



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

## Guide on Article 2 of the European Convention on Human Rights

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Right to life

Updated on 30 April 2020

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This Guide was originally drafted in English. It is updated regularly and, most recently, on 30 April 2020.

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## Note to readers

This Guide is part of the series of Guides on the Convention published by the European Court of Human Rights (hereafter “the Court”, “the European Court” or “the Strasbourg Court”) to inform legal practitioners about the fundamental judgments and decisions delivered by the Strasbourg Court. This particular Guide analyses and sums up the case-law on Article 2 of the European Convention on Human Rights (hereafter “the Convention” or “the European Convention”). Readers will find herein the key principles in this area and the relevant precedents.

The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.\*

The Court’s judgments and decisions serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, § 154, 18 January 1978, Series A no. 25, and, more recently, *Jeronovičs v. Latvia* [GC], no. 44898/10, § 109, 5 July 2016).

The mission of the system set up by the Convention is thus to determine issues of public policy in the general interest, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], § 89, no. 30078/06, ECHR 2012). Indeed, the Court has emphasised the Convention’s role as a “constitutional instrument of European public order” in the field of human rights (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156, ECHR 2005-VI).

This Guide contains references to keywords for each cited Article of the Convention and its Additional Protocols. The legal issues dealt with in each case are summarised in a [List of keywords](#), chosen from a thesaurus of terms taken (in most cases) directly from the text of the Convention and its Protocols.

The [HUDOC database](#) of the Court’s case-law enables searches to be made by keyword. Searching with these keywords enables a group of documents with similar legal content to be found (the Court’s reasoning and conclusions in each case are summarised through the keywords). Keywords for individual cases can be found by clicking on the Case Details tag in HUDOC. For further information about the HUDOC database and the keywords, please see the [HUDOC user manual](#).

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\* The hyperlinks to the cases cited in the electronic version of the Guide refer to the text in English or French (the two official languages of the Court) of the judgment or decision delivered by the Court and of the decisions or reports of the European Commission of Human Rights (hereafter “the Commission”). Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber. Chamber judgments that were not final when this update was published are marked with an asterisk (\*).

## I. General considerations

### Article 2 of the Convention

“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.”

### HUDOC keywords

Expulsion (2) – Extradition (2) – Positive obligations (2)

Life (2-1) – Death penalty (2-1): Prescribed by law (2-1); Accessibility (2-1); Foreseeability (2-1); Safeguards against abuse (2-1); Competent court (2-1) – Effective investigation (2-1)

Use of force (2-2) – Absolutely necessary (2-2): Defence from unlawful violence (2-2); Effect lawful arrest (2-2); Prevent escape (2-2); Quell riot or insurrection (2-2)

## A. Interpretation of Article 2

1. The Court’s approach to the interpretation of Article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions must be interpreted and applied so as to make its safeguards practical and effective (*McCann and Others v. the United Kingdom*, § 146).

2. Article 2 ranks as one of the most fundamental provisions in the Convention, one which in peace time, admits of no derogation under Article 15. Together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe (*Giuliani and Gaggio v. Italy* [GC], § 174). As such, its provisions must be strictly construed (*McCann and Others v. the United Kingdom*, § 147).

## B. State obligations under Article 2

3. Article 2 contains two substantive obligations: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life, delimited by a list of exceptions (*Boso v. Italy* (dec.)). Having regard to its fundamental character, Article 2 of the Convention also contains a procedural obligation to carry out an effective investigation into alleged breaches of its substantive limb (*Armani Da Silva v. the United Kingdom* [GC], § 229).

