THE RIGHT TO LIFE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ARTICLE 2)

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Using this Manual

This manual was originally designed by INTERIGHTS' Europe Programme for its training projects in Central and Eastern Europe and the former Soviet Union. Its purpose was to serve as a reference for lawyers on the European Convention on Human Rights.

The manual includes judgments of the European Court of Human Rights up to August 2011. Any errors, omissions or faults are those of the authors.

Alternative formats of the manual are available upon request.

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1 INTRODUCTION

> Article 2 – Right to Life
>
> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) In defence of any person from unlawful violence;
>
> (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) In action lawfully taken for the purpose of quelling a riot or insurrection.

1.1. The importance of the right to life

Article 2 (the right to life) and Article 3 (the prohibition against torture and inhuman and degrading treatment or punishment) together constitute the core rights enshrining the most crucial values found in those democratic societies comprising the Council of Europe. In particular, the right to life is central to any system for the protection of human rights, and it is not surprising that Article 2 is the first substantive right found in the European Convention on Human Rights ("the Convention" or the "ECHR"). Its central importance is also highlighted by the fact that, in terms of Article 15, it is one of only four rights for which no derogation is permitted in peacetime (although in a time of "war or other public emergency threatening the life of the nation", deaths "resulting from lawful acts of war" will not constitute violations of the right to life).

Though the textual provisions of Article 2 are interpreted strictly (**McCann and Others v United Kingdom (1995)**) by the European Court of Human Rights ("the Court"), the Court has also interpreted the text more creatively, as giving rise to positive duties on the part of the state, such as carrying out adequate investigations into death and taking effective steps to protect individuals from real threats posed by others or by environmental hazards. It is therefore necessary to consider the key case law in order to understand the wide and demanding range of responsibilities assumed by states upon ratification of the Convention.

The fundamental purpose of Article 2 is to protect individuals from unlawful killing and other real threats to life by virtue of two basic elements found in the text: first, by means of a general obligation found in paragraph 1 to protect the right to life "by law"; and second, by describing in paragraph 2 the limited circumstances in which the deprivation of life by state officials may be justified. What emerges from this jurisprudence is that the state's duty to safeguard the right to life can be considered as involving three main aspects:

- the duty to refrain from unlawful killing by its agents (essentially a negative obligation);
- the duty to take steps to safeguard life, in particular to prevent the avoidable loss of life (and other positive obligations requiring the authorities to take reasonable steps); *and*
- the duty to investigate suspicious deaths (the so-called "procedural aspect" of Article 2, another example of a positive obligation).

It is also noteworthy that the case law concerning the scope of obligations flowing from the right to life has developed considerably in the past fifteen years. While allegations of violations of Article 2 had been considered by the European Commission on Human Rights in a number of applications before its functions were assumed by the Court, only in 1995 did the European Court of Human Rights ("the Court") give its first judgment in which this guarantee was extensively discussed. Accordingly, the Court's jurisprudence on this provision is comparatively recent. It is also now surprisingly large: between 1999 (when the "new" Court was first established) and the end of 2010, violations of substantive aspects of the right to life were established in 268 judgments, while in 364 judgments respondent states were deemed to have failed to carry out an effective procedural investigation into loss of life. These judgments have involved, though, only a handful of states, with Turkey and Russia responsible for more than three quarters of all violations established by the Court. However, while the jurisprudence on this provision has developed fast, and is amongst the richest and most dynamic in all of the Court's case law, many questions concerning the right to life have yet to be examined by the Court, leaving the way open for creative litigation on these aspects.

The bulk of Article 2 cases concern killings or acts of a life-threatening nature that were committed directly by state agents. Two types of issue have arisen frequently in such cases:

- First, the Court has examined whether or not killings could be attributed to state agents; if so, the Court has thereafter considered whether the use of force exerted by the police or armed forces falls under one of the exceptions under Article 2 and whether it was "absolutely necessary" in the circumstances. Answering this first question involves an evaluation of the facts and evidence in an attempt to determine whether it can be shown, beyond reasonable doubt, that the state was responsible for the killings; the latter question involves an examination of not only the actual use of lethal force, but also the planning and control of the operation which led to the use of force.

- Second, the Court has questioned whether a state failed to investigate effectively the death of a person unlawfully killed. While the Court may carry out its own investigations, it has also developed the "procedural aspect" of Article 2 to require an investigation into the loss of life to help ensure that domestic law and procedure safeguarding the right to life have been effective in a particular instance.

Article 2 considerations extend well beyond issues concerning unlawful killing by state agents. Other claims under Article 2 have included arguments on a wide range of issues, including the following:

- the right to protection from violation of the right to life by others, including domestic violence;
- forced disappearances;
- capital punishment and the deportation or extradition of an individual to a country where their life would be exposed to the risk of capital punishment or life-threatening violence;
- the positive obligation to protect vulnerable detainees from self-harm;
- the right to a specific level of medical care;
- the right to be protected from environmental damage, including dangerous activities and natural disasters;
- the rights of the unborn child; *and*
- the right to die.

2. THE SCOPE OF ARTICLE 2

2.1. The domestic and extraterritorial scope of Article 2

Article 1 of the Convention requires states to "secure to everyone within their jurisdiction" the rights contained in the Convention and its Protocols. Article 2 provides that "everyone's right to life" is to be protected by law, and that "no one" should be deprived of his life intentionally. The absolute and open nature of this language – "everyone" and "no one" – emphasises that the guarantees found in the Convention exist irrespective of status: they apply both to citizens of a state and to illegal and unregistered immigrants, asylum-seekers, refugees, immigration detainees, those being arrested with a view to removal and those detained pending removal. In any event, the substantive guarantees found in the Convention are also supplemented by Article 14 which provides that these rights are to apply without discrimination. Indeed, as will be discussed, the application of Article 14 may be of particular concern when it is alleged that a killing by a state official has been racially motivated.

The concept of "jurisdiction" within the meaning of Article 1 reflects its meaning in public international law and it follows that a state's jurisdictional competence is primarily territorial (**Ilaşcu and Others v Moldova and Russia (2004)**). Article 56, however, provides that a state may declare by notification to the Secretary General of the Council of Europe that the Convention applies to any territory for whose international relations it is responsible. Separate and additional notification is required under each optional protocol. The failure of a state to lodge notification cannot be overcome by arguing that it is in effective control of its own territory (**Quark Fishing Ltd v United Kingdom (2006)**). Jurisdiction is presumed to be exercised throughout the state's territory, unless it can be shown that a state is unable to exercise its authority on account of exceptional circumstances applying in a particular region. However, "a constraining *de facto* situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State" does not thereby mean that a state ceases to have jurisdiction for the purposes of Article 1, as a positive obligation to seek to secure Convention guarantees will continue to apply to the state.

- In **Ilaşcu and Others v Moldova and Russia (2004)** Moldova claimed that it was not in control of an area of its territory in which a self-proclaimed "Moldavian Republic of Transdniestria" had been established with the support of Russia, but the Court considered that the Moldovan Government could still be held responsible under Article 1 in respect of complaints of ill-treatment and arbitrary deprivation of liberty since the government had not taken all appropriate measures (diplomatic, economic, judicial or otherwise) to seek to re-establish control or to secure the release of those applicants still imprisoned. This rebuttable presumption of control over national territory is justified on the grounds of the maintenance of equality between states and the effectiveness of the Convention.

The concept of "jurisdiction", however, is not necessarily restricted to a state's national territory, as acts performed or which produce effects outside a state's territory ("extra-territorial acts") may amount to exercise of a state's jurisdiction in terms of international law. Thus where a state exercises *de facto* effective control of an area situated outside national boundaries, for example as a consequence of military action, Article 1 responsibility may also be engaged. This is the case whether control is exercised directly through a state's armed forces or through a subordinate local administration.

- In **Loizidou v Turkey (1996)**, an individual resident in southern Cyprus had been denied access on several occasions to her property in the northern part of the island now occupied by the respondent state. The Court accepted that Turkey had a responsibility in terms of Article 1 for "securing" the Convention rights and freedoms of the applicant and others affected by the occupation of northern Cyprus, an obligation arising directly from the control of the territory

> and whether or not the military action was lawful. Further, a situation of occupation and control engages state responsibility not merely in respect of action taken by its officials and agents (such as its military), but also more generally to ensure that the rights contained in the Convention are secured throughout the territory. The "acquiescence or connivance" of the authorities, particularly of self-proclaimed authorities not internationally recognised, in the acts of private individuals which violate the Convention rights of other individuals, will give rise to interferences with Convention guarantees.

A further consequence is that, exceptionally, two states may be deemed to have responsibility for complaints of human rights violations. Thus in **Ilaşcu and Others v Moldova and Russia (2004)**, the Court held that the responsibility of Russia was additionally engaged in terms of Article 1 on account of its military, political and economic contribution to the survival of the separatist regime in the region of Transdniestria, a regime which remained under the effective authority (or at the very least under the decisive influence) of Russia.

Recognition of extraterritorial jurisdiction is thus confined to exceptional circumstances in which the principle of "effective control" applies. Where there is no "effective control", there can be no "jurisdiction" for the purposes of Article 1.

- In **Banković and Others v Belgium and 16 Other Contracting States (2001)**, the Court could find no jurisdictional link in relation to the persons who were victims of the aerial bombing of a television station in Belgrade by NATO forces – action taken as part of its campaign against the Federal Republic of Yugoslavia and following the failure to resolve the situation in Kosovo by diplomatic means. The complaint had been lodged against those countries which were both members of NATO and of the Council of Europe. The applicants' assertion that a positive obligation existed to secure Convention rights in a manner proportionate to the level of control exercised in any given extraterritorial situation was tantamount, the Court considered, to holding that the phrase "within their jurisdiction" was superfluous and devoid of any purpose. Such a reading would also be inconsistent with existing state practice, since earlier instances of military intervention in other parts of the world had not led any state to make a derogation under Article 15, thus suggesting a lack of apprehension on the part of states of extraterritorial responsibility in such military contexts. Nor did the Court consider that declaring the complaint inadmissible would defeat the *ordre* public mission of the Convention, for the Court's obligation was to have regard to the special character of the Convention as a constitutional instrument of *European* public order operating in the legal space (*espace juridique*) of member states.

In short, the "jurisdictional competence of a State is primarily territorial" unless "special justification" can displace this principle. Thus in **Markovic and Others v Italy (2006)**, the Convention (Article 6) was found to apply, even though the same extraterritorial events as in **Banković** were at the heart of the case. Here, however, relatives of those killed had brought a civil action in the Italian courts as they considered that Italy's involvement in the military operations had been more extensive than that of other NATO states. Since the applicants had a genuine arguable claim under domestic law and the case concerned the fairness of the domestic judicial examination of that claim, the necessary jurisdictional link was essentially of a territorial nature.

The principles of extraterritorial application of the Convention in the context of military operations conducted outside the Convention's "legal space" have been significantly developed in a number of recent cases which arose from the military occupation of Iraq by the international coalition forces. In **Al-Saadoon and Mufdhi v United Kingdom (2010)** and in **Al-Jedda v United Kingdom (2011)**, the applicants could rely on the Convention because they had been held in custody by the British military. In **Al-Skeini and Others v United Kingdom (2011)** the Court broke new ground by applying the Convention (and Article 2 in particular) in an extraterritorial situation which did not involve the

same level of physical control of the applicants as in the above custody-related cases. The case concerned the deaths of Iraqi civilians who had been shot by members of British troops during patrol operations. The Court established that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the UK and the US assumed in Iraq the exercise of some of the public powers normally exercised by a sovereign government. These exceptional circumstances gave rise to the conclusion that, as its soldiers engaged in security operations in Basrah during the period in question, the UK exercised authority and control over individuals killed in the course of such security operations. Moreover, while it was undisputed that the death of the relatives of all other applicants had been caused by British troops, it was not known which side killed the wife of the third applicant during an exchange of fire between a British patrol and unidentified gunmen. Nevertheless, the Court was satisfied that there was a jurisdictional link between this latter victim and the UK on the ground that British soldiers were on patrol near her home and took part in the fatal fire exchange.

Other situations of extra-territorial jurisdiction are recognised, and responsibility under Article 1 may also be engaged in other situations not involving military occupation or governmental authority, though this responsibility will be restricted to responsibility for acts or omissions of state officials. Thus customary international law and treaties recognise the extra-territorial exercise of jurisdiction in respect of activities of a state's diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state. Responsibility may also be engaged in respect of individuals who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating (whether lawfully or unlawfully) in the latter state (**Illich Sanchez Ramirez v France (1996)**). Military or police operations conducted outside a state's territory may thus give rise to responsibility under Article 1.

- For example, in **Öcalan v Turkey (2005)**, the applicant alleged he had been unlawfully deprived of his liberty in Kenya. While reiterating that "even an atypical extradition cannot as such be regarded as being contrary to the Convention", the Court noted that the applicant had been arrested by members of the Turkish security forces inside a Turkish-registered aircraft in the international zone of Nairobi airport, and that from this point onwards he had been under effective Turkish authority and therefore within the "jurisdiction" of Turkey. In contrast, in **Issa and Others v Turkey (2004)**, while it was undisputed that in 1995 a military operation had been conducted by the Turkish army in northern Iraq, it had not been established to the required standard of proof that Turkish forces conducted operations in the area in which it was claimed that the victims were at the time they were killed.

- **Banković and Others v Belgium and 16 Other Contracting States (2001)** also raised but avoided the question of whether state responsibility was engaged for the purposes of Article 1 in respect of acts of international organisations of which Council of Europe states are members.

- In **Bosphorus Hava Yollarÿ Turizm ve Ticaret Anonim Sirketi v Ireland (2005)** the Court confirmed the existence of a rebuttable presumption of compatibility of acts adopted by states in fulfilment of the obligations imposed upon them as members of an international organisation (in this instance the European Union) with those obligations assumed in ratifying the European Convention on Human Rights, always providing that these acts may be adequately reviewed for compatibility with fundamental rights within the system set up in the given organisation:

  > *"State action taken in compliance with such legal obligations arising out of commitments undertaken in ratifying a treaty concluded subsequently to accession to the Convention is justified as long as the relevant organisation [...] is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides [...] By 'equivalent' the*

Court means 'comparable': any requirement that the organisation's protection be 'identical' could run counter to the interest of international co-operation pursued."

2.2. Deportation and extradition, and the risk of loss of life

Article 2 has a further potential extraterritorial application in that it protects those liable to expulsion from being sent to other countries where they would face a serious risk to life, whether at the hands of state or non-state actors. Although successful non-refoulement claims are much more commonly brought under Article 3, the Court has recognised on a number of occasions that Article 2 offers similar protection. The principle of non-refoulement under Article 2 is typically invoked when an applicant risks the imposition of the death penalty in the country to which they are to be returned. However, it is accepted that Article 2 would apply when risks to a person's life come from other sources (admissibility decision of **F. v United Kingdom (2004)**). In **M.S.S. v Belgium and Greece (2011)**, the Court held that the applicant had an "arguable claim" under Article 2 when he contended that he would be exposed to the danger of reprisals at the hands of the anti-governmental forces in Afghanistan. However, having disposed of the case under Article 3, the Court considered that there was no need to decide whether there was a separate violation of Article 2.

In this context, the Court was repeatedly called upon to decide whether the death penalty amounted to a violation of Article 2. The Court's response to this question has changed over years. In **Soering v United Kingdom (1989)**, the Court declined to rule that extradition to a country where an individual faced the serious risk of being sentenced to the death penalty was in itself a violation of the Convention on account of the textual provision in paragraph 1 of Article 2 recognising the existence of capital punishment in certain circumstances, noting that Protocol 6 was the means by which European states had chosen to abolish this sentence.

- In **Öcalan v Turkey (2005)**, the Grand Chamber neither excluded nor confirmed that capital punishment in peacetime had come to be regarded as an unacceptable form of punishment with the consequence that it was no longer permissible under Article 2. Instead, the Court relied on Article 3: while it recognised that the significant number of states who were yet to ratify Protocol 13 might prevent a finding that it was established practice in Europe to regard the implementation of the death penalty as inhuman and degrading treatment within the meaning of Article 3, it held that deportation of an individual who has suffered or risks suffering a flagrant denial of a fair trial in the receiving state, the outcome of which was or is likely to be the death penalty, would constitute a violation of Article 3.

- In **Bader and Kanbor v Sweden (2005)**, the Court found the deportation of the applicants would breach *both* Articles 2 and 3 because of the risk of the death penalty one of them would face back in Syria. In line with the **Öcalan** judgment, however, the Court considered it to be decisive that the death penalty was a result of an unfair trial.

- Most recently, however, in **Al-Saadoon and Mufdhi v United Kingdom (2010)**, the Court adopted a significantly different approach. The case was brought by Iraqi nationals who had been arrested by the British forces following the invasion of Iraq by an international coalition in March 2003. They sought to prevent their transfer to the Iraqi authorities as it would put them at real risk of execution by hanging. The Court recognised that state practice in the Council of Europe had evolved since Öcalan and it was now "strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances". From this, the Court concluded that Article 2 no longer precluded considering the death penalty as an "inhuman or degrading treatment or punishment" within the meaning of Article 3. In consequence, it found a violation of Article 3 but held that it was "not necessary" to examine whether there was a separate violation of Article 2.

As the above examples demonstrate, non-refoulement cases involving alleged risk to the applicants' life are typically disposed of under Article 3; the Court tends to either address the issue of the death penalty in terms of inhuman or degrading punishment, or to conclude that there is no need to examine claims regarding risks to the applicant's life when it has already been asserted that there is a separate risk of ill-treatment which in itself is sufficient to prevent the applicant's deportation.

- Unusually, in **Baysakov and Others v Ukraine (2010)**, the Court was prepared to examine a complaint under Article 2 in some detail. The applicants in the case fled Kazakhstan fearing persecution for their involvement in a political opposition group. They were granted refugee status in Ukraine. The Kazakh authorities, however, sought their extradition on various charges, including organised crime and conspiracy to murder. The applicants argued that the charges were politically motivated and that, if extradited to Kazakhstan, they would be denied a fair trial and subjected to torture. Although the Court established that the applicants' extradition would breach Article 3, it did not decline to examine the complaint of one of the applicants that his extradition would also violate his right to life, since the offences he was charged with carried the maximum punishment of the death penalty. In the end, this complaint was held to be manifestly ill-founded. The Court referred to the evidence that Kazakhstan reduced the scope of application of the death penalty to crimes of terrorism and exceptionally grave war crimes. It also noted there was a lasting moratorium on executions. Unlike in the context of ill-treatment, the Court was satisfied with the assurances of the Kazakh Office of the Prosecutor General that the prosecutors would not request the death penalty for the applicant in question. Therefore, the Court was not persuaded that there was a real risk of the death penalty in the case of his extradition to Kazakhstan. The Court explained that the "mere possibility of such a risk because of the alleged ambiguity of the relevant domestic legislation cannot in itself involve a violation of Article 2".

2.3. Recognition of standing as "victim"

The right of individual petition to the Court lies at the heart of the scheme of protection under the Convention. Applications involving alleged violations of the European Convention on Human Rights may be brought by those who can claim legitimately to qualify as "victims" in terms of Article 34(1) of the Convention.

2.3.1. Article 34 – Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

The Court must thus be satisfied that an applicant can be deemed to be a "victim" of a breach of the Convention. Inevitably, allegations of violations of Article 2 will involve applications being lodged in a representative capacity. In the context of Article 2, applications may normally be brought by a deceased's spouse (**Aytekin v Turkey (1998)**), children (**Osman v United Kingdom (1998)**) or sibling, or even nephew (**Yaşa v Turkey (1998)**). In other words, with regard to standing as a "victim", spouses, children and other close relatives of the deceased are recognised as such where they are able to demonstrate that they were personally affected by the incident (rather than merely acting in a representative capacity). For example, in **Ergi v Turkey (1998)** the Court accepted that a brother's complaint about the murder of his sister involved a "genuine and valid exercise" of the right of individual application to Strasbourg. However, the importance of being in some way affected by the death of a relative is crucial. For example, **Sanles v Spain (2000)** concerned an application by the heir of a tetraplegic who had tried unsuccessfully to seek legal recognition of his right to end his life with the help of others and who had been refused permission to carry on domestic proceedings after the

tetraplegic's death. The application was declared inadmissible as the heir could not be recognised in such circumstances as a "victim".

It is also worth noting that Article 2 issues can arise even though no actual death has occurred. An individual who finds that their right to life is directly threatened may also claim to be a "victim", for the Court has accepted that a violation of the right to life can be claimed not only in relation to those whose lives have actually been lost, but also by those who have received death threats and those who have been victims of attempts to kill, whether by state or non-state actors. A violation may also be alleged by an individual who has been the subject of an attempted homicide (**Osman v United Kingdom (1998)**). Article 2 may be applicable even when not only did a victim survive but there was no intention to kill them. When such cases involve use of force by state agents, the choice between Articles 2 and 3 depends on the degree and type of force used and the intention or aim behind the use of that force. Article 2 will apply when the force was potentially deadly and the conduct of the officers applying it put the applicant's life at risk (**Vasil Sashov Petrov v Bulgaria (2010)**). Article 2 may also be relied upon in cases of medical negligence where the victim has been negligently infected with a life-threatening disease (e.g. HIV), even when their life is not in imminent danger (**Oyal v Turkey (2010)**). Surviving victims of serious environmental disasters can also bring claims under Article 2 when a clear threat to their life was involved (**Budayeva and Others v Russia (2008)**).

As with all complaints to the European Court of Human Rights (and as a basic principle of international public law), an applicant must exhaust all domestic remedies before submitting an application to the Court. That does not mean, however, that futile or excessively protracted mechanisms must be exhausted: only those which are adequate and effective in offering a prospect of remedy. The obligation to exhaust domestic remedies requires that applicants use "the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged", but the Court has often reiterated that "the existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness" (**Nachova and Others v Bulgaria (2005)**). The nature of domestic remedies that need to be exhausted is closely linked to the substance of a complaint.

- In **Branko Tomašić and Others v Croatia (2009)**, the central question raised by the applicants went beyond any individual responsibility of a state official and related to the alleged deficiencies of the national system for the protection of a person's life from acts of dangerous criminals, including the legal framework and mechanisms for its implementation. As a result, the Court found that the applicants were not required to resort to available civil-law remedies which would enable them to seek compensation for the unlawful acts of state officials, even though as a general rule such civil action would be an adequate and sufficient remedy in cases of negligence on the part of the authorities.

2.4. The beginning of life: rights of the foetus and the issue of abortion

Despite the importance of the right contained in Article 2, its scope is still in some aspects uncertain. For example, the Convention is silent on the question of when life begins, and thus gives little guidance on termination of pregnancy. Similarly, at the other end of a lifespan, issues concerning euthanasia remain to be addressed. Such questions concerning the rights of the foetus, pregnant women and terminally-ill persons (or persons kept alive on life support machines) involve controversial matters of societal ethics and personal morality.

The question of whether the right to life under Article 2 of the Convention extends to the life of a foetus has arisen mostly in the context of cases concerning abortion laws. The Convention provides no definitive guidance as to when any right to life begins – a feature shared by certain international instruments and in turn reflecting a lack of general agreement on the issues of availability of abor-

tion in relation to the foetus's "right" to life – suggesting that such matters are probably destined to remain within the discretion accorded to domestic decision-makers, that is, the state's "margin of appreciation". There is little if any direct help to be found in case law on national law's compatibility with Article 2 in this area. Indeed, as the Court concluded in **Vo v France (2004)**, "it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention".

- Whether an unborn foetus is covered by the term "everyone" has arisen indirectly in certain cases as with **Open Door and Dublin Well Woman v Ireland (1992)** where the question concerned the right to receive and impart information on abortion, matters falling within the scope of freedom of expression governed by Article 10 of the Convention. Here, the Court declined to consider whether restrictions on expression could be said to have been justified for protecting the "rights of others".

- In **Brüggemann and Scheuten v Germany (1976)**, the applicant had argued that the decision to have an abortion was a matter for her alone as this fell within the scope of the right to respect for private life under Article 8 of the Convention. Although the Commission accepted that women had standing as "victims" to enable them to complain about the restrictions on the availability of abortion, it determined that this provision could not be interpreted in such a way as to imply that pregnancy or its termination were only a matter of the private life of the mother. No case has yet been decided on the issue of whether the failure to make abortion available, even in circumstances where there is a risk to a woman's health or life, compromises a woman's rights.

In a number of cases, Article 2 has been directly relied upon by applicants. Each essentially involved a challenge by a prospective father to permissive abortion laws, but no claim succeeded as inevitably the Commission recognised a "margin of appreciation" (that is, the discretion available to national authorities in determining such a matter). The laws at issue allowed abortion on demand in the early stages of pregnancy (and in certain circumstances in later pregnancy) in cases of serious risk to the woman's health or life or a risk of foetal abnormalities. In **X. v United Kingdom (1980)** the Commission ruled against the proposition that the foetus has an absolute right to life under Article 2, holding that:

> *"The life of the foetus is intimately connected with, and cannot be regarded in isolation of, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman [...] The Commission finds that such an interpretation would be contrary to the object and purpose of the Convention (para 19)."*

However, the Commission in **H. v Norway (1992)** stated that Article 2 might apply, in certain circumstances, to the foetus:

> *"The Commission finds that it does not have to decide whether the foetus may enjoy a certain protection under Article 2 [...] but it will not exclude that in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 protects the unborn life (para 1)."*

Similarly, in **Boso v Italy (2002)** the Court again avoided, but left open, the question whether a foetus could qualify for protection. However, the Court was accorded the opportunity to review the existing case law in 2004.

- In **Vo v France (2004)**, the applicant challenged the lack of criminal sanction for involuntary termination of pregnancy owing to medical negligence. In this case, the applicant had been forced to undergo a therapeutic abortion as a consequence of medical error. Her unborn child was expected to have been viable, but no prosecution of the doctors for unintentional homicide was possible in French law as a foetus was not recognised as a potential victim in such circumstances. Her application raised the issue whether the failure to punish the unintentional destruction of a foetus through criminal prosecution constituted a failure on the part of the state to protect by law the right to life. The Court noted that "the issue has not been resolved within the majority of the Contracting states themselves [...] [and that] there is no European consensus on the scientific and legal definition of the beginning of life" (para 84). It observed, however, that "the life of the foetus was intimately connected with that of the mother and could be protected through her" (para 86). It also reaffirmed the positive obligation upon the state to ensure that regulations compelled hospitals to protect patients' lives and to provide effective judicial procedures to hold those responsible to account.

From all of this, the conclusion is thus that abortion is not specifically excluded from Article 2 consideration, but that it may be difficult to identify the circumstances in which a violation of the guarantee will be deemed to have taken place short of an extreme case in which an individual is forced to undergo such an operation.

- In **Evans v United Kingdom (2007)**, the applicant relied on Article 2 to protect the embryos she created with her partner through *in vitro* fertilisation. The embryos were required by English law to be destroyed after her (by then former) partner withdrew his consent. The Grand Chamber confirmed the approach adopted in **Vo v France**, namely that the issue of when the right to life begins falls within the relevant state's margin of appreciation. It therefore concluded that the embryos created by the applicant did not have a right to life within the meaning of Article 2.

2.5. Article 2 and the terminally ill

The application of Article 2 of the Convention to the treatment of a terminally-ill person has been considered in respect of situations in which a mentally-competent individual seeks assistance to die. Other important issues, such as whether doctors may be authorised to end the life of a patient to avoid further suffering contrary to the wishes of the patient or his family, or whether doctors may provide palliative care which may have the unintended effect of shortening life, are still to be addressed. The lack of European consensus on such issues would suggest – following consideration of abortion – that states should be accorded a margin of appreciation in this respect, but doubtless subject to the crucial proviso that each instance be considered on a case-by-case basis and determined by a process in which full and careful examination of the circumstances has taken place and the decision is solely motivated by the best interests of the patient.

Such questions cannot be addressed by reference to the right to life alone, and must take into account complementary considerations arising under the Convention. Although there is yet no case law on the compatibility of laws permitting euthanasia with Article 2, it seems that the right to life does not include the right to die.

- In **Pretty v United Kingdom (2002)**, the applicant argued that the right to life included a right to die, but the Court rejected this assertion. The applicant was dying of motor neurone disease, a degenerative disease that had left her paralysed from the neck down. Persons suffering from this disease, for which there is no cure, eventually die by means of suffocation when their lungs cease to function. The applicant wanted her husband to be able to assist her in committing suicide at a time of her choosing. Her husband was unable to assist her without incurring the risk of criminal sanctions.

The Court noted that the consistent emphasis in all Article 2 cases before the Court has been on the obligation of the state to protect life. The applicant argued that, as the Court has allowed negative aspects of the right to freedom of association (in terms of Article 11) to include the right not to join an association, it should accordingly interpret Article 2 in a like manner. The Court noted that the word "freedom" in the phrase "freedom of association" implies some measure of choice as to its exercise. The applicant's arguments did not succeed as Article 2 is phrased differently: "It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life". The Court concluded that Article 2 could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely the right to die. The Court did, however, recognise that such questions could give rise to issues within the scope of Article 8, i.e. respect for private life.

This issue is also closely related to discussion of a state's responsibilities in respect of provision of medical treatment, considered further below.

3. SUBSTANTIVE OBLIGATIONS: (I) RECOGNISED CATEGORIES FOR THE USE OF ACTUAL OR POTENTIALLY LETHAL FORCE BY STATE OFFICIALS

ARTICLE 2 PARAGRAPH 2

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

(a) In defence of any person from unlawful violence;

(b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) In action lawfully taken for the purpose of quelling a riot or insurrection.

3.1. The scope of paragraph (2) of Article 2

The initial focus of Article 2 is upon the taking of life by state officials. This is perhaps the most obvious aspect of a state's responsibilities: not to use lethal force except in certain narrowly-prescribed circumstances. As noted, this first substantive obligation under Article 2 is essentially negative in character. The use of force by state agents such as police officers or military personnel that results in the intentional loss of life, or in situations where it is permitted to use force which is likely to lead to death as an unintended outcome, will thus give rise to the application of paragraph (2) of Article 2.

In this area, the majority of cases alleging violations of Article 2 that have come before the Court have involved the use of force in the context of the fight against terrorism. These cases have often involved a certain number of respondent states in which lethal force has been employed in the context of operations against members of organisations seeking to use violence to achieve political ends. Article 2 certainly also applies to the loss of life caused through military action purportedly taken against insurgents. Even where engaged in such an operation, the Court has affirmed that "anti-terrorist operations should be planned and controlled by the authorities so as to minimise to the greatest extent possible recourse to lethal force" (**McCann and Others v United Kingdom (1995)**). It ought, therefore, to be contrary to Article 2 for the law or practice of a state to allow a policy of "shoot-to-kill" of alleged terrorists. However, other cases involve incidents arising out of routine policing in which a number of shortcomings have become obvious in operational planning and control, administrative regulation of the use of firearms, or in the actual decision to employ potentially lethal force. The case law indicates that extreme caution is critical in the use of force which may result in death.

