantwortet eine Reihe von Fragen bezogen auf die Entwicklung der Doktrin der positiven Verpflichtung nach den Artikeln 2 und 3 in Fällen exzessiver Gewaltanwendung durch die Strafverfolgungsbehörden. Folgende Forschungsfragen sind zu nennen: Nach welchen Rechtsgrundlagen ist diese Verpflichtung aufgebaut worden? Mit welcher Methode hat das Gericht ihre Existenz, ihren Umfang und ihren Verstoß festgestellt? Wie hat sie sich entwickelt und was sind die Gründe dafür? Was sind ihre genauen Inhalte, ausdrückliche und implizierte?

Nach einer gründlichen Analyse der einschlägigen Rechtsprechung wurden die Art und Weise deutlich, wie der Europäische Gerichtshof für Menschenrechte die Forderung nach juristischer Kreativität ausbalancierte, um den heutigen Forderungen und der Achtung der Rolle der Mitgliedstaaten gerecht zu werden, wie bei der Festlegung des Rechtenumfangs, welche die Europäische Menschenrechtskonvention in Fällen exzessiver Gewaltanwendung durch die Strafverfolgungsbehörden im Hinblick auf Artikel 2 EMRK garantiert.

Der erste Teil dieser Arbeit widmet sich dem Verhältnis zwischen der Verhältnismäßigkeit der Gewaltanwendung und der Verpflichtung der Staaten, bei der Planung, Durchführung und Kontrolle bei bestimmten Operationen von Strafverfolgungsbeamten angemessene Sorgfalt walten zu lassen und den größtmöglichen Rückgriff auf tödliche Maßnahmen zu minimieren. Die Verpflichtungen der Vertragsstaaten, diese Beamten in Übereinstimmung mit dem in Art. 2 EMRK garantierten Schutz des Rechts auf Leben angemessen ausbilden zu lassen, wurden ebenfalls eingehend geprüft.

Der zweite Teil konzentriert sich auf die positive Verpflichtung der Mitgliedstaaten, eine wirksame Untersuchung der Tötungen von Personen durch die Strafverfolgungsbehörden durchzuführen. Besonderer Wert wird darauf gelegt, die Kreativität des Europäischen Gerichtshofs bei der Entwicklung dieser Verpflichtung sowie der Kriterien aufzuzeigen, die erfüllt sein müssen, damit eine Untersuchung gemäß Artikel 2 der Europäischen Menschenrechtskonvention als "wirksam" gilt.

Im dritten Teil beschäftigt sich diese Arbeit mit der Verfahrenspflicht nach Artikel 3 EMRK. Die Anzahl der Fragen wurde durch eine rechtliche Analyse der Rechtsprechung des Gerichtshofs beantwortet - welche Hauptvoraussetzungen gibt es dafür, dass eine Untersuchung als wirksam im Sinne von Artikel 3 EMRK betrachtet werden kann, worin bestehen die Hauptunterschiede zwischen der verfahrensrechtlichen Verpflichtung, die sich aus diesem Artikel EMRK ergibt und der sich aus Artikel 2 EMRK ergebenden Verpflichtung.

Daraus kann folgende Schlussfolgerung gezogen werden, dass der gegenwärtige Gerichtshof bei der Entwicklung und Anwendung positiver Verpflichtung eher vorsichtig war. Ihre allmähliche, aber stetige Entwicklung kann als Ausdruck der Anerkennung ihrer Bedeutung durch den Straßburger Gerichtshof gesehen werden, ebenso wie es ihre

Wirkung gegen den Machtmissbrauch und die Straflosigkeit der Strafverfolgungsbeamten in den Vertragsstaaten zeigt.

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EDUCATION AND TRAINING

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Thesis: "Obvious disproportion in the law of contracts and torts" under supervision of Prof. Dr. Sanja Radovanovic, LL.M

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2015 Human Rights Course by Norwegian Centre for Human Rights at International Summer School, University of Oslo, Norway, passed with the grade A

2014 passed the Republic of Serbia Bar Exam, organized by the Ministry of Justice of the Republic of Serbia, Novi Sad, Serbia

2014 The Hague Academy of International Law (the Public International Law Session), one of the 22 students (out of 300 participants of the Academy) admitted to the Directed studies, directed by Harvard University Professor Sundhya Pahuja

2012 The Leadership Development Programme, fellowship by the European Fund for Balkans, Transfuse Association and College of Europe

2010-2011 *University of Vienna: Human Resources Development Programme for selected SEE Universities*, The Austrian Federal Ministry for Science and Research in the Frame of the University in Vienna, Austria

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