## C. Applicability of Article 2 in near death situations

4. The Court has emphasised on many occasions that Article 2 of the Convention may come into play even if a person whose right to life was allegedly breached did not die. In particular, the Court has held that in exceptional circumstances, depending on considerations such as the degree and type of force used and the nature of the injuries, use of force by State agents which does not result

in death may disclose a violation of Article 2 of the Convention, if the behaviour of the State agents, by its very nature, puts the applicant's life at serious risk even though the latter survives (*Makaratzis v. Greece* [GC], § 55; *Soare and Others v. Romania*, §§ 108-109; *Trévalet v. Belgium*, §§ 55-61). In all other cases where a person is assaulted or ill-treated by State agents, their complaints will rather fall to be examined under Article 3 of the Convention (*Makaratzis v. Greece* [GC], § 51; *İlhan v. Turkey* [GC], § 76). In cases concerning applicants who survived a potentially lethal attack by non-State actors, the Court has adopted a similar approach to the one taken in respect of cases concerning use of force by State agents (*Yotova v. Bulgaria*, § 69).

5. The Court has also found the allegations of persons suffering from serious illnesses to fall under Article 2 of the Convention when the circumstances potentially engaged the responsibility of the State (*L.C.B. v. the United Kingdom*, §§ 36-41, concerning an applicant suffering from leukaemia; *G.N. and Others v. Italy*, concerning applicants suffering from a potentially life-threatening disease, hepatitis; *Hristozov and Others v. Bulgaria*, concerning applicants suffering from different forms of terminal cancer; *Oyal v. Turkey*, in which the applicant had been infected with the HIV virus, which endangered his life; and *a contrario Brincat and Others v. Malta*, § 84, where the Court considered that Article 2 did not apply to the applicants, former employees of a Government-run ship repair yard, who had been exposed to asbestos, since their current health conditions were neither an inevitable precursor to the diagnosis of a rare cancer associated with asbestos exposure nor life-threatening).

6. The Court has also examined, on the merits, allegations made under Article 2 by persons claiming that their life was at risk, although no such risk had yet materialised, when it was persuaded that there had been a serious threat to their lives (*R.R. and Others v. Hungary*, §§ 26-32, where the applicants complained of having been excluded from a witness protection programme; and by contrast *Selahattin Demirtaş v. Turkey*, §§ 30-36, where the applicant complained that a newspaper article had put his life at risk).

7. Likewise, in cases concerning potentially lethal accidents (*Alkın v. Turkey*, § 29; *Çakmakçı v. Turkey* (dec.), § 32; *Fergec v. Croatia*, §§ 21-24; *Kotelnikov v. Russia*, § 98; *Cavit Tınarloğlu v. Turkey*, § 67; *Marius Alexandru and Marinela Ştefan v. Romania\**, § 75), or environmental disasters (*Kolyadenko and Others v. Russia*, § 155), the Court has examined under Article 2 of the Convention the complaints of the applicant who had fortuitously survived the incident. The principle is that in such situations Article 2 applies either if (a) the activity at issue was dangerous by its very nature and put the life of the people concerned at real and imminent risk, or if (b) the injuries suffered by them were seriously life-threatening. The assessment of the relevant risk or injury depends on various factors (*Nicolae Virgiliu Tănase v. Romania* [GC], §§ 139-145).

8. In *Jeanty v. Belgium\**, where a detainee with psychological difficulties failed in his numerous attempts to commit suicide, the Court considered that Article 2 was applicable in the circumstances of the case, irrespective of the fact that the injuries he had sustained were not serious, in view of the nature of the action at issue which put the applicant's life at a real and imminent risk (§ 40).

## II. Protection of life

### Article 2 § 1 of the Convention

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

**HUDOC keywords**

Positive obligations (2) – Life (2-1)

**A. The nature of the positive obligations of the State**

9. 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 (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], § 130). In broad terms, this positive obligation has two aspects: (a) the duty to provide a regulatory framework; and (b) the obligation to take preventive operational measures.

**B. The scope of the positive obligations of the State**

10. The Court has found the positive obligation under Article 2 to take appropriate steps to safeguard the lives of those within its jurisdiction to apply in the context of any activity, whether public or not, in which the right to life may be at stake (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], § 130).