It is also possible for Article 2 to apply to force used by state officials even when death does not result if this is a likely outcome in the circumstances. However, each case must be determined on its own facts. In other words, for Article 2 to be engaged it is not necessary that there has been actual loss of life. 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 the actions of the state agents, in inflicting injury short of death, must be regarded as incompatible with the object and purpose of Article 2. Whether the use of potentially lethal force which does not actually lead to death gives rise

to an Article 2 question must be determined on the particular facts. This is illustrated by the following case:

- **Makaratzis v Greece (2004)** involved a car chase by police that resulted in the severe wounding of a driver. The Court held that physical ill-treatment by state officials which does not result in death may, in exceptional circumstances, bring the facts of a case within the scope of the safeguard afforded by Article 2. The policemen who had chased the applicant and repeatedly fired at him had not intended to kill him. However, the fact that he was not killed was fortuitous. He had been the victim of conduct which had put his life at risk and Article 2 was thus applicable. Here, the Court noted that "unregulated and arbitrary action by State agents is incompatible with effective respect for human rights". The consequence is that Article 2 requires that "as well as being authorised 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, and even against avoidable accident". The consequence is that the Court is called upon to "subject allegations of a breach of this provision to the most careful scrutiny, taking into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination". Accordingly, Article 2 issues could arise in such circumstances even where death had not resulted.

- Two cases, **Isayeva, Yusupova and Bazayeva v Russia (2005)** and **Isayeva v Russia (2005)** concerned the aerial bombardment of civilians in Chechnya by Russian security forces. The Court again reaffirmed that Article 2 is applicable not only to conduct that results in death, but also to an attack where the victim survives but which, because of the lethal force used, amounts to attempted murder.

Note, too, that where it is not possible to show that the force used was of such a nature or degree as to give rise to an issue falling within the scope of Article 2, the facts may still fall within the scope of Article 3 protection:

- In **Ilhan v Turkey (2000)**, the applicant suffered brain damage following at least one blow to the head by a rifle butt, inflicted by gendarmes who were seeking to arrest him. While the degree and type of force used and the unequivocal intention or aim behind the use of force were relevant factors in assessing whether infliction of injury short of death was incompatible with the object and purpose of Article 2, here the Court ruled that determination of these allegations was more appropriate under Article 3.

The use of actual or potentially lethal force by state agents such as police officers or military personnel which results in the intentional loss of life, or in situations where it is permitted to use force which may so result as an unintended outcome, requires consideration under Article 2 as to the purpose of the use of force and the level of force used. The four sets of circumstances outlined in paragraph (2) of the provision involve situations in which it is recognised that the state may use force which results in the deprivation of life:

- to protect against violence;
- to effect an arrest;
- to prevent the escape of a prisoner; *or*
- to quell rioting or insurrection.

Since the object and purpose of human rights treaties is the protection of human beings, Article 2 must be interpreted and applied so as to make its safeguards "practical and effective". Accordingly, the four exceptions expressly provided in the text of Article 2 must, as with all restrictions to Con-

vention rights, be interpreted narrowly. A strict interpretation of exceptions results in a more stringent protection of the right to life as the Court highlighted in **McCann and Others v United Kingdom (1995)**. To this end, the provision "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".

The first recognised exception – to protect against unlawful violence – covers both self-defence and the defence of others. Police officers also enjoy the right to life. Note, though, that the recognised exclusions are further qualified by the term "lawful", and thus the use of force in self-defence or taken in order to quell a riot must have been "lawful". The second and third exceptions similarly are so qualified, and here the "lawful" arrest or detention must be interpreted consistently with Article 5's guarantees of liberty and security of the person. Only a killing in pursuit of "lawful" arrest (or to prevent the escape of one "lawfully" arrested) may be justified. Arrests that are not in conformity with Article 5 will thus render any violence used in pursuit of arrest unlawful under Article 2, unless another of the exceptions (such as self-defence) applies.

3.2. The duty not to use lethal force unless "absolutely necessary"

The crucial issue in cases involving the use of lethal force by state officials is likely to turn upon the question whether the force used was no more than that which was "absolutely necessary". The idea of "necessity" is found elsewhere in the Convention, but within the context of Article 2 is qualified by the term "absolutely". Here, the Court will make use of other relevant international standards to help it in its assessment.

- In **Makaratzis v Greece (2004)**, police officers had fired several shots at a driver of a car who had driven through a red traffic light and several police barriers, seriously wounding (but not killing) him. For the Court, the "chaotic way" in which the firearms had been used "in a largely uncontrolled chase" in terms of an "obsolete and incomplete" regulation of the use of firearms had amounted to a violation of Article 2. The Court's reference to the United Nations Force and Firearms Principles must be noted of relevance in this case, demonstrating the international influence on the Court's jurisprudence. In particular, the failure of the authorities to put in place an adequate legislative and administrative framework meant that law-enforcement officials lacked clear guidelines and criteria governing the use of force, with the unavoidable result in this case that the police officers involved "enjoyed a greater autonomy of action and were able to take unconsidered initiatives, which they would probably not have displayed had they had the benefit of proper training and instructions". Such "unregulated and arbitrary action" was incompatible with effective respect for human rights.

The test whether force was "absolutely necessary" is clearly a more demanding test than that found elsewhere in the Convention, as the Court noted in **McCann and Others v United Kingdom (1995)**:

> *"In this respect the use of the term 'absolutely necessary' in Article 2 para. 2 indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is 'necessary in a democratic society' under paragraph 2 of Articles 8 to 11 of the Convention. In particular, 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" (para. 149).*

The consequence is that this assessment involves scrutiny of a wide range of issues including consideration of the regulatory framework concerning the use of force, the training, planning and operational control of any police or security service operation, and the particular circumstances surrounding the actual use of force. Relevant international standards may be of assistance in this assessment of whether the force used was "strictly proportionate". In principle, this assessment is

properly a matter for the domestic courts, and the European Court of Human Rights will only depart from the findings of national tribunals where there are "cogent" reasons suggesting domestic proceedings have been defective. If need be, however, the European Court of Human Rights may carry out its own investigations.

3.2.1. Actual force used: examination of the circumstances of the use of force

In assessing whether use of force was absolutely necessary to achieve one of the purposes recognised by Article 2(2), the Court will first look at the actual force used. In any evaluation of the actual force used, consideration of actions of state officials facing split-second decision-making as to whether to use potentially lethal force is not without difficulty. Thus, even force that is actually disproportionate may be justified where it is based on an honest belief which is perceived for good reason to be valid at the time but which subsequently turns out to be mistaken. The Court has recognised that to hold otherwise would impose an unrealistic burden on the state and on its law-enforcement personnel in the execution of their duties, perhaps to the detriment of their lives and the lives of others. Not all assessments are straightforward, for split-second decision-making as to whether to use lethal force may only with the benefit of hindsight be shown to have been erroneous. A selection of judgments will provide an indication of the type of situation the Court has been asked to consider.

- In **McCann and Others v United Kingdom (1995)**, the Court noted that the state authorities were presented with a fundamental dilemma. On the one hand, they were required to have regard to the duty to protect the lives of civilians and military personnel, and, on the other, to have minimum resort to the use of force against those suspected of posing a threat to such lives. Accordingly, the Court had to have regard to whether the actions of the soldiers in shooting dead terrorists in the particular circumstances of the case were strictly proportionate to the threat posed. The Court examined the intelligence supplied to the soldiers and considered whether the soldiers honestly believed, in the light of the information they received, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb which would have caused serious loss of life. It concluded that the actions taken in this case were indeed perceived by the soldiers to have been "absolutely necessary" in order to safeguard innocent lives. There was no violation of Article 2 in this regard.

- In **Andronicou and Constantinou v Cyprus (1997)**, the police had spent a day negotiating with an individual to secure the release of his female co-habiting partner whom he was holding at gunpoint and threatening to shoot were the police to break into his flat. The woman was in considerable distress. Special Forces mounted a rescue attempt. During the raid, the man was seen holding the woman as a shield before shooting at an officer. In the ensuing operation, the police shot 29 bullets, killing both the man and the woman. The Court concluded that the officers were entitled to open fire in an effort to save the woman's life and to take all measures which they honestly and reasonably believed were necessary to eliminate the risk either to her or to their own lives. The use of force did not exceed that which was deemed "absolutely necessary". The Court accepted however, in line with the findings of the commission of inquiry, that two of the police officers honestly believed in the circumstances that it was necessary to kill him in order to save the life of the hostage and their own lives and to fire at him repeatedly in order to remove any risk that he might reach for a weapon. It noted that the use of force by state agents in pursuit of one of the aims delineated in the paragraph 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, as 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 **Güleç v Turkey (1998)**, the applicant's son was killed while taking part in a demonstration in a village in south-east Turkey. Security forces had opened fire from an armoured vehicle. The Court noted that the demonstration had not been a peaceful one. The state argued that the security forces were not responsible for the death as they had fired only warning shots into the air, and that the victim must have been shot by members of the Kurdish terrorist organisation, the PKK. However, the forensic evidence showed that the victim had been shot by bullets fired from the turret of the armoured vehicle on a downward trajectory. The Court held that while the use of force may have been justified in the case, a very powerful weapon had been used and the security forces had not been equipped with less dangerous equipment such as truncheons, tear gas, riot shields, water cannon or rubber bullets. Further, the state adduced no evidence that any of the demonstrators had themselves been armed. The Court concluded that the use of force had not been "absolutely necessary".

- In **Oğur v Turkey (1999)**, security forces carried out an armed operation at a site belonging to a mining company. The applicant's son, who worked at the mine as a night-watchman, was killed as he was about to come off duty. The state argued that the victim had been killed by a warning shot. The Court noted that, by definition, warning shots were fired into the air, with the gun almost vertical, so as to ensure that suspects were not hit. It was difficult to imagine that a genuine warning shot could have struck the victim in the neck. The Court considered that, even supposing that the victim had been killed by a bullet fired as a warning, the firing of that shot had been badly executed to the point of constituting gross negligence. It concluded that the use of force against the victim had been neither proportionate nor, accordingly, absolutely necessary in defence of any person from unlawful violence or to arrest the victim.

- In **Nachova and Others v Bulgaria (2005)**, the applicant's relatives were killed by a member of the military police as they were trying to arrest them in relation to a non-violent offence. Despite being aware that the victims posed no threat, as they were neither considered dangerous nor armed, the arresting officer fired at them with an automatic rifle at close range and when other possibilities of effecting arrest were open. Significantly, the officer chose to use his automatic rifle on automatic mode despite also carrying a handgun, and one of the deceased had been shot in the chest, suggesting the possibility that he had turned to surrender before he was shot. The Court held that the actions of the arresting officer were not in accordance with Article 2, the use of force not being "absolutely necessary" in the circumstances of the case.

- In **Simsek and Others v Turkey (2005)**, the applicants' relatives were killed during demonstrations in Istanbul in 1995. The police set up barricades in the area and at one point began firing at the demonstrators, resulting in the death of two people and significantly raising the level of tension. As demonstrators advanced towards the police barricades, the police again opened fire killing another fifteen persons. The Court held that under Article 2, the use of lethal force by police officers may be justified in certain circumstances, but it does not grant a *carte blanche*. Whilst the demonstrations had not been peaceful and the police were confronted with resistance and acts of violence, the officers had shot directly at the demonstrators without first having recourse to less life-threatening methods or equipment. In such circumstances, the use of force to disperse the demonstrators, which caused the death of seventeen persons, was more than "absolutely necessary" within the meaning of Article 2.

- In **Isayeva v Russia (2005)**, Russian security forces bombarded the vehicle in which the applicant, her family and other villagers were trying to flee from her village, in which there were on going fights between Chechen and Russian forces. The attack resulted in the death of the applicant's son and nieces, and the wounding of the applicant and her relatives. The Court, accepting that the situation that existed in Chechnya at the relevant time called for exceptional measures by the state, first noted that the undisputed presence of a very large group of armed fighters in the

area and their active resistance might have justified use of lethal force by the state agents, thus bringing the situation within paragraph 2 of Article 2. However, the Court held that the use of the indiscriminate weapons was disproportionate to the aim of protecting lives from unlawful violence.

- In **Ramsahai and Others v Netherlands (2007)**, a police officer killed a suspect during an attempt to arrest him for a non-serious offence. The Court held that the use of force was not disproportionate in the circumstances of the case. The Court stressed that the police officer had drawn his service weapon only after the suspect had begun to raise his loaded pistol towards him, causing the officer to believe that a real threat to his life existed.

- In **Kakoulli v Turkey (2005)**, the applicant's relative was killed by Turkish soldiers in northern Cyprus as he crossed the border. The Court, accepting that border policing undoubtedly presented the authorities with special problems, such as unlawful crossing or violent demonstrations, stressed that these difficulties did not give law-enforcement officials *carte blanche* to use firearms. Article 2 requires that law-enforcement actions should be planned and organised in a manner which would minimise any risk of loss of life. The Court held that there had been no basis for the use of lethal force as there was no imminent risk of death or serious harm to soldiers or others. The Court was particularly struck by the fact that the last shot was fired several minutes after two earlier shots which had already wounded the victim and neutralised him, thus rendering it possible to have carried out an arrest.

- In **Giuliani and Gaggio v Italy (2011)**, the applicants invoked Article 2 in relation to the police killing of their son and brother during "anti-globalisation" demonstrations on the fringes of the G8 summit in Genoa. The deceased belonged to a violent group of demonstrators who surrounded a police vehicle wielding stones, sticks and iron bars. When they launched an attack on the vehicle, one of the carabinieri inside shouted a warning and then fired two shots, apparently without aiming at any individual. Carlo Guiliani was killed by one of those shots. The Court emphasised the need to consider the events from the viewpoint of the attacked police officer at the time of the attack. Given the extremely violent nature of the attack on the vehicle, it was concluded that the officer acted in the honest belief that his own life and physical integrity, and those of his colleagues, were in danger, and that he was, therefore, entitled to use appropriate means to defend himself and the colleagues. The Court held that under the circumstances, the use of lethal force was absolutely necessary. The Court also examined the issues of the national regulatory framework for use of firearms by law-enforcement agents and of the organisation and planning of the policing operations during the summit. No violation of Article 2 was found on either of those points.

3.3. Control and organisation of state operations resulting in death or injury

The assessment of whether lethal force used was "absolutely necessary" also entails consideration of the control and organisation of state operations resulting in death. The Court will pay attention in particular to whether the domestic law provides adequate and effective safeguards to prevent arbitrary use of lethal force.

Accordingly, the Court looks not only at the actions of agents of the state who administer the force, but also at all the surrounding circumstances including the planning and control of such actions, to ensure that the authorities have taken appropriate care to ensure that any risks to life were minimised. As noted, in cases such as **Güleç v Turkey (1998)**, this question may also require examination as to whether a range of appropriate equipment has been made available.

- In **McCann and Others v United Kingdom (1995)**, the Court held that the standard of absolute necessity in the defence of persons from unlawful violence within the meaning of Article 2(2)(a) had not been met. This followed from the authorities' decision not to stop three terrorists from entering Gibraltar from Spain, the failure to make allowance for the possibility that the army intelligence might be erroneous, and the automatic recourse of lethal force when the soldiers opened fire. The Court noted that a soldier who had made a cursory examination of the car suspected to contain a bomb had not been qualified in explosives or radio communications but had based his assumption that there was a bomb in the car merely on the fact that the car aerial was out of place. Further, soldiers who had opened fire had been given instructions to shoot to kill, a reflex action lacking the degree of caution in the use of firearms to be expected from firearm personnel, even in the context of terrorism.

- **Gül v Turkey (2000)** provides an illustration of the use of lethal force which the Court was satisfied could not be considered as "absolutely necessary". As part of a security operation, police officers had sought entry to a flat in order to carry out a search but, as the occupier was unlocking the door, the police officers opened fire and fatally injured the occupier who was behind the door. As far as the planning of the operation was concerned, the Court considered that there was insufficient evidence to establish that the officers had been under instructions to use lethal force. However, it also held that the firing of shots at the door could not have been justified by any reasonable belief on the part of the officers that their lives were at risk from the occupants of the flat, let alone that that this was required to secure entry to the flat. In short, their reaction in opening fire with automatic weapons on an unseen target in a residential block inhabited by innocent civilians could only be considered as a grossly disproportionate response.

- In **Makaratzis v Greece (2004)**, the Court was critical of the planning and organisation of a car chase in which a driver was severely injured. The operation had involved a large number of police officers in a chaotic and largely uncontrolled chase, in which there was an absence of clear chains of command exacerbated by the lack of an appropriate structure in domestic law or practice setting out clear guidelines and criteria governing the use of force.

- In **Nachova and Others v Bulgaria (2005)**, the Court was also critical of the planning and control of the arrest operation and concluded that the authorities had failed to comply with their obligation to minimise risk of loss of life. When planning the arrest operation, neither the nature of the offence nor the fact that the individuals did not pose a threat had been taken into account. In addition, the circumstances in which recourse to firearms should be envisaged were not discussed, on account of deficient legal regulation and the lack of adequate training.

- In **Wasilewska and Kałucka v Poland (2010)**, the applicants' son and partner was killed when the police fired shots at the car in which he and his friends were trying to escape during a police raid on a sports centre. According to the applicants, the victims fled because they had mistaken the police operation for an armed robbery. In its criticism of the planning and organisation of the operation, the Court singled out the facts that the intervening police officers were not clearly identifiable as being from the police and that no arrangement had been made for an on-site ambulance. It was relevant to the level of the Court's scrutiny of the police actions that the operation in question was a planned one and involved significant police forces.

By contrast, in other cases the Court was satisfied that operation and control issues had been properly addressed:

- In **Andronicou and Constantinou v Cyprus (1997)**, the Court looked more favourably on the planning and control of the actions of special forces and it was concluded that the planning and control of a police operation against a gunman involved in a domestic dispute with his fiancée

had been planned in such a manner as to minimise as far as possible any risk of death. The Court examined all the surrounding circumstances, including the decision to use special forces, in order to determine whether the authorities had taken care to ensure that the risk to the victims was minimised. Here, the authorities were well aware that they were not dealing with hardened criminals and had engaged in painstaking negotiations following a resolve to do so as far as possible and to use special forces only as a last resort. These forces were briefed carefully on the use of firearms to ensure that only proportionate force was used and thus there had been no violation of Article 2 in this regard.

- In **Bubbins v United Kingdom (2005)**, the planning and control of an operation resulting in the death of an individual were deemed satisfactory. The conduct of the operation had remained at all times under the control of senior officers and the deployment of the armed officers had been reviewed and approved by expert tactical firearms advisers who had been summoned to the scene. Furthermore, 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 backed up by a system of adequate and effective safeguards to prevent the arbitrary use of lethal force.

- In **Ramsahai and Others v Netherlands (2007)**, the Grand Chamber agreed with the Chamber's conclusions that the arrest operation was planned correctly, that the officers acted in conformity with instructions intended to minimise the danger from the use of firearms, that the firearms and ammunition issued to them were specifically designed to prevent unnecessary fatalities, and that the police officer who fired the fatal shot had been adequately trained in the use of his service firearm for personal defence.

- In **Giuliani and Gaggio v Italy (2011)**, one of the questions considered by the Court was whether there was a failure in the organisation and planning of the policing operation during the G8 summit in Genoa that led to the death of the applicants' son and brother who was one of the anti-globalist protesters. The Court attached weight to the fact that the death in question occurred during a mass demonstration. While the state is under a duty to take reasonable and appropriate measures to ensure the peaceful conduct of lawful demonstrations and the safety of all citizens, this is not an absolute obligation and the authorities enjoy a wide discretion in the choice of means. At the same time, some preventive security measures, such as the presence of first-aid services at the sight of demonstrations, would be expected, as well as a certain degree of tolerance towards peaceful gatherings. In the present case, the clash that led to the death of Carlo Giuliani was sudden and lasted only a few minutes. It was impossible to foresee its precise location and circumstances. As for the question of special training for the deployed police personnel, the Court noted that all of them either belonged to specialised units or had received *ad hoc* training in maintaining order during mass gatherings. The Court pointed out that, because of the large numbers of officers deployed, they could not all be required to have had lengthy experience or have been trained over several months or years.

A "shoot-to-kill" policy (in other words, a policy directed at the killing of certain individuals regardless of circumstances) is likely to be considered arbitrary and thus its implementation would violate Article 2. Such a policy leaves no room for a consideration as to the necessity of use of force in the circumstances, or for a consideration of what might amount to a proportionate response to a particular threat or use of violence. However, not every shooting by soldiers or police officers who are trained to kill will automatically involve a violation of Article 2. The surrounding circumstances must be closely examined.

- In **McCann and Others v United Kingdom (1995)**, the Court considered the allegation that there had been a pre-meditated plan to kill the suspected terrorists. There the soldiers shot and killed suspected terrorists. The soldiers admitted that they shot to kill. However, the Court accepted that

the soldiers honestly believed, in the light of the information they received, that it had been necessary to shoot the suspects to prevent them from detonating a bomb and causing loss of life. The Court concluded that there was no evidence to suggest that there had been a pre-meditated plot, either at the highest level of command, at other intermediate levels or by the soldiers themselves. The fact that the SAS (special forces/commandos) were used did not amount to evidence that the killings were intended. The Court noted that since the SAS were specially trained to combat terrorism, it was natural that the state authorities should enlist their skills. However, the Court was critical of the fact that the soldiers had not been trained or instructed to assess whether the use of firearms to wound, rather than kill their targets, might have been warranted by the specific circumstances that confronted them. It concluded that the soldier's reflex reaction in this vital aspect lacked the degree of caution in the use of firearms to be expected from law-enforcement personnel in a democratic society, even where dealing with dangerous terrorist suspects.

- In **Andronicou and Constantinou v Cyprus (1997)**, the Court held that although the officers were trained to shoot to kill if fired at, they were instructed only to use proportionate force if lives were in danger. There was no violation of Article 2 in that regard.

State responsibility may also be engaged where misdirected fire from agents of the state kills civilians, for Article 2 requires that all feasible precautions are taken in the choice of means and methods for carrying out security operations in order to minimise the risk of incidental loss of civilian life:

- In **Ergi v Turkey (1998)**, security forces set up an ambush in a village in south-east Turkey in order to capture members of the Kurdish nationalist organisation, the PKK. They opened fire for more than one hour, resulting in the death of the applicant's sister and her daughter. The Court found that villagers had been placed at considerable risk of being caught in the cross-fire between security forces and PKK terrorists. It stated that even if the security forces had acted with due care for the civilian population, there was no guarantee that the PKK would have exercised the same degree of care in returning fire. There was no evidence to show that any steps or precautions had been taken to protect the villagers from being caught in the conflict. The Court concluded that the ambush operation had not been carried out with the requisite care and control, and thereby violated Article 2.

- In **Isayeva, Yusupova and Bazayeva v Russia (2005)**, Russian air forces bombed a convoy of civilians trying to flee from Grozny to Ingushetia, allegedly as a response to an attack from some of the vehicles. As a result of the bombing, many civilians died, including two children of the first applicant, and many were wounded, including the first and the second applicants. Despite being hampered by a lack of information, the Court found that the operation had not been planned and executed with the requisite care for the lives of the civilians. While the situation in Chechnya called for exceptional measures, including the employment of military aviation equipped with heavy combat weapons, the respondent state had failed to provide any evidence that the aircraft had been under attack by illegal armed groups; further, even if this evidence had been available, the bombing could still not be shown to have been "absolutely necessary" in view of the absence of steps to evaluate any target, the failure to alert relevant military personnel to the announcement of a humanitarian corridor to allow civilians to leave the capital, the prolonged nature of the attack and the type of weapons used. In particular, the authorities should have been aware in advance of the "humanitarian corridor" to Ingushetia, which should have alerted them to the need for extreme caution as regards the use of lethal force. However, the pilots claimed that they were not aware of the "humanitarian corridor" and used an extremely powerful weapon that resulted in a number of casualties. The Court held that, even assuming that the military had been pursuing a legitimate aim, the operation had not been planned and executed with the requisite care for the lives of the civilians.

The Court thus examines all the facts that pertain to a given case. As yet, however, it has not been convinced of the need to examine, for example, statistical information and selective evidence in order to analyse incidents over a period of years with a view to establishing whether they disclose a practice by security forces of using disproportionate force.

3.4. The standard and burden of proof required to establish state liability for unlawful killing

3.4.1. Standard of proof

Article 2 provides protection against the unlawful deprivation of life. The difficulty facing applicants often lies in proving that the state is responsible for a death, for the Court requires that this be established by an applicant to a standard of proof of "beyond reasonable doubt" that force has been more than what was "absolutely necessary". While this appears on the face of it rather a high standard for an applicant to reach, in practice a rather more flexible approach is taken. It is important to note that the Court is not concerned with criminal responsibility. As the Court put it in **Avsar v Turkey (2001)**:

> *"[C]riminal law liability is distinct from international law responsibility under the Convention [and thus] the responsibility of a State under the Convention, arising for the acts of its organs, agents and servants, is not to be confused with the domestic legal issues of individual criminal responsibility under examination in the national criminal courts. The Court is not concerned with reaching any findings as to guilt or innocence in that sense."*

Certainly, in respect of an allegation of a premeditated plan to kill, the case law indicates that "convincing evidence" of such is required. In **McCann and Others v United Kingdom (1995)**, the applicants claimed that the killings of three individuals suspected of being terrorists had been premeditated, but the Court indicated that "it would need to have convincing evidence" before it could conclude that a premeditated plan had existed. Here, the applicants had failed to produce such evidence. There are thus two key issues: the *standard* of proof (in this case, "convincing evidence") and the *onus* or *burden* of proof (here, lying with the applicants).

However, in practice, the *standard* of proof required to show that state agents were implicated in a killing will be achieved by a range of factors. As the Court has often put it, "the attainment of the required evidentiary standard may follow from the co-existence of sufficiently strong, clear and concordant inferences or unrebutted presumptions" whose evidential value must be assessed in the light of the circumstances of the individual case (e.g. **Kaya v Turkey (1998)**). This case confirms that doubts as to certain features of the government's account of the events will not suffice: while the doubts raised in the minds of the members of the Commission were legitimate, their probative force had to be considered to be offset by the absence of any direct oral account of the applicant's version of the events before the Commission's delegates. The failure of the applicant and other witnesses to appear in person and to give evidence to the Commission's delegates who had travelled to Turkey to establish the facts clearly thus undermined the applicant's case.

Certain cases illustrate application of the standard of proof:

- In **Yaşa v Turkey (1998)**, an individual who worked in a newspaper kiosk had received several death threats. Once he was shot and seriously wounded, and on a subsequent occasion he was shot and killed. These attacks took place at a time when there was a sustained campaign against persons distributing pro-Kurdish newspapers. However, no direct evidence showing "beyond reasonable doubt" that the security forces or police had been involved existed. At a subsequent

stage of proceedings before the Court, the applicants submitted an official report analysing a series of murders in the region. This report was neither a judicial investigation nor a formal investigative report and did not specifically analyse the circumstances surrounding the death of the individual; rather, it alleged that state bodies were aware of the widespread killings in the region and that the security forces were responsible for many of them. The Court held that, although the report gave cause for serious concern, it did not contain material enabling the presumed perpetrators of the attacks to be identified with sufficient precision in this case and therefore the state could not be held responsible for the killing.

- In **Tanrikulu v Turkey (1999)**, the deceased's wife had not actually witnessed the killing of her husband, but she had arrived at the scene shortly after hearing shots fired and testified that eight members of the security forces were present nearby and they had taken no action despite a request from her to pursue the perpetrators of the shooting. For the Commission, this witness's testimony was not such as to enable it to draw inferences in order to support a finding that he had been killed either by the eight members of the security forces or with their connivance as such a finding would be pure speculation. The Court, in its turn, noted that even though the state failed to offer any evidence to refute the allegation and had failed to co-operate with the Court by furnishing all documentation pertaining to the investigation into the killing, there was insufficient evidence to the required standard to conclude that the victim had been killed in a manner attaching responsibility to the state.

- In **Ekinci v Turkey (2000)**, the deceased was a lawyer of Kurdish origin who had previously been known to have been a supporter of the Kurdish organisation, the PKK. His body had been found riddled with bullets. The Court noted that there had been no evidence that the applicant (whose work concerned mainly compensation cases) had been threatened or believed that his life was at risk. Further, there were no eyewitnesses to his death and the forensic evidence stated that the bullets had been fired from a single weapon but these bore no resemblance to bullets previously examined by that laboratory. On the other hand, although the authorities had conducted an investigation into the victim's death, they had failed to investigate a possible link between his murder and that of one of his clients who had been killed one month previously in similar circumstances. The Court concluded that while there was *prima facie* evidence that the victim may have been killed by agents of the state, there was insufficient evidence upon which to prove beyond reasonable doubt that the victim's death was attributable to the state. Indeed, the eyewitness testimonies were contradictory and gave inconclusive statements.

- In **Nuray Şen v Turkey (2004)**, the applicant, relying on statements from eyewitnesses, claimed that her husband had been abducted and subsequently tortured and murdered by state agents. She alleged that her husband had previously received threats from plain-clothes policemen in view of his political activities. The government disputed this version of the facts and claimed that the applicant's husband had been taken by three persons whom he had not resisted in a manner suggesting he had known them. Even though Commission delegates took evidence in Turkey, the true identity of the kidnappers remained uncertain. The Court held that it had not been established "beyond reasonable doubt" that state agents were involved in the incidents. The authorities must therefore take all reasonable steps available to them to secure the evidence relating to unlawful killings. While the Court declined to give a shortlist of the procedures the authorities should adopt to ensure a proper examination of the circumstances of an unlawful killing, state authorities should at the very least "take all reasonable steps available to them to secure the evidence concerning the incident". The Court proceeded to give some indication of the type of issues which were relevant in the particular case, including: "securing appropriate forensic evidence such as the retrieval of bullets, a metallurgical analysis of bullets or bullet fragments with a view to identifying the maker and supplier and type of weapon used, and a ballistics report where firearms are involved; ensuring the proper recording of the alleged finding of

the weapons and any spent cartridges; interviewing officers who arrested the victim and all eyewitnesses (including police and members of the armed forces) to ascertain the circumstances of the use of force and the state of health of the victim at the time of arrest; instructing autopsies by appropriately qualified doctors to obtain a complete and accurate record of injury and an objective analysis of clinical findings; preparing diagrams of the scene of the crime and showing the positions of witnesses at the time of the incident; carrying out the testing of any suspect's hands for traces that might link him to the weapon; and requiring any State agents involved to account for the use of their weapons and ammunition".

- In **Tahsin Acar v Turkey (2004)**, the applicant claimed that his brother had been abducted by two police officers, subsequently detained incommunicado, and was now to be presumed dead. Two of the eyewitnesses to the abduction alleged that the applicant's brother had been tied and blindfolded. Following several requests, investigations into his disappearance were initiated. However, the authorities decided not to take any proceedings against the two police officers on the grounds of insufficient evidence. Relatives subsequently claimed to have seen the individual in a news broadcast of apprehended suspected terrorists and attempted unsuccessfully to obtain a video recording of these broadcasts. The Court held that there had been no evidence to support the allegation that the police officers had been involved in the abduction of his brother. Indeed, the only eyewitnesses to the abduction had initially declared they did not know those responsible for the abduction although one had subsequently changed his evidence. The Court therefore held that the applicant's claim was based on hypothesis and speculation rather than on reliable evidence.

- In **Tekdag v Turkey (2004)**, the applicant claimed that her husband was abducted by plain-clothes policemen and then killed. The prosecutor had denied that her husband had been detained but alleged that the husband had been responsible for numerous illegal acts. The authorities generally denied the applicant's version of events and alleged that her husband was a PKK sympathiser and probable member of the organisation who had likely changed his identity and disappeared of his own accord. A delegation of the Court took evidence from witnesses in Turkey. The Court held that the applicant's allegations were not sufficiently proved. As there were no eyewitnesses to the alleged incidents or to the remand in custody of the applicant's husband, it could not be concluded beyond reasonable doubt that he had been abducted and killed by persons acting on behalf of the state authorities.

- In **Nesibe Haran v Turkey (2005)**, the applicant claimed that state authorities were responsible for the disappearance of her husband. Some days after his failure to return home, another villager told the applicant that the husband had been taken away by the police after a dispute over identity checks at his work. The Court considered that the actual circumstances in which he had disappeared remained a matter of speculation and assumption and that, accordingly, there was an insufficient evidentiary basis on which to conclude beyond reasonable doubt that he had been secretly detained and killed by (or with the connivance of) state agents.

In determining whether the standard of proof has been met, the conduct of the parties when evidence is being obtained will thus also be relevant. However, even where the state has failed to co-operate with the Court, it can be difficult to meet the required standard.

3.4.2. Burden of proof

The *burden* of proving that state agents are responsible for violation of the right to life lies generally on the applicant, as noted in **McCann and Others v United Kingdom (1995)**. However, again, in practice this requirement is applied somewhat more flexibly than would first appear. In particular, where the events at issue lie wholly, or in large part, within the exclusive knowledge of the authori-

ties (as for example in the case of persons within the control or custody of state agents, or persons found dead in an area under the state's exclusive control) strong presumptions of fact will arise in respect of injuries and death that occur. Thus if an individual previously in good health dies while in police custody, there is a responsibility upon state authorities to provide a plausible explanation. This responsibility is related to the principle developed in case law under Article 3 that a state must account for injuries sustained by a detainee while in custody. The responsibility for proving the facts thus moves from the applicant to the respondent government. The justification is that rights must confer **"practical and effective" protection**. This obligation on the state to provide an adequate account of the facts is "particularly stringent" in terms of Article 2 in the case of death. The failure of state authorities to provide a plausible explanation for the fate of a detainee will thus give rise to issues which go beyond merely the question of unlawful deprivation of liberty in terms of Article 5.

- In **Carabulea v Romania (2010)**, a healthy young man of Roma origin died in custody for unexplained reasons. The government contended that injuries found on his body had been sustained prior to the victim's detention. The Court rejected this assertion and emphasised the authorities' omission to conduct a medical examination prior to admission into custody in keeping with the CPT standards and domestic law. While this failure as such was not treated as a violation of Article 2, it had direct effect on the burden of proof: the state was barred from relying on the lack of any medical record of the victim's condition at the start of his detention in order to advance alternative theories about the cause of his subsequent death.

The obligation to provide a plausible explanation thus may help support a finding of a violation of the substantive right to life and is supported by – but distinct from – the "procedural aspect" of Article 2 to be discussed further below. This requires an independent investigation into the particular circumstances of the case. However, the procedural aspect of Article 2 will also almost inevitably arise in instances where it is alleged that state agents have either been responsible for unlawful killings or colluded with those responsible. In other words, there may be a finding of a violation of both a substantive and a procedural obligation arising under Article 2.

- In **Çakici v Turkey (1999)**, the security forces had claimed to have found the body of the applicant's brother amongst the corpses of a group of suspected terrorists, while the applicant claimed his brother had last been seen some 15 months before when taken into custody. The Court held that there had been violations of Article 2 both on the basis of a presumption of death after unacknowledged detention by state officials, and also on account of an inadequate investigation into the disappearance and alleged discovery of the body.

The burden of proof may thus be regarded as resting on the authorities to provide a satisfactory and convincing explanation in certain instances. It is thus possible to draw inferences where a state, without good reason, fails to produce material requested of it by the Court.

- In **Orhan v Turkey (2002)**, the respondent government failed to submit information which was in their hands without giving a satisfactory explanation, a fact that not only may "give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 of the Convention. The same applies to delays by the State in submitting information, which prejudices the establishment of facts in a case".

In later cases, the Court gradually broadened the scope of situations in which the burden of proof may be placed upon the state, first extending it to deaths and, then, to disappearances in areas of exclusive military control.

- In **Goygova v Russia (2007)**, one of the many Article 2 cases that have arisen out of Russia's military actions in Chechnya, the applicant complained about the killing of her mother and brother who had been found dead in an area controlled by the Russian military. She submitted that they had been shot dead by Russian troops in the streets of Grozny when her brother and two other men were trying to take her injured mother out of the city. Although the Russian government did not dispute the fact that the applicant's relatives had been killed, it argued that their death could not be attributed to the state because the identity of the perpetrators had not been established and the applicant's evidence in support of her allegations was inconclusive. The Court noted, however, that the government had not presented any alternative account of the events. In such circumstances, it considered that it was "legitimate to draw a parallel between situations of detainees, for whose well-being the State is held responsible, and the situation of persons found injured or dead in an area within the exclusive control of the State authorities." Accordingly, the Court attributed the killing of the applicant's relatives to the respondent state.

- In **Varnava and Others v Turkey (2009)**, the Court recognised that as a logical development of the above approach, the burden of proof may also be shifted in cases of persons who disappeared in an area of exclusive control, with *prima facie* evidence the state may have been involved. In a reversal of positions typically adopted by the parties in disappearance cases, the respondent government argued that the missing men should have been presumed dead, whereas the applicants contended that there was no basis for this presumption. The Court noted that the government had not put forward any concrete information showing that the missing men were dead or any convincing explanation of what might have happened to them. At the same time, it was established that those disappearances had occurred in life-threatening circumstances. Therefore, the state was under a continuing obligation under Article 2 to account for the whereabouts and fate of the missing men.

3.5. Persons taken into custody in good health and later found dead

Persons taken into custody are in a vulnerable position and the authorities have an obligation to protect them. Where a person is taken into custody in good health but is later found dead, it is incumbent upon the state authorities to provide a plausible explanation of the events leading to his death. A failure to provide such an explanation will mean that the state authorities will be held responsible for the death. Strong presumptions of fact will arise where death occurs during detention. (This development in case law mirrors Article 3 jurisprudence in respect of the infliction of ill-treatment upon detainees.)

- In **Salman v Turkey (2000)**, the deceased had been taken into custody in good health without any pre-existing injuries or illnesses. He later died in detention. No plausible explanations were given for the many injuries found on his body. In the circumstances, the Court concluded that the state was responsible for his death.

- In **Anguelova v Bulgaria (2002)**, the deceased died after having been detained for several hours at a police station. The Court held that it was incumbent upon the state authorities to provide a plausible explanation for his death. The state authorities relied upon two conflicting medical reports, one of which placed the time of injury at about the time of the victim's arrest while the other was not based upon an examination of the body but only upon photographs of his injuries. This, together with the fact of delay in allowing the individual to see a doctor and false assertions by police that he was an unidentified person (when in fact he was well-known to them) allowed the Court to conclude that the government's explanation as to the victim's cause of death was implausible.

- In **Aktaş v Turkey (2003)**, the deceased died in custody one week after being arrested and taken into custody. He was in good health when taken into custody, and indeed a brother had visited him on the day after his arrest and he had appeared well. The post mortem examination revealed extensive bruising and discolouring, some of which at least would have been noticeable to even the most casual observer. The injuries could not therefore have been inflicted prior to the victim's arrest as was asserted by the respondent government. The Court accepted the evidence of medical experts that the injuries sustained by the victim were consistent with mechanical asphyxiation and caused by hanging, strangulation or the application of severe pressure to the chest. The Court further noted that it was not known when exactly the deceased had died, there was no hospital record of his death and the government had failed to produce the doctor who pronounced him dead, all of which suggested that he was dead on arrival at the hospital. The Court therefore found proven beyond reasonable doubt that the victim died as a result of the use of violence which directly caused his death, while in the hands of the police.

- In **Carabulea v Romania (2010)**, the applicant complained that his brother, a young and apparently healthy man, had died in consequence of injuries sustained in police custody. The government argued that the victim had died of a medical condition caused by a chronic disease and that the injuries found on his body had occurred prior to his detention. The Court found no evidence in support of the government's claims. It put special emphasis on the authorities' failure to conduct a medical examination of the victim at the outset of his detention. Such an examination would have helped to clarify whether any of the injuries in question pre-dated the detention. The Court also criticised the manner in which medical assistance was provided when Mr Carabulea became unwell. In particular, contrary to a doctor's advice, the police did not immediately take him to a hospital for emergency treatment. Furthermore, the Court found it "entirely unacceptable" that all of Mr Carabulea's medical examinations and consultations had been performed in the presence of the police. Criticism was also expressed about the fact that no meaningful contact with family members had been allowed and that his family had not been permitted to consult with the treating doctors. As a result, the Court found a violation of the substantive limb of Article 2.

3.6. Persons found dead in an area within the exclusive control of the state authorities

The Court applies the same test to situations where individuals are found dead in an area within the exclusive control of the state authorities and where it can be supposed that information about the events in question lies wholly (or at least to a large extent) within the exclusive control of the authorities.

- In **Akkum and Others v Turkey (2005)**, the Court concluded that the government had failed to account for the killings of the applicant's relatives who had been found dead after a military operation in south-east Turkey. The government withheld key documentary evidence indispensable for the correct and complete establishment of the facts and did not give any explanation for the failure to submit this material. In addition, some reports made available to the Court were full of omissions and contradictions, as were statements of state officials. The Court therefore held that the overall circumstances justified the drawing of inferences as to the well-foundedness of the applicants' allegations, noting that it is legitimate to draw a parallel between the situation of detainees, for whose well-being the state was held responsible, and the situation of people found injured or dead in an area within the exclusive control of the state authorities.

- In **Estamirov and Others v Russia (2006)**, concerning the murder of an entire Chechen family by Russian forces that had occupied and were in control of the region, the Court noted that the investigation into the deaths had never been completed and that the individuals responsible had

not been identified or indicted. The version of events suggested by the applicants had been addressed in part during the investigation, and information from several military and police authorities about their possible engagement in the area had been requested. However, it was unclear whether any answers were obtained and it also appeared that the investigation also looked at other versions of the applicants' relatives' murders, such as their possible connection with illegal activities or being involved in a personal feud, even though these suggestions found no support in the witness' statements or in other materials submitted to the Court. The government moreover had not provided any alterative account of the applicants' relatives' deaths and had failed to provide any other satisfactory and convincing explanation of the events.

3.7. Persons taken into custody who thereafter disappear

Where there is evidence that a person has been taken into custody but has later disappeared, the Court has held that the state's failure to account for a detainee's fate may also give rise to a violation of Article 2. This will arise where there is sufficient circumstantial evidence from which it may be concluded to the requisite standard of proof that the detainee died in custody. In determining whether an individual may be presumed dead, a number of factors will be of relevance. The period of time that passes without news is clearly one of the criteria in asserting that a person may be presumed dead. Other factors include the fact of detention or arrest (or at least that an individual was last seen under the control of state agents); the existence of a life-threatening situation in which the individual was detained; the absence of any reliable news about the individual's fate; and the lack of a plausible explanation from the government as to what happened to the individual. Such a combination of factors may convince the Court that the applicant shall be presumed dead. Such factors tend to act in combination with each other. For example, while the period of time which has elapsed since an individual was placed in detention is not decisive, but is still a relevant factor to take into account, the more time that goes by without news of a detainee, the greater the likelihood that they are dead. The passage of time may also affect the weight to be attached to other circumstantial evidence before it may be concluded that the person is to be presumed dead. Here, such background information as the fact that the infliction of torture is known to be commonplace in the locality may also be considered, but there must still be at least some evidence to support the claim that the applicant should be presumed dead.

- Thus in **Bazorkina v Russia (2006)**, a number of crucial elements were taken into account when deciding whether an individual who had not been heard of for six years could be presumed dead and whether his death could be attributed to the authorities. First, the government did not deny that the individual had been detained during a counter-terrorist operation in a particular village. Second, the videotape and numerous witness statements contained in the criminal investigation file confirmed that he had been interrogated by a senior military officer who, at the end of the interrogation, had said that the individual should be executed, a situation that could reasonably have been regarded as life-threatening for the detainee. Third, there had been no reliable news of the individual since that time. Fourth, the evidence to the contrary in the case file was very weak (neither of the witnesses who claim to have seen him thereafter had known him very well, both merely having alleged that they had glimpsed, from a distance, a person who resembled him) and, in contrast, none of his family, fellow students or other persons detained on the same day had seen or heard of him since the relevant date. Fifth, his name had not been found in any of the detention facilities' records. Finally, no plausible explanation as to what happened to him after his detention had been submitted, the versions submitted that he had escaped or had been killed during an ambush not having been supported during the investigation. In consequence, the Court was satisfied that the individual must be presumed dead following unacknowledged detention, thus engaging state responsibility, and, since the authorities had not sought to rely on any ground of justification in respect of use of lethal force by their agents, it followed that liability for the death was attributable to the respondent government.

Other examples of the application of these principles exist:

- In **Kurt v Turkey (1998)**, the victim was last seen by his mother outside a house in his village while surrounded by soldiers. In the subsequent four-and-a-half-year period there had been no additional information as to his whereabouts or fate. In deciding whether it had been shown that there was sufficient concrete evidence to support a conclusion that her son was, beyond reasonable doubt, killed by the authorities either while in detention in the village or at some subsequent stage, the Court noted that the case rested entirely on presumptions deduced from the circumstances of her son's initial detention bolstered by more general analyses of an alleged officially tolerated practice of disappearances and associated ill-treatment and extra-judicial killing of detainees in the respondent state. The Court stated that these arguments were not in themselves sufficient to compensate for the absence of more persuasive indications that her son did in fact meet his death in custody and found no violation of Article 2 on this point.

- In **Çakici v Turkey (1999)**, the applicants claimed that an individual had been taken into custody and subsequently had disappeared. The state disputed this, asserting he had never been detained but rather that he had been killed in a clash between the security forces and terrorists in south-east Turkey and identified by means of his papers. The Court noted that the state had made no official report as to the alleged finding of an identity card on the body of a dead terrorist, nor had it supplied any evidence relating to the identification of the body or its release for burial. The Commission found, having conducted a fact-finding mission, that there was reliable and convincing eyewitness evidence supporting a finding that the victim had indeed been taken into custody. There was also evidence that custody reports for the period in question were highly suspect and did not constitute an accurate or comprehensive record of the persons who might have been detained at the time. Additional testimony was supplied by a fellow detainee that he had been detained along with the individual for more than two weeks, that he had been in a bad condition with dried blood on his clothes, and that he had stated that he had been subjected to violence. The Court concluded that the victim had been the subject of unacknowledged detention and ill-treatment, and that "very strong inferences" could be drawn from the state's claim that the victim's identification card was found on the body of a dead terrorist allowing it to conclude "beyond reasonable doubt" that the victim had died following his apprehension and detention by security forces. Since the victim must be presumed dead following his unacknowledged detention, the state was responsible for his death in violation of Article 2.

- In **Tas v Turkey (2000)**, there was evidence that the victim was taken into custody and then to a military hospital for treatment of a gunshot wound to his knee before being transferred to another hospital. The state conceded that an individual had been taken into custody but was unable to provide any custody or other records showing where he had been subsequently detained, claiming that he had escaped from custody. However, since the report of this alleged escape was unsubstantiated and the signatories of the report had not been traced, the Court held that no plausible explanation for what had happened had been provided. Given the length of time which had elapsed since his disappearance and also the political situation in that part of Turkey, the Court considered that the individual must be presumed dead following his detention by the security forces, and thus liability for his death was attributable to the state. The court noted that, in the general context of the situation in south-east Turkey at the time, an unacknowledged detention of a person was likely to be life-threatening.

- In **Cyprus v Turkey (2001)**, nearly 1500 Greek Cypriots last seen alive twenty years previously in the custody of the Turkish forces had never been accounted for and were still missing twenty years after cessation of hostilities. The Court accepted that their disappearance had taken place in a context that could be considered life-threatening in view of the very high incidence of military and civilian deaths during military operations. However, although subsequent admissions

had been made that the Turkish army had handed over Greek-Cypriot prisoners to Turkish-Cypriot fighters under Turkish command and that these prisoners had then been killed, the Court was not able to conclude that the disappeared persons had been killed by agents of the respondent state.

- In **Orhan v Turkey (2002)**, the victims had been last seen eight years previously as they were being taken away to an unidentified location by authorities for whom the state was responsible. Here, and in distinguishing the factual situation from that in **Kurt v Turkey (1998)**, there was evidence that the individuals were wanted by the authorities. Further, in the general context of the situation in the region at this time, it could not be excluded "that an unacknowledged detention of such persons would be life-threatening", particularly as the effectiveness of the protection the criminal law ought to have offered was weakened by a climate in which members of the security forces were not held accountable for their actions. Here, this lack of accountability was particularly marked as it appeared that police officers knew little of the details of, and thus exercised no control over, military operations. In consequence, the individuals must be presumed dead following unacknowledged detention by the security forces.

- In **Ipek v Turkey (2004)**, for almost nine-and-a-half years there had been no information about the fate of individuals whom the Court was satisfied must be presumed dead. It was established that the victims had been taken to a military establishment but the government had failed to provide any explanation, thus allowing the conclusion that the state was responsible for the deaths.

- In **Aktaş v Turkey (2003)**, a post-mortem examination of an individual who had been in good health at the start of the period of detention had revealed extensive bruising, while additional evidence pointed to the cause of death as mechanical asphyxiation through strangulation or the application of severe pressure to the chest. In these circumstances, the Court accepted that death had occurred as the result of violence inflicted while in police custody.

- In **Imakayeva v Russia (2006)**, the Court found that an individual had been detained in circumstances that could be described as life-threatening, an assumption supported by the absence of any news of him for almost four years. Moreover, since no action that would have been expected and necessary had been taken by the prosecutor's office and other law-enforcement authorities in the crucial first days or weeks after the detention, their stance after the news of his detention had been communicated to them significantly contributed to the possibility that the individual had disappeared, as such official behaviour in the face of the applicant's well-established complaints gave rise to a strong presumption of at least acquiescence in the situation. Furthermore, this behaviour also raised strong doubts as to the objectivity of the investigation.

4. CAPITAL PUNISHMENT

Article 2(1) recognises that a state may deprive an individual of his life through the application of the death penalty, provided that this sentence is passed by a court and following the conviction of a person for a crime for which the death penalty is provided for by law. The phrase "provided for by law" should be interpreted in the same manner as that applied in other articles of the Convention employing this or similar phrases (see e.g. Article 5). To meet the requirement "provided for by law", the law must be foreseeable, in the sense that it must be precise and accessible.

The specific reference to capital punishment in Article 2 is, though, an historical legacy rather than an indication of contemporary practice. Many European states permitted and applied the death penalty in the middle of the twentieth century, but now this practice has been almost entirely abandoned, and no judicially-sanctioned executions have taken place in Council of Europe member states in the twenty-first century. Capital punishment has, for all intents and purposes, disappeared from Europe. It exists only in Belarus, the only European state (along with the Vatican City) not a member of the Council of Europe.

The disappearance of this practice has also been marked by Protocols 6 and 13 to the Convention. Article 1 of Protocol 6 in straightforward language states that: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." However, Article 2 of the protocol does permit a state to make "provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war", but application of the death penalty "shall be applied only in the instances laid down in the law and in accordance with its provisions". The protocol further prohibits any derogation under Article 15 of the Convention. Protocol 6 thus abolishes the death penalty during peacetime and in effect modifies paragraph 1 of Article 2. Only one member state of the Council of Europe – the Russian Federation – is still to ratify Protocol 6 to the Convention.

Protocol 13 takes abolition of the death penalty to its ultimate conclusion. Article 1 of the protocol mirrors the absolute language of the same provision in Protocol 6. At the same time, Articles 2 and 3 of Protocol 13 remove any war time-related exemption to the prohibition and do not allow any derogation. By November 2011, Protocol 13 had been ratified by 42 states and signed by all but two member states.

As has already been mentioned in the context of deportation and extradition, the Court's case law reflects the evolution of the state practice towards abolition of the death penalty not only for acts committed in time of war but also in general.

- In **Öcalan v Turkey (2005)**, the applicant was sentenced to death following his conviction for terrorist offences as the leader of the Kurdish nationalist organisation, the PKK. The applicant's sentence was later commuted to life, and Turkey subsequently abolished the death penalty. The applicant argued, *inter alia*, that the imposition of the death penalty violated Articles 2 and 3 (the prohibition against torture and inhuman or degrading treatment or punishment) of the Convention. The Court examined the question under Article 3, but its conclusions are relevant to both Articles. Initially in its Chamber judgment in 2003, the Court had stated that the territories encompassed by the member states of the Council of Europe had become a zone free of capital punishment and that it could be said that capital punishment in peacetime had come to be regarded as an unacceptable, if not inhuman, form of punishment which was no longer permissible under Article 2. In its 2005 judgment, the Grand Chamber confirmed this reasoning. It further clarified that, although states had chosen a traditional method of amendment of the text of the Convention in pursuit of their policy of abolition – by opening for signature Protocol No. 13 concerning the abolition of the death penalty in all circumstances – this final step towards complete abolition of the death penalty does not necessarily run counter to the view that Article

2 has been amended in so far as it permits the death penalty in times of peace, although in the particular case it was not necessary to provide a definitive ruling on this issue.

- In **Al-Saadoon and Mufdhi v United Kingdom (2010)**, the Grand Chamber took stock of the evolution of state practice in the intervening time and adopted a more forceful position on the compatibility of capital punishment with the right to life. The case concerned a group of Iraqi detainees who were originally in custody of the British military forces in Iraq but were later transferred to the Iraqi authorities despite the risk of being sentenced to death by hanging. The Court referred to the fact that the overwhelming majority of Council of Europe states had ratified Protocol 13 and that a moratorium on capital punishment was observed by those few who had not. It concluded that this was "strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances". The strength of this pronouncement, however, was somewhat undermined by the fact that it was relevant only insofar as it meant that the second sentence of the first paragraph of Article 2 no longer prevented interpreting the words "inhuman or degrading treatment or punishment" in Article 3 so as to include the death penalty. Accordingly, the Court went on to examine the case from the viewpoint of Article 3 only. The UK government argued that in their decision to transfer the applicants they were bound by an international agreement with the Iraqi authorities. The Court, however, rejected this argument by holding that member states could not assume international obligations that contravene the Convention.

- By contrast, in **Baysakov and Others v Ukraine (2010)**, the Court did apply Article 2 when it examined a claim made by one of the applicants that in the eventuality of his extradition to Kazakhstan he would risk the imposition of the death penalty, in addition to the danger of being ill-treated. The Court, however, did not find a violation of the right to life, as it established that there was no actual danger of the applicant's being sentenced to death (more details on the case are included in section 2.2. above).

5. SUBSTANTIVE OBLIGATIONS: (II) POSITIVE OBLIGATIONS TO PROTECT LIFE

The Court has consistently held that Article 2 imposes on the contracting states not only the duty to refrain from intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within their respective jurisdictions. These positive obligations can be summarised as: the duty to ensure that the right to life is protected in the domestic legal system, the duty to protect life and the duty to investigate the taking of life. Positive obligations thus include obligations both of a substantive and procedural nature. The duty to conduct effective investigation will be dealt with separately, in a subsequent section. In this section, the focus is upon a range of situations in which the authorities must act positively to address threats to life. Inevitably, however, the Court in its judgments emphasises the complementary nature of substantive obligations and the "procedural aspect" of Article 2.

5.1. The obligation to provide a legal framework governing the right to life

The first positive obligation is the most obvious. The text of Article 2 requires the right to life to be "protected by law". This reflects the obligation upon states in Article 1 of the Convention to secure the rights and freedoms guaranteed in the Convention to "everyone within their jurisdiction". It also complements the right under Article 13 to effective remedies before domestic courts for alleged violations of Convention rights.

At its most basic, this obligation to protect life by law requires states to put in place effective criminal laws to deter the commission of violent offences against the person (**Nachova and Others v Bulgaria (2005)**). In particular, any force used (for example, in self-defence) must be strictly proportionate to the situation. The Court has also indicated in **Isayeva v Russia (2005)** that the lack of a domestic legal framework on use of lethal force is relevant to assessing the proportionality of the response to an attack. It also requires that the criminal laws are backed up by an efficient law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such laws. In practice, this means there must be sufficiently well-resourced and well-trained law-enforcement officers and judges, and efficient and effective procedures for the prosecution and sentencing of offenders. A domestic legal system must thus be able to show that the law can be applied against those who unlawfully took the life of another, and irrespective of the victim's racial or ethnic origin.

Domestic law must thus make provision regulating the grounds in which lawful force permissible under Article 2(a)-(c) may be employed. As elsewhere in the Convention, "law" presupposes the existence of rules that are accessible and reasonably precise and foreseeable. Such laws must also reflect the requirement that force may only be used where "absolutely necessary", for laws governing the use of force by state authorities which confer too wide a discretion in the use of lethal force will imply the opportunity for arbitrary action and may encourage officials to act with impunity.

- In **Akkoc v Turkey (2000)**, in the context of considering whether the state authorities had taken effective measures to protect the life of the applicant's husband, the Court took into account the fact that there were large numbers of members of the security forces in south-east Turkey where there was a fierce conflict between the PKK and security forces seeking to re-establish public order. It also took into account that the security forces were faced with the difficult task of responding to armed attacks. While there was a framework of law in place with the aim of protecting life (specifically, laws prohibiting murder) and enforced by police with investigative functions under the supervision of public prosecutors and with cases tried by courts, several important deficiencies undermined the legal system: the competence of the public prosecutors had been removed where offences were allegedly committed by state agents in certain circumstances; competence to decide whether or not to prosecute was transferred to administrative councils

comprising civil servants under the orders of the Governor who was himself responsible for the security forces whose conduct was at issue; and investigations were carried out by police linked hierarchically to those units subject to the investigation. All of this, in the Court's opinion, fostered a lack of accountability of members of the security forces for their actions that was not compatible with the rule of law in a democratic society.

- In **Isayeva v Russia (2005)**, the Court considered that the choice of means of military aviation and missiles with a large radius of destruction had not been in conformity with the "strict proportionality" test required by Article 2. The Court further noted that the government had failed to invoke the provisions of domestic legislation governing the use of force by the army or security forces. This, while not in itself sufficient to decide on a violation of the positive obligation of the state to protect the right to life, was also here directly relevant to the proportionality of the response to the alleged attack.

5.2. Obligations to take positive steps to protect individuals whose lives are at risk

5.2.1. Persons who call upon the authorities to provide protection

The Court has also clarified in certain judgments that Article 2 may require the state to take steps to safeguard the lives of those within its jurisdiction. In other words, the guarantee may 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. However, the Court has also recognised that such an obligation must be interpreted in a way that does not put a disproportionate or impossible burden on the state authorities. Thus, not every claimed risk to life means that the state is under an obligation to take practical measures to ensure the risk does not materialise. Furthermore, state authorities such as the police are required to exercise their powers in a manner consistent with other Convention requirements.

The state's positive obligation to take preventive measures to protect a certain individual or individuals may arise where the authorities know or ought to have known of the existence of a "real and immediate risk to life of an identified individual or individuals from the criminal acts of third parties". Failure to take measures within the scope of their powers that might be expected to avoid that risk may thus constitute a violation of the right to life. An applicant must be able to show that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have had knowledge.

- In **Osman v United Kingdom (1998)**, the applicants – the wife and a son of a man murdered by the son's teacher – claimed that the police failed to take adequate steps to protect their family from the real and known danger that this teacher posed. However, while emphasising that such a positive obligation existed, the Court considered that the applicants had failed to point to any decisive stage in the sequence of events leading up to the incident in which the attacks took place where it could be said that the police knew or ought to have known that their lives were in real and immediate danger. The suggestion that the police could have prevented the threat from materialising by arresting the teacher beforehand failed to take into account the absence of adequate suspicion against the teacher of having committed any offence justifying deprivation of liberty.

- In **Kilic v Turkey (2000)**, a journalist for a newspaper which had been the target of many violent attacks had advised the authorities that various distributors of the paper had received death threats and requested that measures be taken to protect the offices, workers and distributors of the paper,

including himself. Instead of taking such action, the authorities instigated criminal proceedings against the journalist who was subsequently shot dead by unknown persons in the street. The Court accepted that the journalist had been at particular risk of an unlawful attack, that the authorities had been specifically made aware of this risk, and that they were aware, or ought to have been aware, of the possibility that this risk derived from the activities of persons or groups acting with knowledge or acquiescence of elements in the security forces. There was no evidence that the authorities had taken any steps in response to the victim's request for protection either by applying reasonable measures of protection or by investigating the extent of the alleged risk to the newspaper's employees with a view to instituting any appropriate measures of prevention. The Court held therefore that the authorities failed to take reasonable measures available to them to prevent a real and immediate risk to the life of the victim, violating Article 2.

- In **Akkoc v Turkey (2000)**, a husband and wife of Kurdish origin had received numerous death threats by phone, threats which had been reported to the prosecutor's office. No action had been taken, and the husband was killed on his way to work. The Court determined that the failure to respond in the circumstances constituted a violation of Article 2.

- In **Gongadze v Ukraine (2005)**, a political journalist was killed by state agents. A few months prior to his death, he had reported to the prosecutor's office that he had received threats and had requested protection. The Court assessed the failure of the authorities to respond to the specific request against the general background of vulnerability facing political journalists in Ukraine at the time, and accepted that the failure to take action involved a breach of Article 2.

- In **Opuz v Turkey (2009)**, the Court was called upon to examine the national authorities' response to domestic violence. On a number of occasions spanning over several years, the applicant and her mother complained to the police about being assaulted and threatened by the applicant's one-time husband. While the authorities were not entirely passive, none of the instances had been properly investigated. On some occasions, the criminal proceedings were discontinued because the women withdrew their complaints. On others, the prosecutor deemed that there was not sufficient evidence to open proceedings at all. When the assailant did get convicted following a particularly serious attack which had caused the applicant's mother life-threatening injuries, the punishment was disproportionately mild: the initial sentence of 3 months in prison was commuted to a small fine. Tragically, this series of assaults culminated in the fatal shooting of the applicant's mother. The Court examined the issues arising out of her killing under Article 2, whereas the violence against the applicant herself was examined under Article 3. The Court referred to the general principles formulated in its previous case law which demand the existence of effective criminal-law provisions for purposes of deterrence and the adoption of preventive operational measures to protect an individual when the authorities can be reasonably expected to be aware of the real and immediate risk to that individual's life. However, the Court emphasised that in applying these principles it would bear in mind the gravity of the problem of domestic violence. The Court also pointed out that when the authorities decide what preventive measures to adopt in order to protect victims of domestic violence, the rights of perpetrators cannot supersede victim's rights to life and to physical and mental integrity.