11. Thus, the Court has found positive obligations to arise under Article 2 in a number of different contexts, such as, for example:

- in the context of healthcare (*Calvelli and Ciglio v. Italy* [GC]; *Vo v. France* [GC]);
- in the context of dangerous activities, including industrial or environmental disasters (*Öneryıldız v. Turkey* [GC]; *Budayeva and Others v. Russia*; *Kolyadenko and Others v. Russia*; *Brincat and Others v. Malta*; *M. Özel and Others v. Turkey*);
- in the context of incidents on board a ship (*Leray and Others v. France* (dec.)), on trains (*Kalender v. Turkey*), on a construction site (*Pereira Henriques v. Luxembourg*), at a playground (*Koceski v. the former Yugoslav Republic of Macedonia* (dec.)); or at a school (*İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*);
- in the context of road safety (*Rajkowska v. Poland* (dec.); *Anna Todorova v. Bulgaria*); the provision of emergency services (*Furdík v. Slovakia* (dec.)); or diving operations in deep sea (*Vilnes and Others v. Norway*);
- in the context of medical care and assistance given to vulnerable persons institutionalised in State facilities (*Nencheva and Others v. Bulgaria*; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC]; *Dumpe v. Latvia* (dec.)).

In the context of the State's failure to properly secure an area mined by the military (*Paşa and Erkan Erol v. Turkey*; *Albekov and Others v. Russia*); to secure and supervise a firing range containing unexploded ordnance (*Oruk v. Turkey*); and to react promptly to a disappearance in life-threatening circumstances (*Osmanoğlu v. Turkey*; *Dodov v. Bulgaria*).

12. In a case where the applicant's husband died after being hit by a tree in a health resort, the Court has held that the State's duty to safeguard the right to life extended to the taking of reasonable measures to ensure the safety of individuals in public places (*Ciechońska v. Poland*, § 67).

13. However, the Court has underlined, many times, that Article 2 of the Convention cannot be interpreted as guaranteeing to every individual an absolute level of security in any activity in which the right to life may be at stake, in particular when the person concerned bears a degree of responsibility for the accident having exposed himself or herself to unjustified danger (*Molie v. Romania* (dec.), § 44; *Koseva v. Bulgaria* (dec.); *Gökdemir v. Turkey* (dec.), § 17; *Çakmak v. Turkey* (dec.)).



## C. Protection of life in context

14. As mentioned above, the positive obligations of the State arise in different contexts, some of which are referred to below.

### 1. Protection of persons from lethal use of force by non-State actors

15. The Court has held that Article 2 of the Convention implies 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 (*Osman v. the United Kingdom*, § 115; *Branko Tomašić and Others v. Croatia*, § 50).

16. However, 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, for the Court not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising (*Osman v. the United Kingdom*, § 116; *Choreftakis and Choreftaki v. Greece*, § 46).

17. In this respect, the Court takes into consideration 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 (*Osman v. the United Kingdom*, § 116).

18. 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 (*Mastromatteo v. Italy* [GC], § 68; *Paul and Audrey Edwards v. the United Kingdom*, § 55).

19. For the Court 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 question in its view could only be answered in the light of all the circumstances of the case at hand (*Osman v. the United Kingdom*, § 116).

20. The Court has considered the State to have an obligation to take preventive operational measures to protect one or more individuals identifiable in advance as the potential target of a lethal act in contexts such as:

- murder of a prisoner (*Paul and Audrey Edwards v. the United Kingdom*, § 57);
- domestic violence (*Branko Tomašić and Others v. Croatia*, §§ 52-53; *Opuz v. Turkey*, § 129; *Kurt v. Austria\**, §§ 67-80);
- killing of a witness in criminal proceedings (*Van Colle v. the United Kingdom*, § 88);
- killing of individuals in a conflict zone (*Kılıç v. Turkey*, § 63; *Mahmut Kaya v. Turkey*, § 88);
- killing of a conscript during military service (*Yabansu and Others v. Turkey*, § 91).
- kidnapping of an individual (*Olewnik-Cieplińska and Olewnik v. Poland*, § 125).