5.3. Persons who are at risk of suicide or being killed by others while in the care of the state

The positive obligation to protect life applies to individuals in custody. In particular, the state has a responsibility to take measures to protect those who are known to be at risk of taking their own lives as well as to ensure that the lives of individual prisoners are not placed at risk from the actions of other detainees.

In addressing the risk of suicide, prison authorities must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned, and thus the opportunities for self-harm may be reduced in many cases without infringing personal autonomy. The question of whether more stringent measures are necessary in respect of a particular prisoner, and whether it is reasonable to apply them, will depend on the particular circumstances of the case. For the state's responsibility to be engaged under Article 2, there needs to be *a real and immediate risk of suicide that the prison authorities knew or ought to have known about*. Where an inmate's behaviour varies over a period of time, the real and immediate risk cannot be said to be present throughout the period. However, in such circumstances, the prison authorities are under an obligation to monitor the inmate's condition carefully in case of sudden deterioration.

- In **Keenan v United Kingdom (2001)**, the applicant's son had a history of disturbed behaviour including self-harm. He was imprisoned following a conviction for an assault. The prison authorities were aware of his background and that he was exhibiting suicidal tendencies. The authorities therefore knew that his mental state was such that he posed a potential risk to himself, although it could not be concluded that he had been at such risk throughout his period of imprisonment as his behaviour had showed periods of apparent normality. The Court was prepared to accept that the authorities had in the circumstances responded appropriately by placing him in hospital care and under watch when suicidal tendencies had been evident. On the day of the suicide, there had been no particular indication that attempted suicide was likely. Accordingly, there was no violation of Article 2.

- In **Trubnikov v Russia (2005)**, the applicant's son committed suicide while he was serving a prison sentence. During his imprisonment he had on several occasions been placed in punishment cells when found to be under the influence of alcohol. During one of these disciplinary confinements he inflicted bodily injury on himself, and on another occasion attempted suicide. He was thereafter under psychiatric supervision for a period, but again was placed in a punishment cell for being under the influence of alcohol and was found dead an hour after being so confined. The Court was of the opinion that it could not be concluded that the authorities had been aware of an imminent threat to life, or that suicide could have reasonably been foreseen in view of his apparently stabilised mental and emotional state. Whilst the applicant's son showed a tendency to inflict self-harm in response to being subjected to disciplinary confinement and had once attempted suicide, his prison medical records indicated that he displayed no acute psychiatric symptoms; further, his psychiatrist had never expressed that he was likely to commit suicide. Therefore, the circumstances of this case were not sufficient to vest the authorities with the entire responsibility for the applicant's son's death.

- In **Akdogdu v Turkey (2005)**, the Court determined that a prisoner found hanged in a detention cell could not be shown to have been intentionally killed as claimed by his family, and further that there was no evidence either proving that the routine monitoring measures in place to prevent suicide had not been followed or that police officers should reasonably have foreseen that the applicant's son would commit suicide.

- In **Renolde v France (2008)**, the Court did, however, find a breach of the substantive obligation to protect the life of a vulnerable prisoner, distinguishing it from **Keenan** on points relating to the seriousness of the mental condition of the two men and the nature of the respective authorities' responses. The present case concerned the death of a man who hanged himself during his pre-trial detention. The suicide took place in a punishment cell where Mr Renolde had been put by way of a disciplinary sanction. He suffered from a serious mental illness and had a record of disturbed behaviour while in prison, including an attempt to commit suicide by cutting his veins. The Court emphasised that its analysis would take account of the particular vulnerability of persons with mental disability. It established that the authorities had known about Mr

Renolde's psychiatric disorder and the propensity for self-harm resulting from it. However, the authorities failed to do all that could be reasonably expected of them to avoid the risk of suicide. The Court was struck by the fact that the authorities had never considered the option of placing Mr Renolde in a psychiatric institution. It stated that, at the very least, he should have been provided with medical treatment corresponding to the seriousness of his condition. The lack of supervision of his taking of medication was highlighted as a factor contributing to his death. Finally, the Court criticised the decision to subject Mr Renolde to the severe disciplinary punishment of 45 days of detention in a punishment cell, despite his vulnerable mental state. The judgment observed that placement in a punishment cell is likely to aggravate any existing risk of suicide, as it isolates prisoners, depriving them of visits and all activities.

With regard to the dangers posed by other prisoners, the state's responsibility is engaged where a prisoner is killed by a fellow prisoner in circumstances where the prison authorities knew or ought to have known that a real threat indeed existed.

- In **Paul and Audrey Edwards v United Kingdom (2002)**, a detainee who suffered from mental illness was killed by another prisoner suffering from severe mental illness and prone to violence who had been placed in the same cell. The failure to pass on readily available medical information about the perpetrator's mental health to the prison authorities taken with the inadequacy of the screening process on his arrival in prison disclosed a breach of the state's obligation to protect the life of the deceased, and thus constituted a violation of Article 2.

Further, **Ataman v Turkey (2006)** indicates that the responsibility to protect individuals also applies to situations in which the state assumes some responsibility, as with military conscription.

- In **Ataman v Turkey (2006)**, a military conscript diagnosed as having psychological problems was returned to guard duty carrying a loaded weapon after limited treatment. He subsequently was found dead with a gunshot wound. Whether or not he had committed suicide by shooting himself was not clear, but the Court considered that in the circumstances the authorities had not taken reasonable steps to address the real and imminent risk that the deceased posed to himself on account of his mental health. Where individuals have access to weapons as in the military, a state was required to ensure adequate treatment to address psychological disorders and to take steps to limit access to weapons.

Issues relating to the authorities' responsibility to protect vulnerable individuals from self-harm may also arise in the context of police operations such as evictions.

- In **Mammadov v Azerbaijan (2007)**, the applicant's wife immolated herself during a police attempt to evict her and her family. In its examination of the question of compliance of the police operation with the positive duty to avoid risks to the evictees' lives, the Court addressed separately the planning stage and the police actions in the course of the eviction. The Court considered that self-immolation as a protest tactic did not constitute predictable conduct in the context of eviction from an illegally occupied dwelling, even when a particularly vulnerable category such as internally displaced persons is involved. Therefore, the authorities could not have reasonably anticipated the suicide of the applicant's wife. In particular, there was no evidence that, in advance of the operation, the police officers had been aware, or should have been aware, of the woman's state of mental health and her alleged propensity for erratic behaviour. As for the police officers' response after Mrs Mammadova's suicidal intent became apparent, the Court pointed out that "as in any other police operation, the police are expected to place the flow of events under their control, to a certain degree". It concluded, however, that there was not enough evidence to assess the police actions in the present case. The Court refused to shift the burden of

proof on to the state, expressly differentiating this case from situations of death in custody. Accordingly, no violation of the substantive positive obligations under Article 2 was found.

5.4. Protection of persons from environmental threats and dangerous activities

The Court has recognised that the obligations under Article 2 may extend to situations where state authorities are engaged in activities that may have the effect of putting the lives of individuals at risk. These obligations have both a substantive and a procedural dimension. Here, these substantive obligations will be discussed.

- In **L.C.B. v United Kingdom (1998)**, the applicant suffered leukaemia and she alleged that her illness was linked to her father's exposure to nuclear testing when he had been a member of the armed forces stationed on islands where testing was carried out. She alleged that the authorities should have warned her parents of the effects of her father's exposure to radiation, which would have enabled pre- and post-natal tests to have been carried out on the applicant. She argued that such tests would have led to an earlier diagnosis of her illness. The Court noted that its role was to determine whether the state did all it could to prevent putting the applicant's life at risk, thereby implicitly accepting that the state did have responsibility in this regard. It held that since no evidence had been provided of individual dose measurements, it was impossible to state whether her father had been exposed to dangerous levels of radiation. In any event, the Court held that it was not established that there was a causal link between the exposure of a father to radiation and leukaemia suffered by a child subsequently conceived. There was, accordingly, no duty on the authorities to have taken action with regard to the applicant. However, it was accepted that positive action on the part of state officials could have been required, but only if it had appeared likely that her father's exposure to radiation had indeed engendered risk to her health.

- In **Oneryildiz v Turkey (2004)**, several people died as the result of a methane explosion at a rubbish-tip, which had destroyed slum dwellings built without authorisation. Before the incident, an expert report had drawn the authorities' attention to the fact that the tip posed dangers to residents, it did not comply with environmental regulations, and that no measures had been taken to prevent an explosion of the gases generated by the decomposing refuse. Legal proceedings prohibiting the use of the site by other local councils were commenced but not concluded by the time of the incident. In deciding that Article 2 imposed substantive positive obligations, the Court emphasised that a basic duty was the provision of a legislative and administrative framework governing the licensing, setting up, operation, security and supervision of any dangerous activity such as the storage of waste and designed to provide effective deterrence against threats to the right to life. A state is also expected to implement practical measures such as the provision of necessary information on the risks posed by such an activity to the public. Here, the authorities had known that there was a specific danger caused by the tip and, while they had not encouraged the applicant to set up home near this site, they had not dissuaded him from doing so either. Further, the authorities had not passed on information concerning the specific risks of methane gas or of landslides – information which ordinary citizens could not reasonably have been expected to possess without official dissemination. Even bearing in mind the need not to impose a disproportionate burden upon authorities in deciding how to deal with such issues, particularly since they involve issues of prioritising of limited resources, the conclusion was that the authorities had known or should have known that the inhabitants of slum areas had been faced with a real threat to their lives, but that they had failed to remedy the situation or do all that could reasonably have been expected of them to avoid the risks, including informing the inhabitants of the area.

- In **Budayeva and Others v Russia (2008)**, the Court extended to the sphere of emergency relief the application of the key principles formulated in **Oneryildiz**. The applicants complained that

the authorities had not taken appropriate measures to protect their lives from a large-scale mudslide which devastated their home town. More specifically, they alleged three major shortcomings in the local system of protection against natural disasters: negligence in maintaining mud-protection engineering facilities; the lack of a public warning about the approaching mudslide; and the lack of an effective judicial inquiry set up in the aftermath of the disaster. The Court stated that the state's margin of appreciation in the choice of particular practical measures is even wider in the context of natural disasters than it is in respect of man-made dangerous activities of the kind addressed in **Oneryildiz**. The authorities' responsibility will depend on whether the imminence of a natural hazard is clearly identifiable, whether the hazard is of a recurring nature and affects an area of human habitation, and on the origin of the hazard and the extent to which it can be mitigated. In the present case, the applicants' home town was situated in an area prone to mudslides in the summer season. In addition, the authorities had received a number of warnings about the increasing risks of a large-scale mudslide and had been aware that even a smaller mudslide could lead to devastating consequence because of the poor state of the defence infrastructure. Nevertheless, no repair works had been carried out. Nor had the authorities taken other essential practical measures to ensure the safety of the local population, such as issuing a public warning and making prior arrangements for an emergency evacuation. In acknowledgement of the authorities' wide margin of appreciation, the Court was willing to examine the implementation of any other general or specific measures besides those referred to by the applicants. However, the government showed no evidence of protection measures of any kind and hence a violation of the substantive aspect of Article 2 was found.

5.5. Medical treatment and Article 2

The specific issue of euthanasia (discussed above) aside, attempts have been made to argue that Article 2 requires states to provide an appropriate level of medical care for individuals within its jurisdiction. However, not every deficiency in a medical care system will result in violation of Article 2. States have a wide margin of appreciation in the area of setting up and running a medical-care system in light of difficult questions concerning the allocation of limited state resources. Most of the cases in this area have arisen in relation to allegations of medical negligence that resulted either in the death of the applicants' next-of-kin or in contracting a life-threatening disease.

- In **Association X v United Kingdom (1978)**, the applicants complained that the administration of a vaccination scheme by the state health services, which had led to the deaths of a number of young children, violated Article 2. The Commission, while finding no violation of Article 2 on the facts, implicitly recognised that the state does have certain responsibilities with regard to medical care under Article 2 in stating that Article 2 "enjoins the State not only to refrain from taking life intentionally, but further, to take appropriate steps to safeguard life".

Article 2 imposes a requirement that hospitals have in place regulations for the protection of patients' lives. There is further an obligation "to establish an effective judicial system for establishing the cause of a death which occurs in hospital and any liability on the part of the medical practitioners concerned" (**Erikson v Italy (1999)**). It is clear that these principles apply with equal force to both the public and private healthcare sectors.

- In **Calvelli and Ciglio v Italy (2002)**, it was claimed that the failure of a private clinic to make appropriate arrangements in light of information as to the mother's health and medical history had significantly reduced a baby's chance of survival. The possibility of raising criminal proceedings for involuntary homicide had become time-barred, but an action for civil damages against the doctor concerned had been instigated and settled between the parties permitting the Court to conclude there had been no violation of Article 2. The Court reiterated that Article 2 enjoins the state not only to refrain from the "intentional" taking of life, but also to take appropri-

ate steps to safeguard the lives of those within its jurisdiction. In the public health sphere these positive obligations require states to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable. However, the Court considered that Article 2 did not guarantee a right to have criminal proceedings instituted against third parties if the loss of life is not caused intentionally. In such circumstances a civil remedy allowing the resolution of liability and the provision of appropriate civil redress would satisfy the requirements of Article 2, provided that this protection indeed operated effectively.

- In **Oyal v Turkey (2010)**, a newly-born child was infected with HIV during a series of blood transfusions. Even though the child had not died and his life was not in imminent danger, the case was examined from the perspective of the right to life. The Court differentiated it from other HIV-related cases in which Article 3 rather than Article 2 was invoked, namely, cases dealing with the deportation of persons living with HIV/AIDS who argued that they would not be able to receive adequate treatment in the country whereto they were to be removed. The element of the present case which brought it under Article 2 was the alleged failure of the authorities to fulfil their positive obligation to protect life, which consisted of taking preventive measures against the spread of HIV through blood transfusions and conducting an effective investigation against those responsible. In regard of the substantive aspect of this positive obligation, the fact that the infection was the result of unlawful negligence had been acknowledged by the Turkish courts and, therefore, was not in dispute. Nevertheless, the applicants complained of the failure of the national authorities to provide sufficient training to relevant medical personnel and to supervise and inspect their work. The Court reiterated the general principle that the state is required to "make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives". In its subsequent analysis, however, it did not discuss the applicants' arguments under the substantive limb of Article 2 and focused instead on the adequacy of the investigation and the compensation provided at national level. The latter was found inadequate, and, in addition to awarding the applicant a very considerable amount in damages, the Court obliged the Turkish government to provide free and full lifelong medical cover for the child.

In contrast with issues of medical negligence, there has been little success with attempts to rely on Article 2 to claim the right to a certain standard of health care (e.g., a particular medical treatment) that is not generally provided by the public health system of the applicant's country.

- In **Pentiacova and Others v Moldova (2005)**, the applicants, who suffered from chronic renal failure and required haemodialysis treatment, argued that for a number of years they were not provided with an appropriate level of medical care. They claimed that during that period the hospital only provided them with the bare minimum of necessary medication and procedures, and required them to pay for full medical care. As their disability allowance was insufficient to pay for the medication not provided by the hospital, they alleged, *inter alia*, that they were forced to undergo the treatment with unbearable pain and suffering, and that some of the patients who refused to undergo the procedure, because of a lack of money, died. The Court noted that it was clearly desirable that all individuals have access to a full range of medical treatment. Moreover, it did not underestimate the difficulties encountered by the applicants during the contentious period. It found that the applicants had access to standard health care before the recent reforms, and full medical care thereafter. Taking into account the wider margin of appreciation of states in cases involving an allocation of limited state resources, the Court held that the state had not failed to discharge its positive obligations under this provision, and therefore struck out the application as manifestly ill-founded.

In a number of cases, issues have been raised with regard to the authorities' failure to ensure timely medical assistance to persons badly injured by state agents. The choice between Article 2 and Article 3 in dealing with such complaints seems to be determined by whether the victim survived.

- In **Ilhan v Turkey (2000)**, army officers delayed taking the victim – a man upon whom they had inflicted serious injuries resulting in brain damage – to the hospital for 36 hours. Despite the seriousness of the assault, the Court confirmed that in almost all cases where a person was assaulted or maltreated by police or soldiers, these complaints would fall to be examined under Article 3. It further held that, having regard to the severity of the injuries inflicted including the significant lapse in time before he was able to receive medical attention, that the victim had been tortured, contrary to Article 3.

- In **Anguelova v Bulgaria (2002)**, the Court examined the delay caused by police officers in seeking medical attention for a suspect they were holding. Instead of calling for an ambulance when they realised the victim's condition was deteriorating, they contacted their colleagues who had arrested the boy. These officers on patrol duty then returned to the police station to verify the situation. One of the officers then drove to the hospital to request an ambulance, instead of simply calling for one, causing a delay of about two hours, which contributed in a decisive manner to the fatal outcome and allowed the Court to conclude that there had been a violation of Article 2.

- In **Wasilewska and Kałucka v Poland (2010)**, the applicants' son and partner was fatally wounded during a police raid and died before the arrival of an ambulance. The Court regarded the failure of the authorities to arrange for an ambulance as one of the flaws in the planning of what was a large-scale police operation involving a large number of police officers and an unknown number of suspects. It was, therefore, a factor contributing to the Court's holding that the authorities were in breach of their substantive obligations under Article 2.

6. Procedural obligations: the "procedural aspect" of Article 2

6.1. Purpose of the requirement for an effective investigation

The European Court of Human Rights has recognised that in practical terms the prohibition against unlawful or arbitrary deprivation of life would be largely meaningless without the imposition of a stringent requirement of domestic procedural investigation in order to help secure the effectiveness of domestic laws which seek to protect life. This is the so-called "procedural aspect" of Article 2. The essential purpose of an 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. An investigation must be "thorough, impartial and careful". What form of investigation will achieve those purposes may vary in different circumstances but, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.

In summary, Article 2 requires a thorough, diligent and comprehensive inquiry conducted in a prompt and expeditious manner in which the victim's relations may participate, carried out by a body independent of the persons implicated in the events and in a manner guaranteeing sufficient public scrutiny. The procedural aspect of Article 2 is of particular relevance where state officials have been responsible for the taking of life, or where it is alleged that they have colluded with others to bring about a death. This duty can be characterised as "not an obligation of result, but of means" in that the investigation should help secure the accountability of officials and ensure that they cannot act with impunity. In such circumstances, the investigation must be capable of determining whether the force used was justified within the meaning of Article 2. While it is not for the Court to specify in detail what procedures should be adopted, nor to conclude that one unified procedure which combines fact-finding, criminal investigation and prosecution is necessary, certain crucial features are indispensable for maintaining public confidence in the rule of law and helping prevent suggestions of official collusion in or tolerance of unlawful acts.

The obligation to carry out an effective investigation is "detachable" in the sense that it constitutes an autonomous duty under Article 2 which does not entirely depend on finding a violation of the substantive obligation. In other words, a breach of the procedural aspect of Article 2 may exist even if no unlawful deprivation of life could be established.

- In **Kaya v Turkey (1998)**, the applicant alleged that his brother had been deliberately killed by security forces while the government suggested that he had died in the course of a gun battle during a skirmish between terrorists and security forces. The Commission had found any possibility of establishing the facts considerably compromised by the failure of the applicant and other key witnesses to give oral evidence, and had concluded that it could not be established beyond reasonable doubt that security forces had intentionally killed the victim. The Court agreed that there was insufficient evidence to establish any violation of Article 2 on this issue. However, the failure of the authorities to carry out any effective investigation into the killing lead to the conclusion that the procedural aspect of Article 2 had not been satisfied. In particular, the public prosecutor had accepted without question the version of the facts given by security forces and had failed to carry out any independent verification of evidence. The duty to investigate extends to victims who have disappeared after being taken into custody. This duty arises where there is an arguable claim that an individual who was last seen in the custody of agents of the state subsequently disappeared in life-threatening circumstances. It is possible for a state to be found in violation of Article 2 of the Convention in respect of the obligation to investigate, even

where the applicant has failed to provide evidence that the individual was intentionally killed by state agents. The mere fact of a failure to conduct an adequate investigation is sufficient to constitute a violation of Article 2.

This detachability of the procedural obligation under Article 2 has its consequences for the Court's jurisdiction *ratione temporis*.

- In **Šilih v Slovenia (2009)**, the Grand Chamber held that it had jurisdiction to examine the effectiveness of the official investigation into the death of the applicants' son, even though the death itself occurred a little more than a year before the Convention entered into force for Slovenia. At the same time, the Court formulated several important criteria restricting the temporal application of Article 2 in such cases. First, only procedural acts and omissions that have taken place after the entry of the Convention into force (the "critical date") can be considered. Second, it is required that a significant proportion of the procedural steps have been carried out after the critical date. Finally, the death and investigative measures should be in proximity to the critical date.

- In **Varnava and Others v Turkey (2009)**, the Court clarified its approach on the last point, stating that temporal proximity is required only when the loss of life of the victim is known for a certainty. By contrast, disappearances are a distinct phenomenon involving a continuing situation of uncertainty about the victims' fate and prolonged torment for the victims' families. Therefore, the Court established that it had jurisdiction to examine the authorities' compliance with a continuing procedural obligation to investigate the disappearance of the applicants' relatives, even though it took place some 13 years before the critical date (i.e. Turkey's acceptance of the right to an individual petition) and over 34 years before the Court's judgment.

The duty to investigate applies to all unlawful killings, and is not confined only to killings perpetrated by state agents. Thus when the authorities are informed of the possibility of an unlawful killing, a disappearance or an attempted murder, they must carry out an effective investigation, even though no formal complaint about the killing has been lodged.

- In **Salman v Turkey (2000)**, the Court held that the mere fact that the authorities were informed of a death in custody was enough to give rise to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death.

- In **Khashiyev and Akayeva v Russia (2005)**, the Court reaffirmed that the authorities must act of their own motion in establishing an investigation once the matter has come to their attention and cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.

- In **Makaratzis v Greece (2004)**, the Court held that there had been a breach of the substantive obligation of Article 2 in the indiscriminate use of firearms even though the force used against the applicant was not in the event lethal. The Court also ruled that the authorities did not conduct a proper investigation and had thus also breached the procedural aspect of the guarantee, in particular by the inability of the authorities to identify all the officers who had been involved in the shooting and wounding of the applicant.

- In **Opuz v Turkey (2009)**, the Court examined a killing which occurred in the context of a prolonged series of incidents of domestic violence. The applicant and her mother had repeatedly complained to the police about physical assaults and threats by the applicant's one-time husband. While the authorities were not entirely passive, none of those incidents had been properly investigated. On some occasions, the criminal proceedings were discontinued because the

women withdrew their complaints. On others, the prosecutor deemed that there was not sufficient evidence to open proceedings at all. Eventually, the persecution escalated into the deadly shooting of the applicant's mother. In examining the adequacy of the authorities' responses to the violence that had taken place prior to the killing, the Court had to address a certain important point peculiar to the context of domestic violence, namely, whether the positive obligations under Article 2 required the authorities to continue criminal prosecution despite the victims' withdrawal of their complaint. The Court acknowledged that there was no consensus in European countries as to the existence of such a duty in the area of domestic violence and pointed to a need to strike a balance between Article 2 and Article 8. That said, the Court identified a number of specific factors which influence the balancing and concluded that "the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if the victims withdraw their complaints".

Investigations must be carried out, even where the deaths in issue take place in the context of the fight against violent separatists or terrorists. The Court has held that the state is not relieved of its obligation in such circumstances, as "otherwise that would exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle".

- In **Ergi v Turkey (1998)**, concerning an ambush mounted by the security forces in south-east Turkey, the Court held 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 the deaths arising out of the clashes involving the security forces, more so in cases [...] where the circumstances are in many respects unclear".

- In **Khashiyev and Akayeva v Russia (2005)**, a case concerning the killing of the applicant's relatives during a military operation in the capital city of the Chechen Republic, there had been a significant delay in opening the investigation. Once the investigation commenced there had also been serious and unexplained failures, including in establishing the details of a military unit allegedly involved in the killings, obtaining a plan of operation or an autopsy report, and examining all the witnesses to the incident.

- Similarly, in **Isayeva, Yusupova and Bazayeva v Russia (2005)**, a case concerning the bombing of a large convoy of civilian vehicles trying to flee from the capital city, there had been a considerable delay before a criminal investigation was opened. During the investigation, there were serious and unexplained failures to act, including failures to obtain the plan of action or information on declaration of "safe passage", to identify officers at the roadblock, and to examine witnesses and victims.

6.2. Nature of the requirement for an effective investigation

In general terms, the procedural limb of Article 2 requires the state to set up an effective judicial system capable of establishing the circumstances of an unlawful death or life-threatening event and the responsibility of those concerned. While it is usually the effectiveness of criminal proceedings that gives rise to complaints under this provision, recourse to the criminal law is not called for in every case. On a number of occasions, the Court has stated that non-criminal law remedies, such as civil action or disciplinary measures, will be sufficient if the infringement of the right to life is not caused intentionally. Thus, a criminal remedy has not been generally required in cases of medical negligence (**Šilih v Slovenia (2009)**) and of negligent failure of law-enforcement officials to protect an individual against the life-threatening behaviour of another private party (**Branco Tomašić and Others v Croatia (2009)**). That said, the Court has made an exception for cases of official failure to protect lives against large-scale environmental disasters, whether natural or man-made. In this area, a criminal investigation is deemed indispensable because public authorities are often the only enti-

ties possessing sufficient knowledge to determine the complex issues surrounding the causes of such incidents (**Budayeva and Others v Russia (2008)**).

Whatever form the mechanism of an effective investigation may eventually assume, there are a number of criteria it must satisfy. These are discussed below.

6.2.1. The persons responsible for and carrying out the investigation must be independent from those implicated in the events

An effective investigation into alleged unlawful killing by the state generally requires that the persons responsible for, and carrying out, the investigation should be independent from those implicated in the event. This means not only a lack of hierarchical or institutional connection, but also a practical independence.

- In **Güleç v Turkey (1998)**, the two investigating officers appointed to conduct the investigation into the death of the victim killed during a demonstration mounted by Kurds in south-east Turkey were hierarchically superior to the police officers whose conduct they had to investigate. The investigating officers did not question the version of events supplied to them by the police officers. They failed to interview crucial witnesses, including an eyewitness who was standing at the victim's side when he was hit by the bullet fragment causing death. The Court concluded that the investigation was not conducted by independent authorities and therefore violated Article 2.

- In **Hugh Jordan v United Kingdom (2001)**, the investigation of the killings by police officers was headed and carried out by other police officers from the same police force. The Court held that this deficiency was not remedied either by the fact that the investigation was supervised by an independent police monitoring authority or by the power the authority had to require the chief police officer of the force to refer the investigating report to the prosecutor for a decision whether to instigate criminal or disciplinary proceedings, as neither provided a sufficient safeguard where the investigation itself has been for all practical purposes conducted by police officers connected with those under investigation.

- In **McShane v United Kingdom (2002)**, the soldier whose acts were under scrutiny had been acting on the orders of a police force which subsequently conducted the investigation into the loss of life. Since the investigation was conducted by police officers connected, albeit indirectly, with the operation under investigation, this cast doubt on its independence.

- In **Finucane v United Kingdom (2003)**, despite several official inquiries, a police investigation and an inquest, the Court held that there had been a failure to hold a prompt and effective investigation, as required by Article 2, into allegations that police officers had colluded with a loyalist paramilitary group which had claimed responsibility for the murder.

- In **Al-Skeini and Others v United Kingdom (2011)**, the Court found that the official investigations into the killing of several Iraqi civilians in an area controlled by the British military had not been sufficiently independent. It was particularly obvious in the case of the first three applicants, for the investigation process remained entirely within the military chain of command and was confined to taking statements from the soldiers involved. In the case of two other applicants, the relevant investigative unit belonged formally to a chain of command separate from that of the investigated soldiers. However, at the relevant time, it was not operationally independent from the latter. If the unit decided to open an investigation, it could be closed at the request of the military chain of command. Hence, this set of investigations too failed to meet the independence requirement.

6.2.2. The investigation must be carried out promptly and with reasonable expedition

A prompt response by the authorities in investigating a use of lethal force is essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. Where the proceedings, once begun, are delayed by adjournments, for example, it may not be possible to meet the requirement of expedition, and the Court has indicated that if long adjournments are regarded as justified in the interests of procedural fairness for the families of the deceased, this calls into question whether the inquiry system is structurally capable of providing both speed and access for the families concerned.

- In **McShane v United Kingdom (2002)**, most of the statements were taken in the two weeks following the killing of the victim, but it was not until some eleven months later that the file was sent to the prosecutor. Further unspecified enquiries took place, and the final report was submitted almost nineteen-and-a-half months after the incident. While it had been necessary to obtain forensic reports, it was not apparent that there had been any difficulty in compiling these. The apparent long periods of inactivity were inexplicable, including the lapse of five-and-a-half months between taking the first and second statements from the driver of the army vehicle that had been involved in the killing. The Court concluded that the investigation was not conducted with reasonable expedition.

- In **Kelly and Others v United Kingdom (2001)**, eight years had elapsed before the opening of an inquest. Additionally, there had been many adjournments, some of which were requested by the applicants. In the circumstances the Court held that the inquiry in this case met neither the requirement of promptness nor expedition, even though certain adjournments had been requested by the applicants.

- In **Paul and Audrey Edwards v United Kingdom (2002)**, the decision to hold an inquiry into the death of a prisoner had been taken eight months after his death. Proceedings opened ten months later. Evidence was heard during a ten-month period and the report was finally issued three-and-a-half years after the death. The Court held that the inquiry, which was complex, involving the attendance of more than 150 witnesses and investigations covering numerous public services, had required a considerable amount of preparation and that it had been reasonable to allow witnesses to comment on the draft findings, given that these involved censure of public practices and individual professional performance. While the time which elapsed before holding the inquiry might be open to criticism, it was not an unreasonable period in the circumstances. There was accordingly no violation of Article 2 in this respect.

- In **Opuz v Turkey (2009)**, the killer of the applicant's mother was tried and convicted six years after the event and the criminal case was still pending before an appeal court at the time of the Court's judgment. The Court found that in the given circumstances, when the perpetrator had already confessed to the crime, the criminal proceedings were not prompt.

- In **Šilih v Slovenia (2009)**, the Court emphasised a particular need for prompt investigation in the context of deaths in medical care. A prompt official response was deemed important for the safety of users of health services, since understanding of the relevant facts and errors committed by hospital staff was needed to remedy the deficiencies in the provision of institutional care and prevent similar medical errors.

6.2.3. The investigation must be carried out with sufficient rigour

The investigations into unlawful killing must be conducted in a manner that ensures that all aspects of the killing are fully explored. Where agents of the state are implicated in the killing, the investigators are obliged to explore such allegations fully. It is not sufficient simply to ask those implicated in the allegations, such as the police, for their version of events. All witnesses, whether supporting or opposing the official version of events, must be questioned with a view to ascertaining the truth.

- In **McCann and Others v United Kingdom (1995)**, an inquest was conducted into the killing of three suspected terrorists in which the applicants were legally represented. As part of a detailed review of events surrounding the killings, a significant number of witnesses, including members of the military and police personnel involved in the planning and conduct of the anti-terrorist operation, were heard and subject to examination and cross-examination by lawyers acting on behalf of next-of-kin. In these circumstances, there was no breach of Article 2 in this regard.