21. The Court has also applied the aforementioned principles to cases giving rise to an obligation to afford general protection to society in certain specific contexts, such as:

- murder committed by convicts on prison leave or placed under a semi-custodial regime (*Mastromatteo v. Italy* [GC], § 69);

- killing by convicted murderer following his release on licence (*Choreftakis and Choreftaki v. Greece*, §§ 48-49);
- killing by an off-duty police officer (*Gorovenky and Bugara v. Ukraine*, § 32);
- murder of a lawyer by her client's mentally disturbed husband (*Bljakaj and Others v. Croatia*, § 121);
- killings perpetrated during a large-scale hostage-taking by terrorists (*Tagayeva and Others v. Russia*, §§ 482-492; by contrast, *Finogenov and Others v. Russia* (dec.), § 173).

## 2. Protection of persons from self-harm

22. The Court has held that Article 2 may imply in certain well-defined circumstances a positive obligation on the part of the authorities to take preventive operational measures in particular circumstances to protect an individual from himself or herself (*Renolde v. France*, § 81).

23. In particular, persons in custody are in a vulnerable position and the authorities are under a duty to protect them (*Keenan v. the United Kingdom*, § 91). 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 available to diminish the opportunities for self-harm, without infringing 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 (*Renolde v. France*, § 83).

24. Likewise, in the context of individuals carrying out compulsory military service, the Court has underlined that, as with persons in custody, conscripts are within the exclusive control of the authorities of the State and that the authorities are under a duty to protect them (*Beker v. Turkey*, §§ 41-42; *Mosendz v. Ukraine*, § 92).

25. Persons with mental disabilities are considered to constitute a particularly vulnerable group who require protection from self-harm (*Renolde v. France*, § 84).

26. In particular, the authorities have a general operational duty to take reasonable measures to prevent a person from self-harm, irrespective of whether there has been voluntary or involuntary hospitalisations. In this respect, the specific measures required will depend on the particular circumstances of the case, and those specific circumstances will often differ depending on whether the patient is voluntarily or involuntarily hospitalised. However, in the case of patients who are hospitalised following a judicial order, and therefore involuntarily, the Court, in its own assessment, may apply a stricter standard of scrutiny (*Fernandes de Oliveira v. Portugal* [GC], § 124).

27. Ultimately, for a positive obligation to arise where the risk to a person derives from self-harm, such as a suicide in custody or in a psychiatric hospital, 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 and, if so, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (*Younger v. the United Kingdom* (dec.); *Fernandes de Oliveira v. Portugal* [GC], § 110).

28. In order to establish whether the authorities knew or ought to have known that the life of a particular individual was subject to a real and immediate risk, triggering the duty to take appropriate preventive measures, the Court takes into account a number of factors, including: i) whether the person had a history of mental health problems; ii) the gravity of the mental condition; iii) previous attempts to commit suicide or self-harm; iv) suicidal thoughts or threats; and v) signs of physical or mental distress (*Fernandes de Oliveira v. Portugal* [GC], § 115).

29. Moreover, the Court also reiterates that the obligation to protect the health and well-being of persons in detention clearly encompasses an obligation to protect the life of arrested and detained

persons from a foreseeable danger (*Eremiášová and Pechová v. the Czech Republic* (revision), § 117; *Keller v. Russia*, § 88).

30. The duty to take preventive operational measures has arisen so far mainly in the following contexts:

- detention in custody or in prison (*Trubnikov v. Russia*; *Akdoğan v. Turkey*; *De Donder and De Clippel v. Belgium*; *Ketreb v. France*; *Volk v. Slovenia*; *Mitić v. Serbia*; *Keller v. Russia*);
- compulsory military service (*Kılınc and Others v. Turkey*; *Ataman v. Turkey*; *Perevedentsev v. Russia*; *Malik Babayev v. Azerbaijan*);
- voluntary/involuntary psychiatric care (*Reynolds v. the United Kingdom*; *Fernandes de Oliveira v. Portugal* [GC]; *Hiller v. Austria*).