- In **Ergi v Turkey (1998)**, the victim was killed during an ambush of a village conducted by the security forces during an attempt to capture members of a terrorist organisation. The public prosecutor in his investigation placed heavy reliance upon a report prepared by a superior police officer who had not been present during the ambush and who had also been unaware of the identities of those taking part in the operation. The prosecutor thereafter concluded that terrorists had been responsible for the killing, although he had failed to take any statements from members of the victim's family, villagers or military personnel. The conduct of the investigation became the responsibility of the prosecutor of the National Security Court where the matter remained pending for some years. No consideration was ever given to the question of whether the security forces had conducted their operation in a proper manner, and consequently the Court ruled that there had been a violation of Article 2.

- In **Kaya v Turkey (1998)**, the prosecutor had assumed that the deceased was a terrorist who had died in a clash with the security forces. No statements were taken from any of the soldiers at the scene. There were no indications that the prosecutor was prepared to scrutinise the soldiers' version of events, namely that there had been an intense gun battle between the security forces and the alleged terrorists. No attempt was made to confirm whether there were spent cartridges over the area consistent with such a battle. This failed to meet the requirements of Article 2.

- In **Kilic v Turkey (2000)**, the investigation into the applicant's brother's death lasted just one month. While a person was charged and tried for the murder, there was no direct evidence linking the suspect with the crime and he was acquitted. No other investigations were subsequently held, nor was there any enquiry into the possible targeting of the victim on account of his job as a journalist or into the possibility of collusion by security forces in the incident. The Court concluded that on account of the limited scope and short duration of the investigation, the duty to investigate under Article 2 had been violated.

- The case of **Cyprus v Turkey (2001)** concerned nearly 1500 persons missing for over 20 years, after having been taken into custody by the Turkish or Turkish-Cypriot forces. The Court found that their detention had occurred at a time when the conduct of military operations was accompanied by arrests and killings on a large scale. Although the arrests of the missing persons had taken place in life-threatening circumstances, the Turkish authorities had never undertaken an investigation into the claims made by the victims' relatives that they had disappeared in situations in which there was real cause to fear for their welfare. This amounted to a violation of Article 2. Efforts made by the UN Committee on Missing Persons were not a substitute for an effective investigation by the authorities for the purposes of Article 2 as the Committee's juris-

diction was limited to the issue of whether those on the list of missing persons were alive or dead and it had no power to make findings as to the cause of death or responsibility. In any case, the Committee's jurisdiction was limited territorially to the island of Cyprus and it had no jurisdiction in respect of persons who were handed over to the Turkish armed forces and disappeared in Turkey.

- In **Ekinci v Turkey (2000)**, while an investigation had been carried out into the death of a lawyer, no such inquiry had been undertaken into a linked death of a former client who had been killed in similar circumstances just one month previously. The Court considered this a "striking omission", particularly since official reports had reinforced the importance of the connection between the two victims. Nor had there been an investigation into the possibility that state agents might have been involved in the death. The criminal investigation was thus neither adequate nor effective.

- In **Nuray Şen v Turkey (2004)**, the Court concluded that the investigation into the killing of the applicant's husband, whom the applicant claimed had been abducted and killed by state agents, was neither adequate nor effective as required by Article 2. There had been striking omissions in the investigation as well as a lack of co-ordination between the different police authorities involved. One of the prosecutors had not taken statements from the eyewitnesses to the abduction, while ballistic enquiries had been ordered late and had been incomplete.

- **Ramsahai and Others v Netherlands (2007)** involved an individual who had stolen a scooter from its owner at gunpoint. Police officers trying to apprehend him had seen him draw a pistol from his trouser belt. One officer had drawn his own pistol and had ordered him to drop his weapon, but when he failed to do so the other officer had fired and fatally wounded him. Parts of the subsequent investigation – and, crucially, the initial stages – had been carried out by the same police force to which the officers belonged before being taken over by an officer of the state criminal investigation department. The public prosecutor, finding that the officer who had fired had acted in legitimate self-defence, had decided that no prosecution should be brought, a decision upheld by the appeal court. For the Grand Chamber, there had been a violation of Article 2 concerning the inadequate investigation into the circumstances surrounding the shooting. First, there had been a failure to test the hands of the two officers for gunshot residue and to stage a reconstruction of the incident. Second, the questioning of the officers had only commenced some three days later. Third, there had been no examination of their weapons or ammunition, nor had an adequate pictorial record of the trauma caused to the deceased's body by the bullet been established. Further, even though there had been no evidence that they had colluded with each other or with their colleagues, there had been a failure to keep the officers separated after the incident. All of this amounted to significant shortcomings in the adequacy of the investigation.

The authorities must therefore take all reasonable steps available to them to secure the evidence relating to unlawful killings. The Court has declined to give a shortlist of the procedures the authorities should adopt to ensure a proper examination of the circumstances of an unlawful killing. However, state authorities should at the very least take all reasonable steps available to them to secure the evidence concerning the incident. This may include, for example, securing appropriate forensic evidence such as the retrieval of bullets, a metallurgical analysis of bullets or bullet fragments with a view to identifying the maker, supplier and type of weapon used, and a ballistics report where firearms are involved; ensuring the proper recording of the alleged finding of the weapons and any spent cartridges; interviewing officers who arrested the victim and all eyewitnesses (including police and members of the armed forces) to ascertain the circumstances of the use of force and the state of health of the victim at the time of arrest; instructing autopsies by appropriately qualified doctors to obtain a complete and accurate record of injury and an objective analysis of clinical findings;

preparing diagrams of the scene of the crime and showing the positions of witnesses at the time of the incident; carrying out the testing of any suspect's hands for traces that might link him to the weapon; and requiring any state agents involved to account for the use of their weapons and ammunition.

- In **Çakici v Turkey (1999)**, the applicant's brother had disappeared after being taken into police custody. No efforts were taken to secure any evidence other than enquiries as to entries into custody records until after the applicant's complaint had been communicated to the Turkish authorities by the Commission, even though the family of the victim had brought the matter to the attention of the authorities and advised that there had been three eyewitnesses to his detention. The Court found a violation of Article 2.

- In **Tanrikulu v Turkey (1999)**, a very superficial search of the scene of the crime was conducted within one hour of the killing and an unsuccessful search for two possible eyewitnesses made. An inadequate post-mortem was also held on the same day by two general practitioners and a ballistics test carried out. On the basis of this evidence, the prosecutor determined it had been a terrorist offence and declined jurisdiction, but no subsequent investigative activity was carried out until after the applicant's complaint was communicated to the state by the Commission. The Court concluded that the investigation was inadequate.

- In **Velikova v Bulgaria (2000)**, a detainee had died within approximately twelve hours of being arrested by the police from acute loss of blood resulting from injuries he had sustained. The government alleged that he might have sustained the injuries prior to his arrest. The Court found that there had been obvious means of obtaining evidence about the timing of the victim's injuries and important evidence about the circumstances surrounding his arrest and state of health, but the investigator had failed to collect such evidence and the supervising prosecutor had done nothing to remedy this failure. Furthermore, the investigation remained dormant for many months during which time nothing was done to uncover the truth about the killing. No plausible explanation for the authorities' failure to collect key evidence was ever provided, and the Court thus found that there had been a violation of the respondent state's obligation under Article 2 of the Convention to conduct an effective investigation into the victim's death.

- In **Akkum and Others v Turkey (2005)**, the Court held that no meaningful investigation had been conducted into killings of the applicant's relatives during a military operation in south-east Turkey. There were significant omissions in ballistic examinations and in the conduct of the autopsy, while the reports of military officials had been full of contradictions. The Court therefore held that Article 2 had been breached.

- In **Al-Skeini and Others v United Kingdom (2011)**, the Court examined the application of the procedural limb of Article 2 in the context of armed conflict. It found a number of flaws in the official investigations carried out by the British authorities in respect of the killings of six Iraqi civilians. One such flaw was the narrowness of the scope of the criminal proceedings against soldiers accused of causing the death of the son of one of the applicants by mistreating him in custody. In the Court's view, the authorities were required to conduct an independent examination of the broader issues of state responsibility for the child's death, such as the instructions, training and supervision given to soldiers undertaking policing tasks.

6.2.4. There must be a sufficient element of public scrutiny of the investigation or its results

The nature and degree of scrutiny necessary to satisfy the minimum standard of an investigation's effectiveness will depend on the circumstances of each particular case. An investigation need not be

carried out in one unified procedure. In **Shanaghan v United Kingdom (2001)**, the fact finding, criminal investigation and prosecution were carried out or shared between several authorities, but this fact alone was not sufficient to ground a finding of a violation of Article 2. What is important is that the investigations pursued provide for the necessary safeguards in an accessible and effective manner. At the very least the next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. In most instances, this will require giving relatives access to certain parts of the proceedings and also to the relevant documents to ensure participation is effective. With regard to public scrutiny of the police investigations, the Court has found that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations. Accordingly, it cannot be regarded as an automatic requirement under Article 2. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures. Domestic arrangements must therefore strike an appropriate balance when seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations in ensuring that Article 2 safeguards are provided in an accessible and effective manner.

- In **Oğur v Turkey (1999)**, during the administrative investigation, the victim's close relatives had no access to the case file or to any part of the proceedings. The domestic court upheld the lower court's findings that it was impossible to identify the killers and ruled on the sole basis of the papers in the case. Since these had been inaccessible to the victim's relatives, the investigation did not satisfy Article 2.

- In **Gül v Turkey (2000)**, the only witnesses heard in criminal proceedings against three officers were the three accused officers. Two expert opinions contained an evaluation of events based on the assumption that the officers' version of events was correct. The applicant and his family were not informed that criminal proceedings were taking place and were not afforded the opportunity of telling the court their very different version of events. This violated Article 2.

- In **Kelly and Others v United Kingdom (2001)**, none of the victims' families were permitted access to witness statements prior to their appearance in the inquests. The Court held that this must be regarded as having placed the families at a disadvantage in relation to preparation and ability to participate in questioning. This contrasted strikingly with the position of the police and army, which had the resources to provide for legal representation and had access to information about the incident from their own records and personnel. The Court held that the right of the family of the deceased whose death was 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.

- In **Ramsahai and Others v Netherlands (2007)**, however, the Grand Chamber did not consider that it could be regarded as an automatic requirement under Article 2 that a deceased victim's surviving next-of-kin be granted access to an investigation as it went along. Nor did Article 2 impose a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation. Further, appeal proceedings do not have to be open to the public, and further, an appeal court's decision does not have to be made public either. In this case, the facts that the applicants were allowed full access to the investigation file, that they were able to participate effectively in the appellate hearing and that they were provided with a reasoned decision meant that there was thus little likelihood that any authority involved in the case might have concealed relevant information from the appeal court or the applicants. Further, the applicants had not been prevented from making the decision public themselves. In these circumstances, the Court was satisfied that the requirement of publicity was satisfied to an extent sufficient to obviate the danger of any improper cover-up by the respondent government authorities.

6.2.5. The investigation must be capable of leading to a determination of whether the force used was justified and of leading to the identification and punishment of those responsible

The essential purpose of Article 2's procedural aspect is to ensure that the protection accorded by domestic law is real rather than illusory. In most cases, domestic proceedings will have terminated before the Court will have an opportunity to adjudicate on their effectiveness, but in certain instances it may be possible to determine that there have been significant shortcomings in the investigation while proceedings are still pending. This is illustrated by a series of four related cases in which the Court examined whether domestic investigations into allegations of unlawful killings had been capable of leading to the identification and punishment of those responsible.

The Court has not stated categorically that state authorities must give reasons for all decisions declining to prosecute in respect of unlawful killings. However, it has noted that, where an investigation is compromised by a lack of independence or in some other relevant way, reasons for failure to prosecute should be given, particularly in high-profile cases where the maintenance of public confidence is important. In any event, the Court has stated that there is a duty to give reasons at least where requested to do so by a member of the victim's family.

- In **Hugh Jordan v United Kingdom (2001)**, the applicant was not informed of the reasons why his son's killing by the police was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. No challenge by way of judicial review existed at the time which would have required the prosecutor to give reasons. In noting that that the police investigation procedure was itself open to doubts regarding a lack of independence and was not amenable to public scrutiny, the Court held that, in such circumstances, it was of increased importance that the officer who decided whether or not to prosecute also gave an appearance of independence in his decision making. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision. Here, the failure to reassure the public that the rule of law had been respected was deemed incompatible with the requirements of Article 2, since this information had not been made available in any other manner.

- In **McShane v United Kingdom (2002)**, the Director of Public Prosecutions (DPP), while not legally required to give reasons for refusing to prosecute, did in this case do so. The applicant claimed they were insufficient and initiated judicial review proceedings, which she later dropped. The Court stated that while it was "not persuaded that Article 2 automatically requires the provision of reasons" by the prosecutor, "it may in appropriate cases be compatible with the requirements of Article 2 that these reasons can be requested by the victim's family, as occurred in this case". The failure to pursue the judicial review proceedings meant that there was no violation of Article 2 in this regard.

6.3. The duty to investigate allegations of discriminatory motives

The obligation to investigate suspicious deaths must be discharged without discrimination, as required by Article 14 of the Convention. Compliance with the state's positive obligations under Article 2 of the Convention requires that the domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another, irrespective of the victim's racial or ethnic origin. This also requires that, in instances where there exists suspicion that racial attitudes may have induced a violent act, the official investigation must be 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.

The duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of the state's procedural obligations arising under Article 2 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination. The Court may examine this issue under each or both of the Articles. When investigating violent incidents and, in particular, deaths at the hands of state agents, state authorities thus must 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. In particular, any evidence of racist verbal abuse by law-enforcement agents during an operation involving the use of force against persons from an ethnic or other minority is highly relevant and must be investigated with care to uncover any possible racist motives.

- In **Nachova and Others v Bulgaria (2005)**, it was accepted that the killing of two military conscripts of Roma origin after they had absconded had called for a proper investigation into the allegation that the shootings had been racially motivated. While the Court ultimately considered that it had not been shown that racist attitudes had actually played a part in the shootings, the failure of the authorities to investigate the allegations of racist verbal abuse with a view to uncovering any possible racist motives in the use of force against members of an ethnic or other minority had been "highly relevant to the question whether or not unlawful, hatred-induced violence has taken place". In such circumstances, "the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment".

However, there must exist concrete indications in the particular case that racist attitudes on the part of officials may have played a part in the use of lethal force by officials before the duty to carry out an effective investigation into this arises, even though there may exist considerable data on the existence of prejudicial attitudes on the part of officials towards certain ethnic groups. Thus, in a more recent Bulgarian case involving a disproportionate use of lethal force by the police, **Vasil Sashov Petrov v Bulgaria (2010)**, the Court found a violation of the applicant's substantive right under Article 2 but no discrimination, even though the applicant was of Roma origin and the proximity of a Roma neighbourhood played a part in the police officers' decision to use firearms against him. From the available evidence, the Court concluded that the officers were not aware of the applicant's ethnic origin and, even assuming that they were, it was not possible to speculate if that knowledge had had any bearing on their actions. It could not be excluded that they were simply following the existing regulations and would have acted as they did in any similar context. In particular, the Court pointed out that in contrast with **Nachova**, there was no indication that the officers had uttered racial slurs at any point during the events in question.

The Court has been equally circumspect in dealing with the procedural obligation to investigate racist motives behind deaths in police custody, despite the fact that the level of control exercised by the authorities over a detainee and the latter's vulnerability have long been recognised in the Court's jurisprudence in general as a ground for shifting the burden of proof to the state.

- In **Ognyanova and Choban v Bulgaria (2006)**, a Roma suspect fell from a third-floor window of a police station while he had been handcuffed. Numerous injuries were also found on his body. The resultant investigation concluded that the suspect had voluntarily jumped out of the window, a finding the Court considered improbable. However, there were no concrete indications in the case file that racist attitudes had played a part in the events. Although there was voluminous documentation on the existence of hostile and prejudicial attitudes on the part of police officers to Roma, there was no indication that this had played any part in the events in the particular

case, nor had the applicants pointed to such. Accordingly, there was no violation of Article 14 in this case, even though the procedural investigation had failed to satisfy Article 2.

- In **Carabulea v Romania (2010)**, the Court held that the death of a young man of Roma origin while in police custody was a violation of both substantive and procedural obligations under Article 2, as the authorities' explanation of serious injuries found on his body lacked credibility. However, the Court declined to examine the applicant's complaint under Article 14 by stating simply that "it was not necessary".

6.4. Investigation of violations with a trans-border element

- In **Rantsev v Cyprus and Russia (2010)**, the issue of an effective investigation arose in connection with the suspicious death in Cyprus of a young Russian woman who had been trafficked for the purpose of sexual exploitation. Ms Rantseva, the applicant's daughter, was found dead below the balcony of an apartment belonging to an employee of the cabaret where she had been 'employed'. The trans-border nature of the crime of trafficking, which was linked to the victim's death, raised questions of potential responsibility of both Cyprus and Russia. The Court pointed out that Cyprus's duty to take necessary and available steps in order to secure relevant evidence extended to situations where evidence was located outside its territory. Although both countries are parties to the Mutual Assistance Convention and participate in a bilateral legal assistance treaty, the Cypriot authorities did not seek any legal assistance from Russia. This failure was one of the reasons for the finding of a procedural violation of Article 2 on the part of Cyprus. A different conclusion, however, was reached in relation to Russia. The Court held that Article 2 did not require member states to provide in their criminal law for extraterritorial jurisdiction over the deaths of their nationals abroad. Hence, there was no free-standing obligation upon Russia to conduct its own investigation into the death of Ms Rantseva. Nevertheless, Russia was not considered to be completely free of any procedural obligations. As a corollary of the obligation on an investigating state to secure evidence located in other jurisdictions, the state where the evidence is located has a duty "to render any assistance within its competence and means sought under a legal assistance request". Since no such request had been put forward by Cyprus, Russia was held not to be in breach of the procedural limb of Article 2.

7. SELECTED JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

7.1. Introduction: the importance of the right to life

Çakici v Turkey (1999)

86. Article 2 of the Convention, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention and, together with Article 3 of the Convention, enshrines one of the basic values of the democratic societies making up the Council of Europe. The obligation imposed is not exclusively concerned with intentional killing resulting from the use of force by agents of the State but also extends, in the first sentence of Article 2 (1), to imposing a positive obligation on States that the right to life be protected by law. This 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 [...]

McCann and Others v United Kingdom (1995)

147. It must also be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention - indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed [...]

7.2. The scope of Article 2

7.2.1. The domestic and extraterritorial scope of Article 2

Al-Skeini and Others v United Kingdom (2011)

132. To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts.

136. In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad [...] The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.

138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration [...] Where the fact of such domination over the territory is estab-

lished, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights [...]

149. It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.

Bader and Kanbor v Sweden (2005)

42. Moreover, the Court has not in earlier cases excluded the possibility that a Contracting State's responsibility might be engaged under Article 2 of the Convention or Article 1 of Protocol No. 6 where an alien is deported to a country where he or she is seriously at risk of being executed, as a result of the imposition of the death penalty or otherwise [...]

Yaşa v Turkey (1998)

65. In the present case, the Government submitted for the first time in their written observations on the Commission's decision on admissibility that the applicant was not a victim. The Court observes that the Government did not in those submissions dispute that the deceased was the applicant's uncle. They are therefore estopped from denying before the Court that the deceased and the applicant were so related. It should also be noted that in his application [the applicant] maintained that the facts of the case amounted to a violation, not only of his deceased uncle's rights under the Convention, but also of his rights [...]

66. In the light of the principles established in its case-law and of the particular facts of the present case, it holds that the applicant, as the deceased's nephew, could legitimately claim to be a victim of an act as tragic as the murder of his uncle. Consequently, the Court dismisses this preliminary objection of the Government [...]

7.2.2. The beginning of life: rights of the foetus and the issue of abortion

X. v United Kingdom (1980)

19. The life of the foetus is intimately connected with, and cannot be regarded in isolation of, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the "unborn life" of the foetus would be regarded as being of a higher value than the life of the pregnant woman [...] the Commission finds that such an interpretation would be contrary to the object and purpose of the Convention.

H. v Norway (1992)

[...] The Commission finds that it does not have to decide whether the foetus may enjoy a certain protection under Article 2 [...] but it will not exclude that in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 protects the unborn life.

Boso v Italy (2002)

[...] The Court considers that it is not required to determine whether the foetus may qualify for protection under the first sentence of Article 2 as interpreted above. Even supposing that, in certain circumstances, the foetus might be considered to have rights protected by Article 2 of the Convention, the Court notes that in the instant case, although the applicant did not state the number of weeks that had elapsed before the abortion or the precise grounds on which it had been carried out, it appears from the evidence that his wife's pregnancy was terminated in conformity with [domestic law].

In the Court's opinion, such provisions strike a fair balance between, on the one hand, the need to ensure protection of the foetus and, on the other, the woman's interests. Having regard to the conditions required for the termination of pregnancy and to the particular circumstances of the case, the Court does not find that the respondent State has gone beyond its discretion in such a sensitive area [...]

Vo v France (2004)

80. [...] [I]n the circumstances examined to date by the Convention institutions – that is, in the various laws on abortion – the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention and that if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. That is what appears to have been contemplated by the Commission in considering that "Article 8 § 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother" [...] It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman, a mother or a father in relation to one another or *vis-à-vis* an unborn child.

84. At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus [...], although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in United Kingdom [...] – require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2. The Oviedo Convention on Human Rights and Biomedicine, indeed, is careful not to give a definition of the term "everyone" and its explanatory report indicates that, in the absence of a unanimous agreement on the definition, the member States decided to allow domestic law to provide clarifications for the purposes of the application of that Convention (see paragraph 36 above). The same is true of the Additional Protocol on the Prohibition of Cloning Human Beings and the draft Additional Protocol on Biomedical Research, which do not define the concept of "human being" [...] It is worth noting that the Court may be requested under Article 29 of the Oviedo Convention to give advisory opinions on the interpretation of that instrument.

85. Having regard to the foregoing, the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention ("*personne*" in the French text). As to the instant case, it considers it unnecessary to examine whether the abrupt end to the applicant's pregnancy falls within the scope of Article 2, seeing that, even assuming that that provision was applicable, there was no failure on the part of the respondent State to comply with the requirements relating to the preservation of life in the public-health sphere. With regard to that issue, the Court has considered whether the legal protection afforded the applicant by France in respect of the loss of the unborn child she was carrying satisfied the procedural requirements inherent in Article 2 of the Convention.

86. In that connection, it observes that the unborn child's lack of a clear legal status does not necessarily deprive it of all protection under French law. However, in the circumstances of the present case, the life of the foetus was intimately connected with that of the mother and could be protected through her, especially as there was no conflict between the rights of the mother and the father or of the unborn child and the parents, the loss of the foetus having been caused by the unintentional negligence of a third party.

88. The Court reiterates that the first sentence of Article 2 [...] requires the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.

89. Those principles apply in the public-health sphere too. The positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable [...]

90. Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently [...], the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence, "the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged"[...]

7.2.3. Article 2 and the terminally ill

Pretty v United Kingdom (2002)

39. The consistent emphasis in all the cases before the Court has been the obligation of the State to protect life. The Court is not persuaded that "the right to life" guaranteed in Article 2 can be interpreted as involving a negative aspect. While, for example in the context of Article 11 of the Convention, the freedom of association has been found to involve not only a right to join an association but a corresponding right not to be forced to join an association, the Court observes that the notion of a freedom implies some measure of choice as to its exercise [...] Article 2 of the Convention is phrased in different terms. It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected

in the rights guaranteed by other Articles of the Convention, or in other international human rights instruments. Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.

40. The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. It is confirmed in this view by the recent Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe (see paragraph 24 above).

41. The applicant has argued that a failure to acknowledge a right to die under the Convention would place those countries which do permit assisted suicide in breach of the Convention. It is not for the Court in this case to attempt to assess whether or not the state of law in any other country fails to protect the right to life [...]

7.3. Recognised categories for the use of actual or potentially lethal force by state officials

7.3.1. The scope of paragraph (2) of Article 2

Makaratzis v Greece (2004)

49. In the present case the force used against the applicant was not in the event lethal. This, however, does not exclude in principle an examination of the applicant's complaints under Article 2, the text of which, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life [...] In fact, the Court has already examined complaints under this provision where the alleged victim had not died as a result of the impugned conduct.

Isayeva, Yusupova and Bazayeva v Russia (2005)

168. Article 2, which safeguards the right to life and sets out the circumstances where deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which in peacetime no derogation is permitted under Article 15. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective.

169. Article 2 covers not only intentional killing but also the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is, however, only one factor to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims.

Ilhan v Turkey (2000)

74. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor, however, to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (see the McCann and Others judgment cited above, p. 46, §§ 148-49).

75. The Court recalls that in the present case the force used against Abdüllatif Ilhan was not in the event lethal. This does not exclude an examination of the applicant's complaints under Article 2. It may be observed that 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.

77. The Court recalls that Abdüllatif Ilhan 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 is not persuaded in the circumstances of this case that the use of force applied by the gendarmes when they apprehended Abdüllatif Ilhan was of such a nature or degree as to breach Article 2 of the Convention. Nor does any separate issue arise in this context concerning the alleged lack of prompt medical treatment for his injuries. It will, however, examine these aspects further under Article 3 of the Convention below.

78. It follows that there has been no violation of Article 2 of the Convention concerning the infliction of injuries on Abdüllatif Ilhan.

7.3.2. The duty not to use lethal force unless "absolutely necessary"

Giuliani and Gaggio v Italy (2011)

175. The exceptions delineated in paragraph 2 indicate that Article 2 extends to, but is not concerned exclusively with, intentional killing. 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. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) [...]

176. The use of the term "absolutely necessary" indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. In particular, 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. Furthermore, in keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also

all the surrounding circumstances, including such matters as the planning and control of the actions under examination [...]

177. The circumstances in which deprivation of life may be justified must be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also require that Article 2 be interpreted and applied so as to make its safeguards practical and effective [...] In particular, the Court has held that the opening of fire should, whenever possible, be preceded by warning shots [...]

178. 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. 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 [...]

179. When called upon to examine whether the use of lethal force was legitimate, the Court, detached from the events at issue, 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 [...]

188. The Court reiterates in that regard the need to consider the events from the viewpoint of the victims of the attack at the time of the events [...] It is true, for instance, that other *carabinieri* were positioned nearby who could have intervened to assist the jeep's occupants had the situation degenerated further. However, this fact could not have been known to M.P., who, injured and panic-stricken, was lying in the rear of the vehicle surrounded by a large number of demonstrators and who therefore could not have had a clear view of the positioning of the troops on the ground or the logistical options available to them. As the footage shows, the jeep was entirely at the mercy of the demonstrators shortly before the fatal shooting.

189. In the light of the foregoing, and bearing in mind the extremely violent nature of the attack on the jeep, as seen on the images which it viewed, the Court considers that M.P. acted in the honest belief that his own life and physical integrity, and those of his colleagues, were in danger because of the unlawful attack to which they were being subjected. M.P. was accordingly entitled to use appropriate means to defend himself and the other occupants of the jeep.

216. The applicants next complained of the fact that the law-enforcement agencies had not been equipped with non-lethal weapons, and in particular with guns firing rubber bullets. However, the Court notes that the officers on the ground had available to them means of dispersing and controlling the crowd which were not life-threatening, in the form of tear gas [...] In general terms, there is room for debate as to whether law-enforcement personnel should also be issued with other equipment of this type, such as water cannons and guns using non-lethal ammunition. However, such discussions are not relevant in the present case, in which a death occurred not in the course of an operation to disperse demonstrators and control a crowd of marchers, but during a sudden and violent attack which, as the Court has just observed [...], posed an imminent and serious threat to the lives of three *carabinieri*. The Convention, as interpreted by the Court, provides no basis for concluding that law-enforcement officers should not be entitled to have lethal weapons at their disposal to counter such attacks.

McCann and Others v United Kingdom (1995)

149. In this respect the use of the term "absolutely necessary" in Article 2 para. 2 (art. 2-2) indicates that a stricter and more compelling test of necessity must be employed from that normally applica-

ble when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2) of the Convention. In particular, 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 (art. 2-2-a-b-c).

200. The Court accepts that the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life (see paragraph 195 above). The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 (art. 2-2) of the Convention may be justified under this provision (art. 2-2) where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.

It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision (art. 2-2).

211. However, the failure to make provision for a margin of error must also be considered in combination with the training of the soldiers to continue shooting once they opened fire until the suspect was dead. As noted by the Coroner in his summing-up to the jury at the inquest, all four soldiers shot to kill the suspects [...] Soldier E testified that it had been discussed with the soldiers that there was an increased chance that they would have to shoot to kill since there would be less time where there was a "button" device (see paragraph 26 above). 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.

212. Although detailed investigation at the inquest into the training received by the soldiers was prevented by the public interest certificates which had been issued [...], it is not clear whether they had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest.

Their reflex action 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, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement [...]

This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.

213. In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of per-

sons from unlawful violence within the meaning of Article 2 para. 2 (a) (art. 2-2-a) of the Convention.

Andronicou and Constantinou v Cyprus (1997)

192. The Court accepts however, in line with the findings of the commission of inquiry, that Officers nos. 2 and 4 honestly believed in the circumstances 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. It notes in this respect 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 (see the McCann and Others judgment cited above, pp. 58–59, § 200).

It is clearly regrettable that so much fire power was used in the circumstances to neutralise any risk presented by Lefteris Andronicou. However, the Court 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 was for them a unique and unprecedented operation to save life. The officers were entitled to open fire for this purpose and to take all measures which they honestly and reasonably believed were necessary to eliminate any risk either to the young woman's life or to their own lives. It transpired at the commission of inquiry that only two of the officers' bullets actually struck her. While tragically they proved to be fatal, it must be acknowledged that the accuracy of the officers' fire was impaired through Lefteris Andronicou's action in clinging on to her thereby exposing her to risk.

193. The Court considers therefore that the use of lethal force in the circumstances, however regrettable it may have been, did not exceed what was "absolutely necessary" for the purposes of defending the lives of Elsie Constantinou 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.

Güleç v Turkey (1998)

71. The Court, like the Commission, accepts that the use of force may be justified in the present case under paragraph 2 (c) of Article 2, but it goes without saying that a balance must be struck between the aim pursued and the means employed to achieve it. The gendarmes used a very powerful weapon because they apparently did not have truncheons, riot shields, water cannon, rubber bullets or tear gas. The lack of such equipment is all the more incomprehensible and unacceptable because [this region], as the Government pointed out, is in a region in which a state of emergency has been declared, where at the material time disorder could have been expected.

78. 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; 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.

Oğur v Turkey (1999)

79. The Court must therefore now consider whether in the instant case the force used against the victim by the security forces could be said to be absolutely necessary and therefore strictly proportionate to the achievement of one of the aims set out in paragraph 2 of Article 2, the only relevant

ones of which, in the circumstances of the case, are the "defence of any person from unlawful violence" and "effect[ing] a lawful arrest".

84. In sum, all the deficiencies so far noted in the planning and execution of the operation in issue suffice for it to be concluded that the use of force against Musa Oğur was neither proportionate nor, accordingly, absolutely necessary in defence of any person from unlawful violence or to arrest the victim. There has therefore been a violation of Article 2 on that account.

Gül v Turkey (2000)

82. In those circumstances, 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. The Court recalls that the Commission, based on the assessment of its Delegates who heard the officers concerned, considered that the officers possibly opened fire in reaction to the sound of the door bolt being drawn back in the mistaken view that they were about to come under fire by terrorists. The reaction however of opening fire with automatic weapons on an unseen target in a residential block inhabited by innocent civilians, women and children was as the Commission found, grossly disproportionate. This case is therefore to be distinguished from Andronicou and Constantinou v Cyprus (cited above, p. 2106, §§ 191-192), where the police officers fired on, and killed, a hostage taker, who was in known possession of a gun which he had fired twice, injuring a police officer and the hostage.

83. The Court concludes that the use of force by the police officers cannot be regarded as "absolutely necessary" for the purpose of defending life. It follows that there has been a violation of Article 2 in that respect.

Makaratzis v Greece (2004)

58. 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 authorised 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 (see, *mutatis mutandis, Hilda Hafsteinsdóttir v Iceland*, no. 40905/98, § 56, 8 June 2004; see also Human Rights Committee, General Comment no. 6, Article 6, 16th Session (1982), § 3), and even against avoidable accident.

59. In view of the foregoing, in keeping with the importance of Article 2 in a democratic society, the Court must subject allegations of a breach of this provision to the most careful scrutiny, taking into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination (see *McCann and Others*, cited above, p. 46, § 150). In the latter connection, police officers 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 the international standards which have been developed in this respect.

67. However, although the recourse as such to some potentially lethal force in the present case can be said to have been compatible with Article 2 of the Convention, the Court is struck by the chaotic way in which the firearms were actually used by the police in the circumstances. It may be recalled

that an unspecified number of police officers fired a hail of shots at the applicant's car with revolvers, pistols and submachine guns. No less than 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 the tyres, and 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 (see paragraph 14 above). In sum, it appears from the evidence produced before the Court that large numbers of police officers took part in a largely uncontrolled chase.

71. In the light of the above, the Court considers that, as far as their positive obligation under the first sentence of Article 2 § 1 to put in place an adequate legislative and administrative framework was concerned, the Greek authorities had not, at the relevant time, done all that could be reasonably expected of them to afford to citizens, and in particular to those, such as the applicant, against whom potentially lethal force was used, the level of safeguards required and to avoid real and immediate risk to life which they knew was liable to arise, albeit only exceptionally, in hot-pursuit police operations (see, *mutatis mutandis, Osman*, cited above, p. 3160, § 116 *in fine*).

72. Accordingly, the applicant has been the victim of a violation of Article 2 of the Convention on this ground. In view of this conclusion, it is not necessary to examine the life-threatening conduct of the police under the second paragraph of Article 2.

Nachova and Others v Bulgaria (2005)

105. The use of potentially lethal firearms inevitably exposes human life to danger even when there are rules designed to minimise the risks. Accordingly, the Court considers that it can in no circumstances be "absolutely necessary" within the meaning of Article 2 § 2 of the Convention to use such firearms to arrest a person suspected of a non-violent offence who is known not to pose a threat to life or limb, even where a failure to do so may result in the opportunity to arrest the fugitive being lost.

106. It follows that in the circumstances that obtained in the present case (see paragraphs 98 100 above) the use of firearms could not possibly have been "absolutely necessary" and was prohibited by Article 2 of the Convention.

114. The Court finds that as regards the planning and control of the arrest operation the authorities failed to comply with their obligation to minimise the risk of loss of life, as the nature of the offence committed by Mr Angelov and Mr Petkov and the fact that they did not pose a danger were not taken into account and the circumstances in which recourse to firearms should be envisaged - if at all - were not discussed apparently owing to deficient rules and lack of adequate training.

115. The Court thus finds that respondent State is responsible for deprivation of life in violation of Article 2 of the Convention, as firearms were used to arrest persons who were suspected of non-violent offences, were not armed and did not pose any threat to the arresting officers or others. The violation of Article 2 is further aggravated by the fact that excessive firepower was used. The respondent State is also responsible for the failure to plan and control the operation for the arrest of Mr Angelov and Mr Petkov in a manner compatible with Article 2 of the Convention

Simsek and Others v Turkey (2005)

108. The Court repeats that the use of force may be justified under Article 2 § 2 (c), in cases where the action is taken for the purpose of quelling a riot or insurrection. However in the instant case, the submissions of the applicants and the decision of the Trabzon Assize Court show that, in order to disperse the crowd, officers shot directly at the demonstrators without first having recourse to less

life-threatening methods, such as tear gas, water cannons or rubber bullets. In this connection, the Court observes that Turkish legislation allows police officers to use firearms only in limited and special circumstances [...] However, it appears that this principle was not applied during the Gazi and Ümraniye incidents.

111. Furthermore, it was the responsibility of the Security Forces, who had been aware of the tense situation in both districts, to provide the necessary equipment, such as tear gas, plastic bullets, water cannons, etc., to disperse the crowd. In the Court's view, the lack of such equipment is unacceptable.

112. In conclusion, the Court considers that, in the circumstances of the instant case, the force used to disperse the demonstrators, which caused the death of seventeen people, was more than absolutely necessary within the meaning of Article 2.

113. There has therefore been a violation of Article 2 in that respect.

Andronicou and Constantinou v Cyprus (1997)

185. In the Court's view the authorities' decision to use the *MMAD* officers in the circumstances as they were known at the time was justified. Recourse to the skills of a highly professionally trained unit like the *MMAD* would appear to be quite natural given the nature of the operation which was contemplated. The decision to use the *MMAD* officers was a considered one of last resort. It was discussed both at the highest possible level in the police chain of command and at ministerial level (see paragraph 55 above) and only implemented when the negotiations failed and, as noted above, in view of a reasonably held belief that the young woman's life was in imminent danger. While it is true that the officers deployed were trained to shoot to kill if fired at, it is to be noted that they were issued with clear instructions as to when to use their weapons. They were told to use only proportionate force and to fire only if Elsie Constantinou's life or their own lives were in danger [...]

193. The Court considers therefore that the use of lethal force in the circumstances, however regrettable it may have been, did not exceed what was "absolutely necessary" for the purposes of defending the lives of Elsie Constantinou 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.

182. In carrying out its assessment of the planning and control phase of the operation from the standpoint of Article 2 of the Convention, the Court must have particular regard to the context in which the incident occurred as well as to the way in which the situation developed over the course of the day.

Nachova and Others v Bulgaria (2005)

103. The Chamber gave separate consideration to the manner in which the arrest operation had been planned. The Grand Chamber endorses the Chamber's finding that the authorities failed to comply with their obligation to minimise the risk of loss of life since the arresting officers were instructed to use all available means to arrest [the two detainees] in disregard of the fact that the fugitives were unarmed and posed no danger to life or limb. As the Chamber rightly stated (§ 110):

"[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."

Ergi v Turkey (1998)

81. The Court, having regard to the Commission's findings (see paragraphs 34–41 above) and to its own assessment, considers that it was probable that the bullet which killed Havva Ergi had been fired from the south or south-east, that the security forces had been present in the south and that there had been a real risk to the lives of the civilian population through being exposed to cross-fire between the security forces and the PKK. In the light of the failure of the authorities of the respondent State to adduce direct evidence on the planning and conduct of the ambush operation, the Court, in agreement with the Commission, finds that it can reasonably be inferred that insufficient precautions had been taken to protect the lives of the civilian population.

7.3.3. Control and organisation of State operations resulting in death or injury

Giuliani and Gaggio v Italy (2011)

249. According to its case-law, the Court must examine the planning and control of a policing operation resulting in the death of one or more individuals in order to assess whether, in the particular circumstances of the case, the authorities took appropriate care to ensure that any risk to life was minimised and were not negligent in their choice of action [...] 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 policing operations must be sufficiently regulated by national law, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force. Accordingly, the Court must take into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination. Police officers should not be left in a vacuum when performing their duties: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect [...]

251. Lastly, it should not be overlooked that Carlo Giuliani's death occurred in the course of a mass demonstration. While it is the duty of Contracting States to take reasonable and appropriate measures with regard to lawful demonstrations to ensure their peaceful conduct and the safety of all citizens, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used. In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved [...] However, it is important that preventive security measures such as, for example, the presence of first aid services at the site of demonstrations, be taken in order to guarantee the smooth conduct of any event, meeting or other gathering, be it political, cultural or of another nature [...] Moreover, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance [...] On the other hand, interferences with the right guaranteed by that provision are in principle justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others where demonstrators engage in acts of violence [...]

253. The fact remains, however, that the present application does not concern the organisation of the public-order operations during the G8 as a whole. It is confined to examining, among other things, whether, in the organisation and planning of that event, failings occurred which can be linked directly to the death of Carlo Giuliani [...]

254. The Court observes in that regard that the intervention of the *carabinieri* on Via Caffa [...] and the attack on the jeep by demonstrators took place at a time of relative calm when, following a long

day of clashes, the detachment of *carabinieri* had taken up position on Piazza Alimonda in order to rest, regroup and allow the injured officers to board the jeeps. As the footage shows, the clash between demonstrators and law-enforcement officers occurred suddenly and lasted only a few minutes before the fatal shooting. It could not have been predicted that an attack of such violence would take place in that precise location and in those circumstances. Moreover, the reasons which drove the crowd to act as it did can only be speculated upon.

255. It should also be noted that the Government had deployed considerable numbers of personnel to police the event (18,000 officers [...]) and that all the personnel either belonged to specialised units or had received *ad hoc* training in maintaining order during mass gatherings. M.P., in particular, had taken part in training courses in Velletri [...] In view of the very large numbers of officers deployed on the ground, they could not all be required to have lengthy experience and/or to have been trained over several months or years. To hold otherwise would be to impose a disproportionate and unrealistic obligation on the State. Furthermore, as the Government rightly stressed [...], a distinction has to be made between cases where the law-enforcement agencies are dealing with a precise and identifiable target [...] and those where the issue is the maintenance of order in the face of possible disturbances spread over an area as wide as an entire city, as in the instant case. Only in the first category of cases can all the officers involved be expected to be highly specialised in dealing with the task assigned to them.

256. It follows that no violation of Article 2 of the Convention can be found solely on the basis of the selection, for the G8 summit in Genoa, of a *carabiniere* who, like M.P., was only twenty years and eleven months of age at the material time and had been serving for only ten months [...] The Court also points out that it has already held that M.P.'s actions during the attack on the jeep did not amount to a breach of Article 2 in its substantive aspect [...] It has not been established that he took unconsidered initiatives or acted without proper instructions [...]

257. It therefore remains to be ascertained whether the decisions taken on Piazza Alimonda immediately before the attack on the jeep by the demonstrators were in breach of the obligation to protect life. To that end the Court must take account of the information available to the authorities at the time the decisions were taken. There was nothing at that juncture to indicate that Carlo Giuliani, more than any other demonstrator or any of the persons present at the scene, was the potential target of a lethal act. Hence, the authorities were not under an obligation to provide him with personal protection, but were simply obliged to refrain from taking action which, in general terms, was liable to clearly endanger the life and physical integrity of any of the persons concerned.

McCann and Others v United Kingdom (1995)

183. Nor can the Court accept the applicants' contention that the use of the SAS, in itself, amounted to evidence that the killing of the suspects was intended. In this respect it notes that the SAS is a special unit which has received specialist training in combating terrorism. It was only natural, therefore, that in light of the advance warning that the authorities received of an impending terrorist attack they would resort to the skill and experience of the SAS in order to deal with the threat in the safest and most informed manner possible.

184. The Court therefore rejects as unsubstantiated the applicants' allegations that the killing of the three suspects was premeditated or the product of a tacit agreement amongst those involved in the operation.

Andronicou and Constantinou v Cyprus (1997)

185. In the Court's view the authorities' decision to use the *MMAD* officers in the circumstances as they were known at the time was justified. Recourse to the skills of a highly professionally trained

unit like the *MMAD* would appear to be quite natural given the nature of the operation which was contemplated. The decision to use the *MMAD* officers was a considered one of last resort. It was discussed both at the highest possible level in the police chain of command and at ministerial level (see paragraph 55 above) and only implemented when the negotiations failed and, as noted above, in view of a reasonably held belief that the young woman's life was in imminent danger. While it is true that the officers deployed were trained to shoot to kill if fired at, it is to be noted that they were issued with clear instructions as to when to use their weapons. They were told to use only proportionate force and to fire only if Elsie Constantinou's life or their own lives were in danger (see paragraph 38 above).

193. The Court considers therefore that the use of lethal force in the circumstances, however regrettable it may have been, did not exceed what was "absolutely necessary" for the purposes of defending the lives of Elsie Constantinou 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.

7.3.4. The standard and burden of proof required to establish State liability for unlawful killing

7.3.4.1. Standard of proof

Giuliani and Gaggio v Italy (2011)

181. To assess the factual evidence, the Court adopts the standard of proof "beyond reasonable doubt", but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained may also be taken into account [...] Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights [...]

182. The Court must be especially vigilant in cases where violations of Articles 2 and 3 of the Convention are alleged [...] When there have been criminal proceedings in the domestic courts concerning such allegations, it must be borne in mind that criminal law liability is distinct from the State's responsibility under the Convention. The Court's competence is confined to the latter. Responsibility under the Convention is based on its own provisions which are to be interpreted in the light of the object and purpose of the Convention, taking into account any relevant rules or principles of international law. The responsibility of a State under the Convention, arising for the acts of its organs, agents and servants, is not to be confused with the domestic legal issues of individual criminal responsibility under examination in the national criminal courts. The Court is not concerned with reaching any findings as to guilt or innocence in that sense [...]

Yaşa v Turkey (1998)

94. The Court reiterates that in determining whether substantial grounds have been shown for believing that the respondent State has not complied with its responsibilities under the Convention, the Court must examine the issues raised before it in the light of the material provided by those appearing before it and, if necessary, of material obtained *propriomotu* (see, *mutatis mutandis, the Ireland v United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 64, § 160, and the Cruz Varas and Others v Sweden judgment of 20 March 1991, Series A no. 201, p. 29, § 75). Although the Court must refer primarily to the circumstances existing at the time of the incidents complained of,

it is not precluded from having regard to information coming to light subsequently (see, *mutatis mutandis,* the Cruz Varas and Others judgment cited above, p. 30, § 76).

96. While it is true that the attainment of the required evidentiary standard (see paragraphs 34 and 91 above) may follow from the co existence of sufficiently strong, clear and concordant inferences or unrebutted presumptions (see the Aydın judgment cited above, p. 1888, § 70, and the Kaya judgment cited above, p. 322, § 77), their evidential value must be considered in the light of the circumstances of the individual case and the seriousness and nature of the charge to which they give rise against the respondent State.

In the present case, the Court considers that notwithstanding the serious concerns to which it gives rise, the *Susurluk* report does not contain material enabling the presumed perpetrators of the attacks on the applicant and his uncle to be identified with sufficient precision. Indeed, the applicant admits as much in his memorial (see paragraph 83 above).

Nuray Şen v Turkey (2004)

172. However, for the Court, the required evidentiary standard of proof for the purposes of the Convention is that of "beyond reasonable doubt". Accordingly, the Court refers to its finding above (paragraph 160) to the effect that the applicant's allegations have not been sufficiently proved. It appears from the evidence that no eyewitnesses could identify the people who had abducted and killed the applicant's husband. In particular, it has not been established that any State official was involved in these incidents. The witnesses relied on by the applicant gave inconclusive statements to the gendarmerie and failed to give evidence before the Commission's Delegates (paragraph 89 above). The only evidence available was the hearsay statements of the applicant herself (paragraphs 11-22 and 27-39).

173. In view of the above, the Court considers that the material in the case file does not enable it to conclude beyond all reasonable doubt that the applicant's husband was abducted and killed by any State agent or person acting on behalf of the State authorities. It follows that there has been no violation of Article 2 on that account.

Tekdag v Turkey (2004)

73. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances (see, among other authorities, Orhan, cited above, § 326).

75. However, for the Court, the required evidentiary standard of proof for the purposes of the Convention is that of "beyond reasonable doubt", and such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see Ireland v United Kingdom, judgment of 18 January 1978, Series A no. 25, p. 65, § 161).

76. Accordingly, the Court refers to its above finding (see paragraph 68) that the applicant's allegations concerning her husband's abduction and killing have not been sufficiently proved. It appears from the evidence that there were no eyewitnesses to these alleged incidents. Nor has it been established that A.T. was seen in the custody of the State security forces. The witnesses referred to by the applicant either proved impossible to trace or preferred to remain anonymous.

77. In view of the above, the Court considers that the material in the case file does not enable it to conclude beyond all reasonable doubt that the applicant's husband was abducted and killed by any State agent or person acting on behalf of the State authorities.

It follows that there has been no violation of Article 2 on that account.

Nesibe Haran v Turkey (2005)

68. In the light of the foregoing, the Court considers that the actual circumstances in which Ihsan Haran disappeared remain a matter of speculation and assumption and that, accordingly, there is an insufficient evidentiary basis on which to conclude that he was, beyond reasonable doubt, secretly detained and killed by or with the connivance of State agents in the circumstances alleged by the applicant.

69. Accordingly, there has been no violation of Article 2 on that account.

7.3.4.2. Burden of proof

Orhan v Turkey (2002)

266. It is important to note that Convention proceedings, such as the present application, do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation). The Court has previously held that it is of the utmost importance for the effective operation of the system of individual petition instituted under former Article 25 of the Convention (now replaced by Article 34) that States should furnish all necessary facilities to make possible a proper and effective examination of applications (*Tanrıkulu v Turkey*, no. 23763/94, § 70, ECHR 1999–IV). It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (*Timurtas v Turkey*, no. 23531/94 §§ 66 and 70, ECHR 2000-VI). The same applies to delays by the State in submitting information which prejudices the establishment of facts in a case.

274. The Court concludes that the Government have not advanced any, or any convincing, explanation for its delays and omissions in response to the Commission and Court's requests for relevant documents, information and witnesses. Accordingly, it finds that it can draw inferences from the Government's conduct in this respect. Furthermore, and referring to the importance of a respondent Government's co-operation in Convention proceedings (see paragraph 266 above) and mindful of the difficulties inevitably arising from an evidence-taking exercise of this nature (the above-cited *Timurtas* case, at § 70), the Court finds that the Government fell short of their obligations under Article 38 § 1(a) (formerly Article 28 § 1(a)) of the Convention to furnish all necessary facilities to the Commission and Court in its task of establishing the facts.

7.3.5. Persons taken into custody in good health, later found dead

Anguelova v Bulgaria (2002)

110. In the light of the importance of the protection afforded by Article 2, the Court must subject complaints about deprivations of life to the most careful scrutiny, taking into consideration all relevant circumstances.

Persons in custody are in a vulnerable position and the authorities are under 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 (see, *mutatis mutandis, Selmouni v France*, no. 25803/94, § 87, ECHR 1999-V, and *Salman and Velikova*, cited above).

121. Having regard to all the relevant circumstances, the Court thus finds implausible the Government's explanation of Mr Zabchekov's death, which was based on the conclusion of the second forensic report as to the timing of the injury and a supposition that the boy might have injured himself by falling to the ground. The Government have not offered any other explanation.

122. Accordingly, there has been a violation of Article 2 of the Convention.

Aktaş v Turkey (2003)

290. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Detained persons are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, amongst other authorities, *Avşar v Turkey*, cited above, § 391). The obligation on the authorities to account for the treatment of a detained individual is particularly stringent where that individual dies or disappears thereafter (*Orhan*, cited above, § 326).

291. 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. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (*Salman v Turkey*, no. 21986/93, § 100, ECHR 2000-VII; *Çakıcı v Turkey*, no. 23657/94, § 85, ECHR 1999 IV; *Ertak v Turkey*, no. 20764/92, § 32, ECHR 2000-V; *Timurtas v Turkey*, cited above, § 82, ECHR 2000-VI; and *Orhan*, cited above, § 327).

7.3.6. Persons found injured or dead in an area within the exclusive control of the state authorities

Akkum and Others v Turkey (2005)

211. The Court considers it legitimate to draw a parallel between the situation of detainees, for whose well-being the State is held responsible, and the situation of persons found injured or dead in an area within the exclusive control of the authorities of the State. Such a parallel is based on the salient fact that in both situations the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities. It is appropriate, therefore, that in cases such as the present one, where it is the non-disclosure by the Government of crucial documents in their exclusive possession which is preventing the Court from establishing the facts, it is for the Government either 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, failing which an issue under Article 2 and/or Article 3 of the Convention will arise.

212. The Government have failed to adduce any argument from which it could be deduced that the documents withheld by them contained no information bearing on the applicant's claims. Therefore, the Court will examine whether the Government have discharged their burden of explaining the

killings of the applicants' two relatives and the mutilation of the body of Mehmet Akkum. In doing so, the Court will assess the oral evidence given before the delegates and will also have particular regard to the investigation carried out at domestic level in order to establish whether that investigation was capable of leading to the identification and punishment of those responsible.

231. On the basis of its examination of the domestic investigation and of the criminal proceedings before the Military Court, the Court concludes that no meaningful investigation was conducted at domestic level capable, firstly, of establishing the true facts surrounding the killings of Mehmet Akkum and Mehmet Akan and the mutilation of the body of Mehmet Akkum, and, secondly, of leading to the identification and punishment of those responsible.

232. In the light of the above, it follows that the Government have failed to account for the killing of Mehmet Akkum and Mehmet Akan and also for the mutilation of the body of Mehmet Akkum.

7.3.7. Persons taken into custody and who thereafter disappear

Tas v Turkey (2000)

63. The Court has previously held that where an individual is taken into 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 of how those injuries were caused, failing which an issue arises under Article 3 of the Convention (see the Tomasi v France judgment of 27 August 1992, Series A no. 241-A, §§ 108-111, Ribitsch v Austria judgment of 4 December 1995, Series A no. 336, § 34, and Selmouni v France judgment of 28 July 1999, to be published in ECHR 1999, § 87). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies. Whether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention depends on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody (see the Çakıcı v Turkey judgment of 8 July 1999, to be published in ECHR 1999, § 85; Ertak v Turkey judgment of 9 May 2000, to be published in ECHR 2000, § 131 and Timurtas v Turkey judgment of 13 June 2000, to be published in ECHR 2000, §§ 82-86).

66. The Court draws very strong inferences from the lack of any documentary evidence relating to where Muhsin Tas was detained and from the inability of the Government to provide a satisfactory and plausible explanation as to what happened to him. It also observes that in the general context of the situation in south-east Turkey in 1993, it can by no means be excluded that an unacknowledged detention of such a person would be life-threatening. It is recalled that the Court has held in two recent judgments that defects undermining the effectiveness of criminal law protection in the south-east region during the period relevant also to this case permitted or fostered a lack of accountability of members of the security forces for their actions (see the Kılıç v Turkey judgment of 28 March 2000, § 75, and the Mahmut Kaya v Turkey judgment of 28 March 2000, § 98, both to be published in ECHR 2000).

67. For the above reasons, the Court finds that Muhsin Tas must be presumed dead following his detention by the security forces. Consequently, the responsibility of the respondent State for his death is engaged. Noting that the authorities have not accounted for what happened during Muhsin Tas's detention and that they do not rely on any ground of justification in respect of any use of lethal force by their agents, it follows that liability for his death is attributable to the respondent Government (see Çakıcı v Turkey, *loc. cit.*, § 87). Accordingly, there has been a violation of Article 2 on that account.

Orhan v Turkey (2002)

266. It is important to note that Convention proceedings, such as the present application, do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation). The Court has previously held that it is of the utmost importance for the effective operation of the system of individual petition instituted under former Article 25 of the Convention (now replaced by Article 34) that States should furnish all necessary facilities to make possible a proper and effective examination of applications (*Tanrıkulu v Turkey*, no. 23763/94, § 70, ECHR 1999–IV). It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (*Timurtas v Turkey*, no. 23531/94 §§ 66 and 70, ECHR 2000-VI). The same applies to delays by the State in submitting information which prejudices the establishment of facts in a case.

274. The Court concludes that the Government have not advanced any, or any convincing, explanation for its delays and omissions in response to the Commission and Court's requests for relevant documents, information and witnesses. Accordingly, it finds that it can draw inferences from the Government's conduct in this respect. Furthermore, and referring to the importance of a respondent Government's co-operation in Convention proceedings (see paragraph 266 above) and mindful of the difficulties inevitably arising from an evidence-taking exercise of this nature (the above-cited *Timurtas* case, at § 70), the Court finds that the Government fell short of their obligations under Article 38 § 1(a) (formerly Article 28 § 1(a)) of the Convention to furnish all necessary facilities to the Commission and Court in its task of establishing the facts.

Ipek v Turkey (2004)

165. 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. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (*Salman v Turkey*, no. 21986/93, § 100, ECHR 2000-VII; *Çakıcı*, cited above, § 85; *Ertak v Turkey*, no. 20764/92, § 32, ECHR 2000-V, and *Timurtas v Turkey*, no. 23531/94, § 82, ECHR 2000-VI, and *Orhan*, cited above, § 327).

177. In the light of the above, the Court considers that the investigations carried out into the disappearance of the applicant's two sons were seriously inadequate and deficient. It concludes therefore that there has also been a violation of Article 2 of the Convention under its procedural limb.

Salman v Turkey (2000)

99. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, among other authorities, *Selmouni v*

France, no. 25803/94, § 87, ECHR 1999-V). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies.

100. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see the Ireland v United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. 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 such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.

7.4. Capital punishment

Al-Saadoon and Mufdhi v United Kingdom (2010)

120. It can be seen, therefore, that the Grand Chamber in *Öcalan* did not exclude that Article 2 had already been amended so as to remove the exception permitting the death penalty. Moreover, as noted above, the position has evolved since then. All but two of the Member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty (cf. *Soering*, cited above, §§ 102-104).

Öcalan v Turkey (2005)

163. The Grand Chamber agrees with the following conclusions of the Chamber on this point (see paragraphs 189-196 of the Chamber judgment):

[...] Such a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1, particularly when regard is had to the fact that all Contracting States have now signed Protocol No. 6 and that it has been ratified by forty-one States. It may be questioned whether it is necessary to await ratification of Protocol No 6 by the three remaining States before concluding that the death penalty exception in Article 2 has been significantly modified. Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable [...] form of punishment which is no longer permissible under Article 2."

164. The Court notes that by opening for signature Protocol No. 13 concerning the abolition of the death penalty in all circumstances the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition. At the date of this judgment, three member States have not signed this Protocol and sixteen have yet to ratify it. However, this final step toward complete abolition of the death penalty - that is to say both in times of peace and in times of war - can be seen as confirmation of the abolitionist trend in the practice of the Contracting States. It does not necessarily run counter to the view that Article 2 has been amended in so far as it permits the death penalty in times of peace.

165. For the time being, the fact that there are still a large number of States who have yet to sign or ratify Protocol No. 13 may prevent the Court from finding that it is the established practice of the Con-

tracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention, since no derogation may be made from that provision, even in times of war. However, the Grand Chamber agrees with the Chamber that it is not necessary for the Court to reach any firm conclusion on these points since, for the following reasons, it would be contrary to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.

7.5. Positive obligations arising under Article 2

7.5.1. The obligation to provide a legal framework governing the right to life

Osman v United Kingdom (1998)

115. The Court notes 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. 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 [...]

Akkoc v Turkey (2000)

77. The Court recalls 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 (see the L.C.B. v United Kingdom judgment of 9 June 1998, *Reports* 1998-III, p. 1403, § 36). This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by a law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see the Osman v United Kingdom judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159, § 115).

78. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life therefore can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see the Osman judgment cited above, p. 3159-60, § 116).

91. The Court finds that these defects undermined the effectiveness of the protection afforded by the criminal law in the south-east region during the period relevant to this case. It considers that this permitted or fostered a lack of accountability of members of the security forces for their actions which, as the Commission stated in its report, was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention.

Shanaghan v United Kingdom (2001)

88. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also 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 (see, *mutatis mutandis, the McCann* judgment, cited above, p. 49, § 161, and the Kaya v Turkey judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 329, § 105). 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. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, for example, *mutatis mutandis, Ilhan v Turkey* no. 22277/93, ECHR 2000-VII, § 63).

7.5.2. Obligations to take positive steps to protect individuals whose lives are at risk

Branko Tomašić and Others v Croatia (2009)

49. The Court reiterates that Article 2 enjoins the State to take appropriate steps to safeguard the lives of those within its jurisdiction [...] This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions [...]

50. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. 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 Court is also careful, when considering positive obligations, not to interpret Article 2 in such a way as to impose an impossible or disproportionate burden on authorities [...] Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.

Opuz v Turkey (2009)

129. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention [...]

132. However, before embarking upon these issues, the Court must stress that the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse, cannot be confined to the circumstances of the present case. It is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly. Accordingly, the Court will bear in mind the gravity of the problem at issue when examining the present case.

146. The legislative framework preventing effective protection for victims of domestic violence aside, the Court must also consider whether the local authorities displayed due diligence to protect the right to life of the applicant's mother in other respects.

147. In this connection, the Court notes that despite the deceased's complaint that H.O. had been harassing her, invading her privacy by wandering around her property and carrying knives and guns (see paragraph 47 above), the police and prosecuting authorities failed either to place H.O. in detention or to take other appropriate action in respect of the allegation that he had a shotgun and had made violent threats with it [...] While the Government argued that there was no tangible evidence that the applicant's mother's life was in imminent danger, the Court observes that it is not in fact apparent that the authorities assessed the threat posed by H.O. and concluded that his detention was a disproportionate step in the circumstances; rather the authorities failed to address the issues at all. In any event, the Court would underline that in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity [...]

148. Furthermore, in the light of the State's positive obligation to take preventive operational measures to protect an individual whose life is at risk, it might have been expected that the authorities, faced with a suspect known to have a criminal record of perpetrating violent attacks, would take special measures consonant with the gravity of the situation with a view to protecting the applicant's mother. To that end, the local public prosecutor or the judge at the Magistrate's Court could have ordered on his/her initiative one or more of the protective measures enumerated under sections 1 and 2 of Law no. 4320 [...] They could also have issued an injunction with the effect of banning H.O. from contacting, communicating with or approaching the applicant's mother or entering defined areas [...] On the contrary, in response to the applicant's mother's repeated requests for protection, the police and the Magistrate's Court merely took statements from H.O. and released him [...] While the authorities remained passive for almost two weeks apart from taking statements, H.O. shot dead the applicant's mother.

Osman v United Kingdom (1998)

115. The Court notes 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 (see the L.C.B. v United Kingdom judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). 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. It is thus accepted by those appearing before the Court that 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. The scope of this obligation is a matter of dispute between the parties.

116. For the Court, 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. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view 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 wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the abovementioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all 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. This is a question which can only be answered in the light of all the circumstances of any particular case.

Kilic v Turkey (2000)

63. 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 or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see the *Osman* judgment cited above, pp. 3159-60, § 116).

Akkoc v Turkey (2000)

93. The Government have disputed that they could in any event have effectively provided protection against an attack. The Court is not convinced by this argument. A wide range of preventive measures would have been available to the authorities regarding the activities of their own security forces and those groups allegedly acting under their auspices or with their knowledge. The Government have not provided any information concerning steps taken by them prior to the Susurluk report to investigate the existence of contra-guerrilla groups and the extent to which State officials were im-

plicated in unlawful killings carried out during this period, with a view to instituting any appropriate measures of prevention or protection. No steps were taken when the applicant and her husband petitioned the public prosecutor, drawing to his attention that they were victims of direct threats to their lives.

94. The Court concludes that in the circumstances of this case the authorities failed to take reasonable measures available to them to prevent a real and immediate risk to the life of Zübeyir Akkoç. There has, accordingly, been a violation of Article 2 of the Convention.

7.5.3. Persons who are at risk of suicide or being killed by others while in prison

Keenan v United Kingdom (2001)

92. The Government have argued that special considerations arise where a person takes his own life, due to the principles of dignity and autonomy which should prohibit any oppressive removal of a person's freedom of choice and action. The Court has recognised that restraints will inevitably be placed on the preventive measures taken by the authorities, for example in the context of police action, by the guarantees of Articles 5 and 8 of the Convention (see Osman, cited above, pp. 3159-60, § 116, and pp. 3162-63, § 121). The prison authorities, similarly, must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned. There are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing on personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them will depend on the circumstances of the case.

Mikayil Mammadov v Azerbaijan (2009)

111. Nevertheless, the Court considers that, for the purposes of the present complaint under Article 2, the question of whether there was a lawful basis for this operation is not crucial. The Court considers that, by conducting the operation to evict the applicant's family (whether lawfully or not), the authorities could not be considered to have intentionally put the life of the applicant's wife at risk or otherwise caused her to commit suicide. The Court considers that, reasonably speaking, self-immolation as a protest tactic does not constitute predictable or reasonable conduct in the context of eviction from an illegally occupied dwelling, even in a situation involving such a particularly vulnerable sector of the population as refugees and internally displaced persons. When deciding to send the police to the applicant's dwelling in order to evict his family, the authorities could not have reasonably anticipated that the applicant's wife might react by committing suicide. There is no evidence to suggest that, in advance of the operation, the State agents involved had been aware, or should have been aware, of Chichek Mammadova's state of mental health and her alleged propensity for erratic behaviour.

113. However, the State's responsibility under Article 2 is not limited only to the above considerations. The Court considers that the principal issue in the present case stems from the fact that, during the process of eviction, the events unfolded in an unpredictable way and the State agents were suddenly confronted with a situation where their demands to vacate the dwelling were met with an act of self-immolation by the applicant's wife. In this context, it is necessary to determine whether this specific situation triggered the State's positive obligation under Article 2; that is, whether at some point during the course of the operation the State agents became aware or ought to have become aware that Chichek Mammadova posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent that risk.

114. The Court notes that, as a general rule, in a police operation with the aim of eviction, as in any other police operation, the police are expected to place the flow of events under their control, to a cer-

tain degree. Moreover, in the present case, Chichek Mammadova's actions, however unpredictable or unreasonable they might have seemed, constituted a direct response to the State agents' demands and actions.

115. The Court considers that, in a situation where an individual threatens to take his or her own life in plain view of State agents and, moreover, where this threat is an emotional reaction directly induced by the State agents' actions or demands, the latter should treat this threat with the utmost seriousness as constituting an imminent risk to that individual's life, regardless of how unexpected that threat might have been. In the Court's opinion, in such a situation as in the present case, if the State agents become aware of such a threat a sufficient time in advance, a positive obligation arises under Article 2 requiring them to prevent this threat from materialising, by any means which are reasonable and feasible in the circumstances.

116. In the context of the present case, the Court notes that, depending on practical possibilities and the moment at which the State agents became aware of the threat, some of the hypothetical steps to be considered could have entailed, *inter alia*, calming down the situation by verbally persuading Chichek Mammadova to refrain from any actions threatening her life, or physically preventing her from taking hold of and pouring kerosene on herself, or physically preventing her from igniting it, or putting out the fire as soon as she set fire to herself. Such steps could also have included providing immediate first aid, calling an ambulance or assisting in hospitalising the victim. The Court acknowledges that, given the unpredictability of human conduct and the relatively short time span between the verbal threat and the act of self-immolation, there may indeed have been very limited time and facilities available to the State agents to react meaningfully.

117. The Court notes, however, that in the present case the exact factual circumstances surrounding the incident itself are heavily disputed and are far from being clear, making it difficult to determine whether the State agents should have known of the victim's intention to commit suicide prior to her actually setting fire to herself and, if so, what adequate measures could feasibly have been taken by the State agents in those circumstances [...]

119. The Court also notes that the situation in the present case cannot be equated to, for example, a situation involving a death in custody, where the burden may be regarded as fully resting on the State to provide a satisfactory and plausible explanation, in the absence of which inferences unfavourable to the State can be drawn.

120. In view of the above analysis, the Court considers that, owing to the lack of relevant factual details, doubts remain that the responsibility for Chichek Mammadova's death might have lain at least in part with the authorities. However, having assessed the available material, the Court finds those doubts insufficient to establish conclusively that the authorities acted in a manner incompatible with their positive obligations to guarantee the right to life.

Paul and Audrey Edwards v United Kingdom (2002)

57. Christopher Edwards was killed while detained on remand by a dangerous, mentally ill prisoner, Richard Linford, who was placed in his cell. As a prisoner he fell under the responsibility of the authorities who were under a domestic-law and Convention obligation to protect his life. The Court has examined, firstly, whether the authorities knew or ought to have known of the existence of a real and immediate risk to the life of Christopher Edwards from the acts of Richard Linford and, secondly, whether they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

64. The Court concludes that the failure of the agencies involved in this case (medical profession, police, prosecution and court) to pass information about Richard Linford on to the prison authorities and the inadequate nature of the screening process on Richard Linford's arrival in prison disclose a breach of the State's obligation to protect the life of Christopher Edwards. There has therefore been a breach of Article 2 of the Convention in this regard.

7.5.4. Protection from environmental threats and dangerous activities

Budayeva and Others v Russia (2008)

128. The Court reiterates that Article 2 does not solely concern deaths resulting from the use of force by agents of the State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction [...]

129. This positive obligation entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life [...]

130. This obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake [...] In particular, it applies to the sphere of industrial risks, or "dangerous activities", such as the operation of waste collection sites in the case of *Öneryıldız* [...]

131. The obligation on the part of the State to safeguard the lives of those within its jurisdiction has been interpreted so as to include both substantive and procedural aspects, notably a positive obligation to take regulatory measures and to adequately inform the public about any life-threatening emergency, and to ensure that any occasion of the deaths caused thereby would be followed by a judicial enquiry [...]

132. As regards the substantive aspect, in the particular context of dangerous activities the Court has found that special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. Among these preventive measures, particular emphasis should be placed on the public's right to information, as established in the case-law of the Convention institutions. The relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels [...]

133. It has been recognised that in the context of dangerous activities the scope of the positive obligations under Article 2 of the Convention largely overlap with those under Article 8 [...] Consequently, the principles developed in the Court's case-law relating to planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life.

135. In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources [...]; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres [...] This consideration must be afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature.

136. In assessing whether the respondent State had complied with the positive obligation, the Court must consider the particular circumstances of the case, regard being had, among other elements, to the domestic legality of the authorities' acts or omissions [...], the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the issue, especially where conflicting Convention interests are involved [...]

137. In the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use [...] The scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation.

146. The Court will begin by noting that although only one of the present applications, brought by Ms Budayeva, concerns the death of a family member, the circumstances of the case in respect of the other applicants leave no doubt as to the existence of a threat to their physical integrity [...] This brings their complaints within the ambit of Article 2 of the Convention [...]

149. It follows that the authorities of the KBR at various levels were aware that any mudslide, regardless of its scale, was capable of causing devastating consequences in Tyrnauz because of the state of disrepair in which the defence infrastructure had been left after the previous mudslide. It is also clear that there was no ambiguity about the scope or the timing of the work that needed to be performed. However, the Government gave no reasons why no such steps were taken [...]

152. In such circumstances the authorities could reasonably be expected to acknowledge the increased risk of accidents in the event of a mudslide that year and to show all possible diligence in informing the civilians and making advance arrangements for the emergency evacuation. In any event, informing the public about inherent risks was one of the essential practical measures needed to ensure effective protection of the citizens concerned.

156. Finally, having regard to the authorities' wide margin of appreciation in matters where the State is required to take positive action, the Court must look beyond the measures specifically referred to by the applicants and consider whether the Government envisaged other solutions to ensure the safety of the local population. On order to do so the Court has requested the Government to provide information on the regulatory framework, land-planning policies and specific safety measures implemented at the material time in Tyrnauz for deterring natural hazards. The information submitted in response related exclusively to the creation of the mud-retention dam and the mud-retention collector, facilities that, as the Court has established above, were not adequately maintained. Accordingly, in exercising their discretion as to the choice of measures required to comply with their positive obligations, the authorities ended up by taking no measures at all up to the day of the disaster.

158. In the light of the above findings the Court concludes that there was no justification for the authorities' omissions in implementation of the land-planning and emergency relief policies in the hazardous area of Tyrnauz regarding the foreseeable exposure of residents, including all applicants, to mortal risk [...]

L.C.B. v United Kingdom (1998)

36. The applicant complained in addition that the respondent State's failure to warn and advise her parents or monitor her health prior to her diagnosis with leukaemia in October 1970 had given rise to a violation of Article 2 of the Convention.

In this connection, the Court considers 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 (cf. the Court's reasoning in respect of Article 8 in the Guerra and Others v Italy judgment of 19 February 1998, *Reports* 1998-I, p. 227, § 58, and see also the decision of the Commission on the admissibility of application no. 7154/75 of 12 July 1978, Decisions and Reports 14, p. 31). It has not been suggested that the respondent State intentionally sought to deprive the applicant of her life. The Court's task is, therefore, to determine whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant's life from being avoidably put at risk.

41. In conclusion, the Court does not find it established that, given the information available to the State at the relevant time (see paragraph 37 above) concerning the likelihood of the applicant's father having been exposed to dangerous levels of radiation and of this having created a risk to her health, it could have been expected to act of its own motion to notify her parents of these matters or to take any other special action in relation to her.

It follows that there has been no violation of Article 2.

Oneryildiz v Turkey (2004)

71. In this connection, the Court reiterates that Article 2 does not solely concern deaths resulting from the use of force by agents of the State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction [...] The Court considers that this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites ("dangerous activities" - for the relevant European standards, see paragraphs 59 and 60 above).

73. In this connection, contrary to what the Government appear to be suggesting, the harmfulness of the phenomena inherent in the activity in question, the contingency of the risk to which the applicant was exposed by reason of any life-endangering circumstances, the status of those involved in bringing about such circumstances, and whether the acts or omissions attributable to them were deliberate are merely factors among others that must be taken into account in the examination of the merits of a particular case, with a view to determining the responsibility which the State may bear under Article 2 [...]

7.5.5. The right to medical care

Ilhan v Turkey (2000)

86. The Court has accepted the findings of the Commission concerning the injuries inflicted upon Abdüllatif Ilhan, namely, that he was kicked and beaten and struck at least once on the head with a G3 rifle. This resulted in severe bruising and two injuries to the head, which caused brain damage and long-term impairment of function. Notwithstanding the visible injuries to his head and the evident difficulties which Abdüllatif Ilhan had in walking and talking, there was a delay of some thirty-six hours in bringing him to a hospital.

87. Having regard to the severity of the ill-treatment suffered by Abdüllatif Ilhan and the surrounding circumstances, including the significant lapse in time before he received proper medical attention, the Court finds that he was a victim of very serious and cruel suffering that may be characterised as torture (see also *Selmouni v France*, no. 25803/94, §§ 96-105, ECHR 1999-V).

Oyal v Turkey (2010)

53. The Court reiterates that Article 2 does not solely concern deaths resulting from the use of unjustified force by agents of the State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction [...]

54. Those principles apply in the public-health sphere too. The aforementioned positive obligations therefore require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable [...]

55. Furthermore, on a number of occasions the Court has examined complaints raised under Article 2 of the Convention where the victims had suffered serious injuries as a result of illegal acts perpetrated against them and has accepted that the aforementioned provision could apply in exceptional circumstances even if the victims had not died [...]

56. Likewise, in the above-cited *L.C.B.* case, where the applicant had suffered from leukaemia diminishing her chances of survival, and in the case of *Karchen and Others v. France* ((dec.), no. 5722/04, 4 March 2008), where the first applicant had been infected with the HIV virus which put his life in danger, the Court held that Article 2 of the Convention was applicable.

58. As regards the Government's reference to the case of *D. v. the United Kingdom* [...], where the applicant's complaints under Article 2 had been examined under Article 3 of the Convention, the Court notes that the circumstances of that case are fundamentally different from the present case. In the case of *D.* the Court examined the respondent Government's responsibility stemming from the attempted expulsion of the applicant to a third country, where he would be deprived of the medical treatment he had been receiving in the United Kingdom, from the standpoint of Article 3 of the Convention in accordance with its established practice in expulsion cases [...] In the instant case, however, the applicants' complaints must be examined under Article 2 of the Convention since they pertain to the alleged failure of the State authorities to fulfil their positive obligation to protect life by not taking preventive measures against the spread of HIV through blood transfusions and by not conducting an effective investigation against those responsible for the infection of the first applicant.

Pentiacova and Others v Moldova (2005)

[...] Moreover, an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally (see *Cyprus v Turkey*, no. 25781/94, § 219, ECHR 2001-IV and *Nitecki v Poland* (dec.), no. 65653/01, 21 March 2002).

Turning to the facts of the instant case, the Court notes that the applicants have failed to adduce any evidence that their lives have been put at risk. They claim that a number of patients have died in recent years and cite the case of Gheorghe Lungu, but they have not adduced any evidence that the cause of death was the lack of any specific drug or the lack of appropriate medical care. The Court

notes that chronic renal failure is a very serious progressive disease with a high rate of mortality, not only in Moldova but throughout the world. The fact that a person has died of this disease is not, therefore, in itself proof that the death was caused by shortcomings in the medical care system.

Anguelova v Bulgaria (2002)

125. The Court, referring to its findings as regards the suspect conduct of the police (see paragraph 120 above), observes that they delayed the provision of medical assistance to Mr Zabchekov and that that contributed in a decisive manner to the fatal outcome.

130. The Court thus finds that the behaviour of the police officers between 3 a.m. and 5 a.m. on 29 January 1996 and the lack of any reaction by the authorities constituted a violation of the State's obligation to protect the lives of persons in custody.

131. There has been therefore a violation of Article 2 § 1 of the Convention in that respect.

7.6. Procedural requirements – the duty to conduct an effective investigation

7.6.1. Purpose of the requirement for an effective investigation

McCann and Others v United Kingdom (1995)

161. The Court confines itself to noting, like the Commission, 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 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.

Salman v Turkey (2000)

105. In that connection, the Court points out that the obligation mentioned above is not confined to cases where it is apparent that the killing was caused by an agent of the State. The applicant and the father of the deceased lodged a formal complaint about the death with the competent investigation authorities, alleging that it was the result of torture. Moreover, the mere fact that the authorities were informed of the death in custody of Agit Salman gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death. This involves, where appropriate, an autopsy which provides a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death.

Šilih v Slovenia (2009)

140. The Court reiterates that the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party or, as the case may be, prior to the entry into force of Protocol No. 11, before the date on which the respondent Party recognized the right of individual petition, when this recognition was still optional (“the critical date”) [...]

141. The Court further notes that, in applying the principle of non-retroactivity, it has been prepared in previous cases to have some regard to facts which occurred prior to the critical date because of their causal connection with subsequent facts which form the sole basis of the complaint and of the Court's examination.

147. The Court notes that the test and the criteria established in the *Blečić* case are of a general character, which requires that the special nature of certain rights, such as those laid down in Articles 2 and 3 of the Convention, be taken into consideration when applying those criteria. The Court reiterates in this connection that Article 2 together with Article 3 are amongst the most fundamental provisions in the Convention and also enshrine the basic values of the democratic societies making up the Council of Europe [...]

152. Having regard to the varying approaches taken by different Chambers of the Court in the above cases, the Grand Chamber must now determine whether the procedural obligations arising under Article 2 can be seen as being detachable from the substantive act and capable of coming into play in respect of deaths which occurred prior to the critical date or alternatively whether they are so inextricably linked to the substantive obligation that an issue may only arise in respect of deaths which occur after that date.

155. In the sphere of medical negligence, the procedural obligation under Article 2 has been interpreted by the Court as imposing an obligation on the State to set up an effective judicial system for establishing both the cause of death of an individual under the care and responsibility of health professionals and any responsibility on the part of the latter [...]

156. The Court observes that the procedural obligation has not been considered dependent on whether the State is ultimately found to be responsible for the death. When an intentional taking of life is alleged, the mere fact that the authorities are informed that a death had taken place gives rise *ipso facto* to an obligation under Article 2 to carry out an effective official investigation [...] In cases where the death was caused unintentionally and in which the procedural obligation is applicable, this obligation may come into play upon the institution of proceedings by the deceased's relatives [...]

158. The Court also attaches weight to the fact that it has consistently examined the question of procedural obligations under Article 2 separately from the question of compliance with the substantive obligation and, where appropriate, has found a separate violation of Article 2 on that account [...]

159. Against this background, the Court concludes that the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent "interference" within the meaning of the *Blečić* judgment [...] In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date.

161. However, having regard to the principle of legal certainty, the Court's temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respect of deaths that occur before the critical date is not open-ended.

162. First, it is clear that, where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction.

163. Second, there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.

Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account [...] will have been or ought to have been carried out after the critical date.

However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.

165. Applying the above principles to the circumstances of the present case, the Court notes that the death of the applicants' son occurred only a little more than a year before the entry into force of the Convention in respect of Slovenia, while, with the exception of the preliminary investigation, all the criminal and civil proceedings were initiated and conducted after that date [...]

Varnava and Others v Turkey (2009)

144. The Court would here distinguish between the making of a factual presumption and the legal consequences that may flow from such a presumption. Even if there was an evidential basis which might justify finding that the nine missing men died in or closely after the events in 1974, this would not dispose of the applicants' complaints concerning the lack of an effective investigation.

145. The Court would recall that the procedural obligation to investigate under Article 2 where there has been an unlawful or suspicious death is triggered by, in most cases, the discovery of the body or the occurrence of death. Where disappearances in life-threatening circumstances are concerned, the procedural obligation to investigate can hardly come to an end on discovery of the body or the presumption of death; this merely casts light on one aspect of the fate of the missing person. An obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain.

146. The Court therefore concludes that even though a lapse of over 34 years without any news of the missing persons may provide strong circumstantial evidence that they have died meanwhile, this does not remove the procedural obligation to investigate.

148. There is however an important distinction to be drawn in the Court's case-law between the obligation to investigate a suspicious death and the obligation to investigate a suspicious disappearance. A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred [...] This situation is very often drawn out over time, prolonging the torment of the victim's relatives. It cannot therefore be said that a disappearance is, simply, an "instantaneous" act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation [...] This is so, even where death may, eventually, be presumed.

149. It may be noted that the approach applied in *Šilih v. Slovenia* (cited above, § 163) concerning the requirement of proximity of the death and investigative steps to the date of entry into force of the Convention applies only in the context of killings or suspicious deaths, where the anchoring factual element, the loss of life of the victim, is known for a certainty, even if the exact cause or ultimate responsibility is not. The procedural obligation in that context is not of a continuing nature in the sense described above.

186. In the present case, the respondent Government have not put forward any materials or concrete information that would show that any of the missing men were found dead or were killed in the conflict zone under their control. Nor is there any other convincing explanation as to what might have happened to them that might counter the applicants' claims that the men disappeared in areas under the respondent Government's exclusive control. In light of the findings in the fourth inter-State case, which have not been controverted, these disappearances occurred in life-threatening circumstances where the conduct of military operations was accompanied by widespread arrests and killings. Article 2 therefore imposes a continuing obligation on the respondent Government to account for the whereabouts and fate of the missing men in the present case; if warranted, consequent measures for redress could then be effectively adopted.

193. It may be that both sides in this conflict prefer not to attempt to bring out to the light of day the reprisals, extra-judicial killings and massacres that took place or to identify those amongst their own forces and citizens who were implicated. It may be that they prefer a "politically-sensitive" approach to the missing persons problem and that the CMP with its limited remit was the only solution which could be agreed under the brokerage of the UN. That can have no bearing on the application of the provisions of the Convention.

Yaşa v Turkey (1998)

100. [...] In the case under consideration, the mere fact that the authorities were informed of the murder of the applicant's uncle gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation. The same applies to the attack on the applicant which, because eight shots were fired at him, amounted to attempted murder [...]

104. The Court is prepared to take into account the fact that the prevailing climate at the time in that region of Turkey, marked by violent action by the PKK and measures taken in reaction thereto by the authorities, may have impeded the search for conclusive evidence in the domestic criminal proceedings. Nonetheless, 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.

Ergi v Turkey (1998)

85. In the light of the foregoing, the Court, like the Commission, finds that the authorities failed to carry out an effective investigation into the circumstances surrounding Havva Ergi's death. It is mindful, as indicated in previous judgments concerning Turkey, of the fact that loss of life is a tragic and frequent occurrence in the security situation in south-east Turkey (see, for instance, the above-mentioned Aydın and Kaya judgments, respectively at paragraphs 14 and 91). However, 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 the deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear (ibid.).

7.6.2. Nature of the requirement for an effective investigation

Budayeva and Others v Russia (2008)

139. In this connection, the Court has held that if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation to set up an "effective judicial system" does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims [...]

140. However, in the particular context of dangerous activities, the Court considered that an official criminal investigation is indispensible given that public authorities are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused an incident. It held that where the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative [...]

141. The approach taken by the Court in a case brought by victims of a natural disaster, namely campers caught in a flood at an official camping site, was consistent with that in the area of dangerous activities. The Court found that successful proceedings for damages before an administrative tribunal, preceded by comprehensive criminal proceedings, were an effective remedy for the purposes of Article 35 § 1 of the Convention [...]

142. Accordingly, the principles developed in relation to judicial response following incidents resulting from dangerous activities lend themselves to application also in the area of disaster relief. Where lives are lost as a result of events engaging the State's responsibility for positive preventive action, the judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied to the extent that this is justified by the findings of the investigation [...] In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue [...]

143. Moreover, the requirements of Article 2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law [...]

162. Within a week of the incident the prosecutor's office decided to dispense with a criminal investigation into the circumstances of Vladimir Budayev's death. However, in conducting the inquest the prosecutor's office confined itself to establishing the immediate cause of his death, which was found to be the collapse of the building, and did not enter into the questions of safety compliance or the possible engagement of the authorities' responsibility. Moreover, it does not appear that those questions were the subject of any enquiry, whether criminal, administrative or technical. In particular, no action has been taken to verify the numerous allegations made in the media and in the victims' complaints concerning the inadequate maintenance of the mud-defence infrastructure or the authorities' failure to set up the warning system.

163. In so far as the question of State liability has been raised in certain individual civil actions, the Court notes that in order to be successful in these proceedings the plaintiffs would have to demonstrate to what extent the damage attributable to the State's alleged negligence exceeded what was inevitable in the circumstances of a natural disaster. Indeed, the applicants' claims for damages were dismissed precisely for the failure to do so [...] However, this question could only be answered, if at all, by a complex expert investigation involving the assessment of technical and administrative aspects, as well as by obtaining factual information available to the authorities alone. The claimants were thus required to discharge a burden of proof in respect of facts that were beyond the reach of private individuals. Accordingly, without the benefit of an independent criminal enquiry or expert

assessment the victims would inevitably fall short of means to establish civil liability on the part of the State.

Branko Tomašić and Others v Croatia (2009)

38. In respect of a substantive complaint of failure of the State to take adequate positive measures to protect a person's life in violation of Article 2, the possibility of obtaining compensation for the death of a person will generally, and in normal circumstances, constitute an adequate and sufficient remedy [...]

41. The Court notes that after M.M. had killed M.T. and V.T. no responsibility of the State officials involved was established in respect of the relevant authorities' duty to protect the lives of the victims. In these circumstances it might be said that a civil action for damages against the State does not have much prospect of success, in particular in view of the requirement under domestic law and practice that the State's liability be engaged only in the event of unlawful conduct on the part of the authorities or unlawful failure to act and intent on the part of the authorities to cause damage to a third person or acceptance of that outcome.

42. However, and notwithstanding the chances of success of a potential civil action concerning the lawfulness of the acts of the relevant authorities, the Court notes that in any event the issue here is not a question of whether the authorities acted unlawfully or whether there was any individual responsibility of a State official on whatever grounds. Much more broadly, the central question of the present case is the alleged deficiencies of the national system for the protection of the lives of others from acts of dangerous criminals who have been identified as such by the relevant authorities and the treatment of such individuals, including the legal framework within which the competent authorities are to operate and the mechanisms provided for. In this connection the Court notes that the Government have not shown that these issues, and in particular the applicants' complaint under Article 2 of the Convention related to the insufficiencies of domestic law and practice preceding the deaths of M.T. and V.T., could be examined in any proceedings relied on by the Government.

64. It now remains to be established whether in the circumstances of the present case the State had a further positive obligation to investigate the criminal responsibility of any of the State officials involved. The Court firstly reiterates that although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently [...], the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. The Court has already held that in the specific sphere of medical negligence, the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged [...] The same should apply in respect of the possible responsibility of State officials for the deaths occurring as a result of their negligence. However, the applicants' complaint in respect of the substantive aspect of Article 2 of the Convention is not whether there was any individual responsibility of a State official on whatever grounds. The Court considers that the central complaint concentrates on the deficiencies of the national system for the protection of the lives of others from acts of dangerous criminals who have been identified as such by the relevant authorities and the treatment of such individuals, including the legal framework within which the competent authorities are to operate and the mechanisms provided for.

65. In view of the nature of the applicants' complaint under the substantive aspect of Article 2 of the Convention and the Court's finding in this respect which imply that the procedures involved were necessarily insufficient from the standpoint of the substantive aspect of Article 2, the Court considers that there is no need for it to examine separately the applicants' complaint under the procedural aspect of Article 2 of the Convention.

Šilih v Slovenia (2009)

192. As the Court has held on several occasions, the procedural obligation of Article 2 requires the States to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable [...]

193. The Court reiterates that this procedural obligation is not an obligation of result but of means only [...]

194. Even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the Court has said many times that the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to personal integrity is not caused intentionally, the procedural obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case [...] In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and/or for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged [...]

Oyal v Turkey (2010)

66. The Court reiterates that, even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties [...], the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence, the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages. Disciplinary measures may also be envisaged [...]

70. It thus appears that the applicants had access to the civil and administrative courts which enabled the establishment of the liability of those responsible for the infection of the first applicant with the HIV virus and the award of civil redress, in an order for damages. However, as it appears from the parties' submissions, a crucial question in the instant case is whether the redress in question was appropriate and sufficient.

71. In this connection, the Court notes that the non-pecuniary damage awards received by the applicants only covered one year's treatment and medication for the first applicant [...] Thus the family was left in debt and poverty and unable to meet the high costs of the continued treatment and medication amounting to a monthly cost of almost EUR 6,800, which was not contested by the Government [...] Despite the promises made by the authorities to pay the medical expenses of the first

applicant, the applicants' requests to that effect were rejected by the Kızılay and the Ministry of Health [...] It is striking that the green card given to the applicants was withdrawn immediately after the announcement of the judgments ordering the defendants to pay compensation to the applicants [...] It follows that the applicants were left on their own to pay the high costs of treatment and medication for the first applicant.

72. In view of the above, while the Court acknowledges the sensitive and positive approach adopted by the national courts in determining the responsibility of the Kızılay and the Ministry of Health and in ordering them to pay damages to the applicants, it considers that the most appropriate remedy in the circumstances would have been to have ordered the defendants, in addition to the payment of non-pecuniary damages, to pay for the treatment and medication expenses of the first applicant during his lifetime. The Court concludes therefore that the redress offered to the applicants was far from satisfactory for the purposes of the positive obligation under Article 2 of the Convention.

7.6.2.1. The persons responsible for and carrying out the investigation must be independent from those implicated in the events

Al-Skeini and Others v United Kingdom (2011)

168. The Court takes as its starting point the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading *inter alia* to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.

169. Nonetheless, the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.

171. It is clear that the investigations into the shooting of the first, second and third applicants' relatives fell short of the requirements of Article 2, since the investigation process remained entirely within the military chain of command and was limited to taking statements from the soldiers involved [...]

172. As regards the other applicants, although there was an investigation by the Special Investigation Branch into the death of the fourth applicant's brother and the fifth applicant's son, the Court does not consider that this was sufficient to comply with the requirements of Article 2. It is true that the Royal Military Police, including its Special Investigation Branch, had a separate chain of command from the soldiers on combat duty whom it was required to investigate. However, as the domestic courts observed [...], the Special Investigation Branch was not, during the relevant period, operationally independent from the military chain of command. It was generally for the Commanding Officer of the unit involved in the incident to decide whether the Special Investigation Branch should be called in. If the Special Investigation Branch decided on its own initiative to commence an investigation, this investigation could be closed at the request of the military chain of command, as demonstrated in the fourth applicant's case. On conclusion of a Special Investigation Branch investigation, the report was sent to the Commanding Officer, who was responsible for deciding whether or not the case should be referred to the prosecuting authority. The Court considers [...] that the fact that the Special Investigation Branch was not "free to decide for itself when to start

and cease an investigation" and did not report "in the first instance to the [Army Prosecuting Authority]" rather than to the military chain of command, meant that it could not be seen as sufficiently independent from the soldiers implicated in the events to satisfy the requirements of Article 2.

173. It follows that the initial investigation into the shooting of the fourth applicant's brother was flawed by the lack of independence of the Special Investigation Branch officers [...] As previously stated, eye witness testimony was central in this case, since the cause of the death was not in dispute. The Court considers that the long period of time that was allowed to elapse before Lance Corporal S was questioned about the incident, combined with the delay in having a fully independent investigator interview the other military witnesses, entailed a high risk that the evidence was contaminated and unreliable by the time the Army Prosecuting Authority came to consider it. Moreover, it does not appear that any fully independent investigator took evidence from the Iraqi neighbours who the applicant claims witnessed the shooting.

174. While there is no evidence that the military chain of command attempted to intervene in the investigation into the fifth applicant's son's death, the Court considers that the Special Investigation Branch investigators lacked independence for the reasons set out above. In addition, no explanation has been provided by the Government in respect of the long delay between the death and the court-martial. It appears that the delay seriously undermined the effectiveness of the investigation, not least because some of the soldiers accused of involvement in the incident were by then untraceable [...] Moreover, the Court considers that the narrow focus of the criminal proceedings against the accused soldiers was inadequate to satisfy the requirements of Article 2 in the particular circumstances of this case. There appears to be at least *prima facie* evidence that the applicant's son, a minor, was taken into the custody of British soldiers who were assisting the Iraqi police to take measures to combat looting and that, as a result of his mistreatment by the soldiers, he drowned. In these circumstances, the Court considers that Article 2 required an independent examination, accessible to the victim's family and to the public, of the broader issues of State responsibility for the death, including the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion.

McShane v United Kingdom (2002)

95. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see e.g. the Güleç v Turkey judgment of 27 July 1998, *Reports* 1998-IV, §§ 81-82; *Öğur v Turkey*, no. 21954/93, ECHR 1999-III, §§ 91-92). This means not only a lack of hierarchical or institutional connection but also a practical independence (see, for example, the Ergi v Turkey judgment of 28 July 1998, *Reports* 1998-IV, §§ 83-84, where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident).

7.6.2.2. The investigation must be carried out promptly and with reasonable expedition

Hugh Jordan v United Kingdom (2001)

108. A requirement of promptness and reasonable expedition is implicit in this context. It must be 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 a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

Kelly and Others v United Kingdom (2001)

132. While it is therefore the case that the applicants contributed significantly to the delay in the inquest being opened, this has to some extent resulted from the difficulties facing relatives in participating in inquest procedures (see paragraphs 127-128 above concerning the non-disclosure of witness statements). It cannot be regarded as unreasonable that the applicants had regard to the legal remedies being used to challenge these aspects of inquest procedure. The Court observes that the Coroner, who was responsible for the conduct of the proceedings, acceded to these adjournments. The fact that they were requested by the applicants do not dispense the authorities from ensuring compliance with the requirement for reasonable expedition (see *mutatis mutandis* concerning speed requirements under Article 6 § 1 of the Convention, Scopelliti v Italy judgment of 23 November 1993, Series A no. 278, p. 9, § 25). If long adjournments are regarded as justified in the interests of procedural fairness to the deceaseds' 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.

Šilih v Slovenia (2009)

195. A requirement of promptness and reasonable expedition is implicit in this context. Even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts [...] The same applies to Article 2 cases concerning medical negligence. The State's obligation under Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice and that requires a prompt examination of the case without unnecessary delays [...]

196. Lastly, apart from the concern for the respect of the rights inherent in Article 2 of the Convention in each individual case, more general considerations also call for a prompt examination of cases concerning death in a hospital setting. Knowledge of the facts and of possible errors committed in the course of medical care are essential to enable the institutions concerned and medical staff to remedy the potential deficiencies and prevent similar errors. The prompt examination of such cases is therefore important for the safety of users of all health services [...]

202. The Court is not called upon to determine whether in the present case the criminal proceedings should have been conducted *ex-officio* or to identify what sort of steps the public prosecutor should have taken as the procedural obligation under Article 2 does not necessarily require the State to provide criminal proceedings in such cases (see paragraph 194 above), even if it is clear that such proceedings could by themselves have fulfilled the requirements of Article 2. The Court therefore confines itself to noting that the criminal proceedings, in particular the investigation, were excessively long and that neither the conduct of the applicants nor the complexity of the case can suffice to explain such length.

203. Unlike the Government, the Court finds it significant that the applicants had recourse to civil proceedings in which they were entitled to an adversarial trial enabling any responsibility of the doctors or hospital concerned to be established and any appropriate civil redress to be obtained [...]

205. The Court appreciates that evidence adduced in criminal proceedings may be of relevance to decisions in civil proceedings arising out of the same incident. Accordingly, it does not find that the stay of the civil proceedings was in itself unreasonable in the present case. Having said that, it stresses that the stay did not release the domestic authorities from their obligation to examine the case promptly. In this respect, the Court would recall its above findings concerning the processing

of the case in the criminal proceedings. In addition, it would also note that the civil court before which the applicants' case was pending remained responsible for the conduct of the civil proceedings and ought therefore to have weighed the advantages of a continued stay against the requirement of promptness when deciding whether or not to resume the proceedings.

210. Lastly, the Court considers it unsatisfactory for the applicants' case to have been dealt with by at least six different judges in a single set of first-instance proceedings. While it accepts that the domestic courts are better placed to assess whether an individual judge is able to sit in a particular case, it nevertheless notes that a frequent change of the sitting judge will undoubtedly impede the effective processing of the case. It observes in this connection that it is for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of the Convention, including those enshrined in the procedural obligation of Article 2 [...]

211. Having regard to the above background, the Court considers that the domestic authorities failed to deal with the applicants' claim arising out of their son's death with the level of diligence required by Article 2 of the Convention. Consequently, there has been a violation of Article 2 in its procedural aspect and the Government's preliminary objection concerning the exhaustion of civil domestic remedies in respect of the procedural limb of this provision is dismissed.

Oyal v Turkey (2010)

75. On that basis, the Court observes that, despite the due diligence shown by the civil courts in the handling of the applicants' compensation claims within a very short time (approximately one year and two months), the administrative court proceedings aimed at determining the liability of the Ministry of Health lasted nine years, four months and seventeen days [...] Having regard to the latter delay, it cannot be said that the administrative courts complied with the requirements of promptness and reasonable expedition implicit in this context.

76. In that connection, the Court recalls that, apart from the concern for the respect of the rights inherent in Article 2 of the Convention in each individual case, more general considerations also call for a prompt examination of cases concerning medical negligence in a hospital setting. Knowledge of the facts and of possible errors committed in the course of medical care is essential to enable the institutions and medical staff concerned to remedy the potential deficiencies and prevent similar errors. The prompt examination of such cases is therefore important for the safety of users of all health services [...]

7.6.2.3. The investigation must be carried out with sufficient rigour

Branko Tomašić and Others v Croatia (2009)

43. [...] [T]he Court reiterates that in cases concerning a death in circumstances that might give rise to the State's responsibility the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures [...]

Gül v Turkey (2000)

93. The criminal court heard evidence from the three officers charged, whose brief statements added nothing of substance to their written statements. It called no other witnesses. The applicant and members of his family were not informed that the proceedings were going on and were not afforded the opportunity of telling the court of their very different version of events. The court did request two expert opinions, the first from a gendarme lieutenant and the second from police experts. These re-

ports contained an evaluation of events based, without explanation, on the assumption that the police officers' account was the correct one. They both reached conclusions as to the lack of fault of the officers which were based on that general evaluation rather than on any findings of a technical expert report.

Ergi v Turkey (1998)

83. However, the Court is struck by the heavy reliance placed by Mustafa Yüce, the public prosecutor who had the obligation to carry out an investigation into Havva Ergi's death, on the conclusion of the gendarmerie incident report that it was the PKK which had shot the applicant's sister. The prosecutor had explained to the delegates that only if there had been any elements contradicting this conclusion would he have considered that any other investigatory measures would have been necessary. He also seemed to consider that the onus was on the deceased's relatives to alert him to any suspicion of wrongdoing on the part of the security forces and they had not approached him in this case (ibid.). In the absence of any such elements of suspicion, he had issued a decision of lack of jurisdiction indicating that the PKK was suspected of the killing, without having taken statements from members of the victim's family, villagers or any military personnel present during the operation. This being so, it had not been apparent from the incident report in question or the sketch map that it was the PKK which had fired the bullet which killed the applicant's sister. In addition, the report itself had been drafted by a gendarmerie commander, Osa Gündo du, who had not himself been present during the clash and who had stated that he was unaware of the identity of any of the officers or units involved and that his information as to what occurred was derived from apparently brief coded radio transmissions. However, the public prosecutor had not investigated the circumstances surrounding the killing of Havva Ergi and for that reason could not have been apprised of these documents.

84. Nor was any detailed consideration given by either the district gendarmerie commander or the public prosecutor to verifying whether the security forces had conducted the operation in a proper manner. Although Ahmet Kuzu had stated to the delegates 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, it would appear that no inquiry was conducted into whether the plan and its implementation had been inadequate in the circumstances of the case.

Güleç v Turkey (1998)

79. The Court observes that the Government blamed the PKK for Ahmet Güleç's death. In the first place, the report on the incidents drawn up by the commanding officers of the gendarmerie, the Idil police and the army indicates that the security forces were convinced that this death was the result of a "shot fired by armed troublemakers who had mingled with the demonstrators" (see paragraph 17 above). Similarly, in its letter of 14 June 1991 replying to the Idil District Commissioner's letter of 12 June, the gendarmerie asserted without any reservation that the demonstration had been "organised by terrorist militants from the PKK" and that "the infiltration of armed militants among the people and the use of weapons during the demonstration show how serious the situation was" (see paragraph 23 above). This same document also reveals the lack of cooperation by the gendarmerie, which announced that it could not supply the names of the soldiers who had been on board the armoured vehicle. The investigating officer does not seem to have had any doubt about the official version of events when, in his inquiry report, he maintained, *inter alia*, that the victim's father had made "gratuitous and inopportune accusations against Major M. Karatan" which revealed "an ideological outlook and a complete lack of objectivity". He maintained that the security forces had not aimed at the citizens or returned fire from the crowd, and that they had twice as many wounded as the demonstrators. On that basis he argued that it was impossible "to determine who was responsible for the incidents" (see paragraph 27 above).

In addition, investigating officer Kurt merely interviewed a few people without bothering to summon warrant-officer Ayhan or other witnesses, such as Cüda Demir. The Court considers that the statements of the two last-mentioned witnesses are of fundamental importance, since Mr Ayhan was the driver of the Condor and Ms Demir was standing at the applicant's son's side when he was hit by the bullet fragment which caused his death.

A reconstruction of the events would have made it possible to determine the trajectory of the bullet fragment and the position of the weapon that had fired it. Similarly a metallurgical analysis of the fragment would have made it possible to identify its maker and supplier, and consequently the type of weapon used. Furthermore, no one seems to have taken any interest in the source of the bullet which passed through Ahmet Güleç's body, following a downward trajectory, which is perfectly consistent with fire having been opened from the Condor's turret.

Kaya v Turkey (1998)

90. No concrete measures were taken thereafter by the public prosecutor to investigate the death of the applicant's brother, for example by verifying whether the deceased was in fact an active member of the PKK or by questioning villagers living in the vicinity of Dolunay to ascertain whether they heard the sound of a gun battle on the day in question or by summoning members of the security forces involved to his office to take statements. The public prosecutor's firm conviction that the deceased was a terrorist killed in an armed clash with the security forces was never in fact tested against any other evidence and the terms of his non-jurisdiction decision effectively excluded any possibility that the security forces might somehow have been culpable, including with respect to the proportionality of the force used in the circumstances of the alleged armed attack. It is also to be noted that the public prosecutor attached to the National Security Court did not seek to verify the statement made by Hikmet Aksoy on 17 June 1994, for example by checking the custody records at the Lice gendarmerie headquarters to ascertain whether he had been detained there on or around 25 March 1993 as alleged (see paragraph 20 above).

Hugh Jordan v United Kingdom (2001)

107. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *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. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.

Shanaghan v United Kingdom (2001)

90. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (e.g. Kaya v Turkey judgment, cited above, p. 324, § 87) and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *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 (see concerning autopsies, e.g. *Salman v Turkey* cited above, § 106; concerning witnesses e.g. *Tanrıkulu v Turkey*, no. 23763/94, ECHR 1999-IV, § 109; concerning forensic evidence e.g. *Gül v*

Turkey, no. 22676/93, [Section 4], § 89). 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.

Opuz v Turkey (2009)

138. The Court notes at the outset that there seems to be no general consensus among States Parties regarding the pursuance of the criminal prosecution against perpetrators of domestic violence when the victim withdraws her complaints [...] Nevertheless, there appears to be an acknowledgement of the duty on the part of the authorities to strike a balance between a victim's Article 2, Article 3 or Article 8 rights in deciding on a course of action. In this connection, having examined the practices in the member States [...], the Court observes that there are certain factors that can be taken into account in deciding to pursue the prosecution:

- the seriousness of the offence;
- whether the victim's injuries are physical or psychological;
- if the defendant used a weapon;
- if the defendant has made any threats since the attack;
- if the defendant planned the attack;
- the effect (including psychological) on any children living in the household;
- the chances of the defendant offending again;
- the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved;
- the current state of the victim's relationship with the defendant;
- the effect on that relationship of continuing with the prosecution against the victim's wishes;
- the history of the relationship, particularly if there had been any other violence in the past; and
- the defendant's criminal history, particularly any previous violence.

139. It can be inferred from this practice that the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints.

Velikova v Bulgaria (2000)

83. The Court observes that there existed obvious means to obtain evidence about the time at which Mr Tsonchev's injuries occurred and further important evidence about the circumstances surrounding his arrest, his state of health and, consequently, about the perpetrators of the grave crime committed against him (see paragraph 79 above). However, the investigator did not proceed to collect such evidence, an omission which was sanctioned through the order of 19 March 1996 and the letter of 3 June 1997 by the regional prosecutor (see paragraphs 37 and 40 above).

Furthermore, the investigation remained dormant, nothing having been done since December 1994 to uncover the truth about the death of Mr Tsonchev. The applicant's numerous complaints of the authorities' inactivity were to no avail (see paragraphs 35-40 above).

No plausible explanation for the reasons of the authorities' failure to collect key evidence was ever provided by the Government.

Tanrikulu v Turkey (1999)

106. A post-mortem examination was performed on the same day by two general practitioners. The two physicians found that the applicant's husband had been hit by thirteen bullets, one of which had lodged in the body and was removed (see paragraph 35 above). The Court, sharing the Commis-

sion's misgivings as to the limited amount of forensic information obtained from this examination, considers it regrettable that no forensic specialist was involved and that no full autopsy was performed.

Gül v Turkey (2000)

89. In that connection, the Court notes that an investigation into the incident was carried out by the public prosecutor. Notwithstanding the seriousness of the incident however and the necessity to gather and record the evidence which would establish what had happened, there were a number of significant omissions. There was no attempt to find the bullet allegedly fired by Mehmet Gül at the police officers, which was their primary justification for shooting him. There was no proper recording of the alleged finding of two guns and a spent cartridge inside the flat, which was also relied on by the police in justifying their actions. The references in the police statements on this point were vague and inconsistent, rendering it impossible to identify which officer had found each weapon. No photograph was taken of the weapons at the alleged location. While a test was carried out on the Browning weapon to show that it had been recently fired, there was no testing of Mehmet Gül's hands for traces that would link him with the gun. Nor was the gun tested for prints. The failure of the autopsy examination to record fully the injuries on Mehmet Gül's body hampered an assessment of the extent to which he was caught in the gunfire, and his position and distance relative to the door, which could have cast further light on the circumstances in which he was killed. The Government submitted that further examination was not necessary since the cause of death was clear. The purpose of a *post mortem* examination however is also to elucidate the circumstances surrounding the death, including a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings (see in that respect the Model Autopsy Protocol annexed to The Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions adopted by the United Nations in 1991, which emphasises the necessity in potentially controversial cases for a systematic and comprehensive examination and report to prevent the omission or loss of important details, cited in the Salman v Turkey judgment of 27 June 2000, § 73, to be published in *Reports* 2000 [...])

7.6.2.4. There must be a sufficient element of public scrutiny of the investigation or its results

Giuliani and Gaggio v Italy (2011)

311. It remains to be determined whether the applicants were afforded access to the investigation to the extent necessary to safeguard their legitimate interests, whether the proceedings satisfied the requirement of promptness arising out of the Court's case-law and whether the persons responsible for and conducting the investigation were independent from those implicated in the events.

312. In that connection the Court observes that it is true that under Italian law the injured party may not apply to join the proceedings as a civil party until the preliminary hearing, and that no such hearing took place in the present case. Nevertheless, at the stage of the preliminary investigation injured parties may exercise rights and powers expressly afforded to them by law [...]

313. It is not disputed in the instant case that the applicants had the option to exercise these rights. In particular, they appointed experts of their own choosing, whom they instructed to prepare expert reports which were submitted to the prosecuting authorities and the investigating judge [...], and their representatives and experts participated in the third set of ballistics tests [...] Furthermore, they were able to lodge an objection against the request to discontinue the proceedings and to indicate additional investigate measures which they wished to see carried out. The fact that the Genoa investigating judge, making use of her powers to assess the facts and the evidence, refused their re-

quests [...] does not in itself amount to a violation of Article 2 of the Convention, particularly since the investigating judge's decision on these points does not appear to the Court to have been arbitrary.

320. The Court also notes that the procedural obligations arising out of Article 2 require that an effective "investigation" be carried out and do not require the holding of public hearings. Hence, if the evidence gathered by the authorities is sufficient to rule out any criminal responsibility on the part of the State agent who had recourse to force, the Convention does not prohibit the discontinuation of the proceedings at the preliminary investigation stage. As the Court has just found, the evidence gathered by the prosecuting authorities, and in particular the footage of the attack on the jeep, led to the conclusion, beyond reasonable doubt, that M.P. had acted in self-defence, which constitutes a ground of justification under Italian criminal law.

321. Furthermore, it cannot be said that the prosecuting authorities accepted without question the version supplied by the law-enforcement officers implicated in the events. They not only questioned numerous witnesses, including demonstrators and third parties who had witnessed the events on Piazza Alimonda [...], but also ordered several forensic examinations, including an expert medical examination and three sets of ballistics tests [...] The fact that the experts did not agree on all aspects of the reconstruction of events (and, in particular, on the distance from which the shot had been fired and the trajectory of the bullet) was not, in itself, such as to make further investigations necessary, given that it was for the judge to assess the pertinence of the explanations given by the various experts and whether they were compatible with the existence of grounds of justification exempting the accused from criminal responsibility.

McKerr v United Kingdom (2001)

115. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç*, cited above, p. 1733, § 82, where the father of the victim was not informed of the decision not to prosecute; Oğur, cited above, § 92, where the family of the victim had no access to the investigation and court documents; and Gül, cited above, § 93).

McShane v United Kingdom (2002)

114. The applicant has also made complaint about lack of access to the investigation documents during the investigation period. She did not obtain copies of many reports or statements until the case was sent to the Coroner in early 1999. The Court has commented in other cases that, as regards the public scrutiny of the police investigations, 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 (see *Hugh Jordan v United Kingdom*, no. 24746/94, [Sect.3], judgment of 4 May 2001, § 121). The requisite access of the public or the victim's relatives may be provided for at other stages of the available procedures (see further below).

7.6.2.5. The investigation must be capable of leading to a determination of whether the force used was justified and of leading to the identification and punishment of those responsible

Kelly and Others v United Kingdom (2001)

96. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (e.g. Kaya v Turkey judgment, cited above, p. 324, § 87) and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *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 (see concerning autopsies, e.g. *Salman v Turkey* cited above, § 106; concerning witnesses e.g. *Tanrıkulu v Turkey*, no. 23763/94, ECHR 199-IV, § 109; concerning forensic evidence e.g. *Gül v Turkey*, 22676/93, [Section 4], § 89). 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.

Tahsin Acar v Turkey (2004)

220. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, taken in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] 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 (see, *mutatis mutandis, McCann and Others v United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 49 § 161, and Kaya v Turkey, judgment of 19 February 1998, Reports 1998-I, p. 329, § 105). Such investigations should take place in every case of a killing resulting from the use of force, regardless of whether the alleged perpetrators are State agents or third persons. However, where an involvement of State agents or bodies is alleged, specific requirements as to the effectiveness of investigation may apply.

221. 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 (see Mastromatteo v Italy, no. 37703/97, § 89, ECHR 2002-VIII). What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, *mutatis mutandis*, Olhan v Turkey, no. 22277/93, § 63, ECHR 2000-VII, and Finucane v United Kingdom, no. 29178/95, § 67, ECHR 2003-VIII).

222. For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see Güleç v Turkey, judgment of 27 July 1998, Reports 1998-IV, p. 1733, §§ 81-82, and Oğur v Turkey, no. 21594/93, §§ 91-92, ECHR 1999-III). This means not only a lack of hierarchical or institutional connection but also a practical independence (see Ergi v Turkey, judgment of 28 July 1998, Reports 1998-IV, pp. 1778-79, §§ 83-84, and Paul and Audrey Edwards v United Kingdom, no. 46477/99, § 70, ECHR 2002-II).

223. The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see Oğur, cited above, § 88). This is not an obligation

of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident (see Tanrıkulu v Turkey, no. 23763/94, § 109, ECHR 1999-IV, and Salman v Turkey, no. 21986/93, § 106, ECHR 2000-VII). Any deficiency in the investigation which undermines its ability to identify the perpetrator(s) will risk falling foul of this standard (see Akta v Turkey, no. 24351/94, § 300, 24 April 2003).

224. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see McKerr v United Kingdom, no. 28883/95, § 114, ECHR 2001-III).

225. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç*, cited above, p. 1733, § 82; *Oğur*, cited above, § 92; and *McKerr*, cited above, § 148).

McShane v United Kingdom (2002)

117. The Court recalls that indeed the judicial review proceedings brought by the applicant in respect of the DPP's decision not to prosecute were adjourned in order that the applicant might formally request the reasons for the decision and for the DPP to respond. It is not persuaded that Article 2 automatically requires the provision of reasons by the DPP. It may in appropriate cases be compatible with the requirements of Article 2 that these reasons can be requested by the victim's family, as occurred in this case [...]

Hugh Jordan v United Kingdom (2001)

123. The Court does not doubt the independence of the DPP. However, where the police investigation procedure is itself open to doubts of a lack of 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. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.

Ramsahai and Others v Netherlands (2007)

326. The applicants correctly pointed out that several forensic examinations which one would normally expect in a case such as the present had not been carried out: thus, no attempt had been made to determine the precise trajectory of the bullet (which the applicants submitted would have been possible); the hands of Officers Brons and Bultstra had not been tested for gunshot residue; no report of any examination of Officer Brons's service weapon and ammunition or of the spent cartridge was contained in the investigation file; the autopsy report, as filed, did not comprise any drawings or photographs showing the entry and exit wounds caused by the fatal bullet; and there had been no reconstruction of the incident. Lastly, Officers Brons and Bultstra had not been questioned until several days after the fatal shooting, during which time they had had the opportunity to discuss the incident with others and with each other.

327. It is true that no attempt was made to establish the trajectory of the bullet. It may be questioned whether this could have been determined on the basis of the information available, since after hitting Moravia Ramsahai, the bullet left no trace apart from a shattered pane of glass (see paragraph 230 above).

328. However, the Court considers that the other failings pointed out by the applicants impaired the adequacy of the investigation. On this point its findings differ from those of the Chamber.

329. The failure to test the hands of the two officers for gunshot residue and to stage a reconstruction of the incident, as well as the apparent absence of any examination of their weapons or ammunition and the lack of an adequate pictorial record of the trauma caused to Moravia Ramsahai's body by the bullet, have not been explained.

330. What is more, Officers Brons and Bultstra were not kept separated after the incident and were not questioned until nearly three days later. Although, as already noted, there is no evidence that they colluded with each other or with their colleagues on the Amsterdam/Amstell and police force, 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.

331. These lacunae in the investigation are all the more regrettable in that there were no witnesses who saw the fatal shot fired from close by, except for Officers Brons and Bultstra themselves. The Court has already drawn attention to the inconsistency between their statements to the effect that the fatal shot was fired by Officer Brons and those of Officers Braam and Van Daal, who both stated that they had heard Officer Bultstra report that he had fired and call for an ambulance (see paragraph 275 above).

332. There has accordingly been a violation of Article 2 of the Convention in that the investigation into the circumstances surrounding the death of Moravia Ramsahai was inadequate.

333. The independence of the State Criminal Investigation Department has not been questioned before the Grand Chamber, which for its part sees no reason to reach a different conclusion from that of the Chamber on this point.

334. However, fifteen and a half hours passed from the time of Moravia Ramsahai's death until the State Criminal Investigation Department became involved in the investigation [...] No explanation for this delay has been given.

335. It has not been disputed that essential parts of the investigation were carried out by the same force to which Officers Brons and Bultstra belonged, the Amsterdam/Amstell and police force: namely, the forensic examination of the scene of the shooting, the door-to-door search for witnesses and the initial questioning of witnesses, including police officers who also belonged to the Amsterdam/Amstell and police force.

336. After the State Criminal Investigation Department took over, further investigations were undertaken by the Amsterdam/Amstell and police force, although at the State Criminal Investigation Department's behest and under its responsibility.

337. The Court has had occasion to find a violation of Article 2 in its procedural aspect in that 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 (see *Aktaş*, cited above, § 301). Supervision by another authority, however independent, has been found not to be a sufficient safe-

guard for the independence of the investigation (see *Hugh Jordan*, cited above,§ 120, and *McKerr*, cited above, § 128).

338. Whilst it is true that to oblige the local police to remain passive until independent investigators arrive may result in the loss or destruction of important evidence, the Government have 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; there is no need for the Court to consider this question in the abstract.

339. What is more, in another case that has come to the Court's notice and which involves the same respondent Party, the State Criminal Investigation Department appeared four and a half hours after a fatal shooting had taken place (see *Romijn v the Netherlands* (dec.), no. 62006/00, 3 March 2005). In addition, as stated by the Minister of Justice to Parliament, the State Criminal Investigation Department are able to appear on the scene of events within, on average, no more than an hour and a half. Seen in this light, a delay of no less than fifteen and a half hours is unacceptable.

340. As to the investigations of the Amsterdam/Amstell and police force after the State Criminal Investigation Department took over, the Court finds that the Department's subsequent involvement cannot suffice to remove the taint of the force's lack of independence.

341. On these grounds alone the Court therefore finds that there has been a violation of Article 2 of the Convention in that the police investigation was not sufficiently independent.

347. The disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects for private individuals or other investigations. It cannot therefore be regarded as an automatic requirement under Article 2 that a deceased victim's surviving next-of-kin be granted access to the investigation as it goes along. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures (see, among other authorities, *McKerr*, cited above, § 129).

348. The Court does not consider that Article 2 imposes a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation.

349. The Chamber found that the applicants had been granted access to the information yielded by the investigation to a degree sufficient for them to participate effectively in proceedings aimed at challenging the decision not to prosecute Officer Brons. The Court notes that neither party has offered any further argument on this subject; for its part, it agrees with the Chamber and sees no reason to take any different view of the matter.

350. There has not therefore been a violation of Article 2 in this regard.

351. Argument before the Grand Chamber was focused on whether the proceedings and the decision of the Court of Appeal should have been public.

352. The Court will deal below with the question whether Article 6 applies to proceedings under Article 12 of the Netherlands Code of Criminal Procedure. For the purposes of Article 2, however, it agrees with the Chamber that such proceedings are not to be equated with a prosecution but are intended solely to allow a decision not to prosecute to be challenged.

353. Article 2 does not go so far as to require all proceedings following an inquiry into a violent death to be public. As stated in, for example, *Anguelova* (cited above, see paragraph 321), the test is whether

there is a sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts. It must be accepted in this connection that the degree of public scrutiny required may well vary from case to case.

354. Turning to the facts of the present case, the Court agrees with the Chamber that the Court of Appeal's proceedings did not have to be open to the public. Unlike the Chamber, however, the Court takes the view that the Court of Appeal's decision was not required to be made public either. The applicants were allowed full access to the investigation file and were enabled to participate effectively in the Court of Appeal's hearing; they were provided with a reasoned decision. There was thus little likelihood that any authority involved in the case might have concealed relevant information from the Court of Appeal or the applicants. In addition, given that the applicants were not prevented from making the decision public themselves, the Court takes the view that the requirement of publicity was satisfied to an extent sufficient to obviate the danger of any improper cover-up by the Netherlands authorities.

355. There has accordingly not been a violation of Article 2 as regards the procedure followed by the Court of Appeal.

7.6.3. The duty to conduct investigation without discrimination and the duty to investigate racial motivations of killings

Nachova and Others v Bulgaria (2005)

160. The Grand Chamber endorses the Chamber's analysis in the present case of the Contracting States' procedural obligation to investigate possible racist motives for acts of violence. The Chamber stated, in particular (§§ 156-159):

"[...] 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 [...] [W]here 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. Compliance with the State's positive obligations under Article 2 of the Convention requires that the domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another, irrespective of the victim's racial or ethnic origin (see Menson and Others v United Kingdom (dec.), no. 47916/99, ECHR 2003-V)...

[...] [W]hen 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 overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see, *mutatis mutandis*, Thlimmenos v Greece, no. 34369/97, § 44, ECHR 2000-IV). In order to maintain public confidence in their law enforcement machinery, Contracting States must ensure that in the investigation of incidents involving the use of force a distinction is

made both in their legal systems and in practice between cases of excessive use of force and of racist killing.

Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute (see, *mutatis mutandis*, Shanaghan v United Kingdom, no. 37715/97, § 90, ECHR 2001-III, setting out the same standard with regard to the general obligation to investigate). 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."

161. The Grand Chamber would add that the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination. Owing to the interplay of the two provisions, issues such as those in the present case may fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require examination under both Articles. This is a question to be decided in each case on its facts and depending on the nature of the allegations made.

7.6.4. Investigation of violations with a trans-border element

Rantsev v Cyprus and Russia (2010)

241. Finally, for an investigation into a death to be effective, member States must take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State. The Court observes that both Cyprus and Russia are parties to the Mutual Assistance Convention and have, in addition, concluded the bilateral Legal Assistance Treaty [...] These instruments set out a clear procedure by which the Cypriot authorities could have sought assistance from Russia in investigating the circumstances of Ms Rantseva's stay in Cyprus and her subsequent death. The Prosecutor General of the Russian Federation provided an unsolicited undertaking that Russia would assist in any request for legal assistance by Cyprus aimed at the collection of further evidence [...] However, there is no evidence that the Cypriot authorities sought any legal assistance from Russia in the context of their investigation. In the circumstances, the Court finds the Cypriot authorities' refusal to make a legal assistance request to obtain the testimony of the two Russian women who worked with Ms Rantseva at the cabaret particularly unfortunate given the value of such testimony in helping to clarify matters which were central to the investigation. Although Ms Rantseva died in 2001, the applicant is still waiting for a satisfactory explanation of the circumstances leading to her death.

243. The Court recalls that Ms Rantseva's death took place in Cyprus. Accordingly, unless it can be shown that there are special features in the present case which require a departure from the general approach, the obligation to ensure an effective official investigation applies to Cyprus alone [...]

244. As to the existence of special features, the applicant relies on the fact that Ms Rantseva was a Russian national. However, the Court does not consider that Article 2 requires member States' criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals. There are no other special features which would support the imposition of a duty on Russia to conduct its own investigation. Accordingly, the Court concludes that there was no free-standing obligation incumbent on the Russian authorities under Article 2 of the Convention to investigate Ms Rantseva's death.

245. However, the corollary of the obligation on an investigating State to secure evidence located in other jurisdictions is a duty on the State where evidence is located to render any assistance within its competence and means sought under a legal assistance request [...] The applicant argued that the Russian authorities should have proceeded to interview the two women notwithstanding the absence of any request from the Cypriot authorities. However, the Court recalls that the responsibility for investigating Ms Rantseva's death lay with Cyprus. In the absence of a legal assistance request, the Russian authorities were not required under Article 2 to secure the evidence themselves.

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