31. In a case where the applicant's wife set herself on fire in protest at a forced eviction, the Court held 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 such circumstances, if the State agents become aware of such a threat sufficiently 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 (*Mikayil Mammadov v. Azerbaijan*, § 115).

### 3. Protection of persons from environmental or industrial disasters

32. In the context of industrial activities, which the Court has deemed to be by their very nature dangerous, the Court has placed a special emphasis 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. It considered that 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.

33. Among these preventive measures, a particular weight should be placed on the public's right to information, as established in the case-law of the Convention institutions and 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 (*Öneryıldız v. Turkey* [GC], § 90; *Budayeva and Others v. Russia*, § 132; *Kolyadenko and Others v. Russia*, § 159).

34. As to the choice of particular practical measures, the Court has consistently held that where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. 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 (*Budayeva and Others v. Russia*, §§ 134-135; *Vilnes and Others v. Norway*, § 220; *Brincat and Others v. Malta*, § 101).

35. In assessing whether the respondent State complied with its 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. 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 (*Budayeva and Others v. Russia*, §§ 136-137; *Kolyadenko and Others v. Russia*, § 161).

36. Whenever a State undertakes or organises dangerous activities, or authorises them, it must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum (*Mučibabić v. Serbia*, § 126). If nevertheless damage arises, it will only amount to a breach of the State's positive obligations if it was due to insufficient regulations or insufficient control, but not if the damage was caused through the negligent conduct of an individual or a concatenation of unfortunate events (*Stoyanovi v. Bulgaria*, § 61).

37. In the context of environmental disasters over which States have no control, the obligation of the State to take preventive operational measures comes down to adopting measures to reinforce the State's capacity to deal with the unexpected and violent nature of such natural phenomena (*M. Özel and Others v. Turkey*, § 173).

38. The Court examined and found the respondent State had failed to discharge its obligation to protect persons from environmental or industrial disasters in the following circumstances:

- deaths resulting from an accidental explosion at a rubbish tip close to a shanty town (*Öneryıldız v. Turkey* [GC]);
- loss of life occasioned by a foreseeable mudslide due to the failure of the authorities to implement land-planning and emergency-relief policies (*Budayeva and Others v. Russia*);
- serious risk to life due to a heavy flash flood after an urgent massive evacuation of water from the reservoir of a dam (*Kolyadenko and Others v. Russia*);
- death as a result of prolonged exposure to asbestos in a Government-run ship yard (*Brincat and Others v. Malta*).

39. By contrast, in the case of *Vilnes and Others v. Norway*, which concerned disabilities caused by diving operations, including test dives, conducted by diving companies used by oil companies drilling the Norwegian Continental Shelf, the Court found that the respondent State, by taking a wide range of measures, had gone to some lengths to secure the protection of the safety and health of its divers who were engaged in diving operations in the North Sea. It therefore found no violation under Article 2 of the Convention.

## 4. Protection of persons in the context of healthcare

### a. General population

40. In the context of healthcare, the positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives (*Calvelli and Ciglio v. Italy* [GC], § 49; *Vo v. France* [GC], § 89; *Lopes de Sousa Fernandes v. Portugal* [GC], § 166).

41. In this connection, the States' obligation to regulate must be understood in a broader sense which includes the duty to ensure the effective functioning of that regulatory framework. The regulatory duties thus encompass necessary measures to ensure implementation, including supervision and enforcement (*Lopes de Sousa Fernandes v. Portugal* [GC], § 190).

42. However, the question whether there has been a failure by the State in its regulatory duties calls for a concrete assessment of the alleged deficiencies rather than an abstract one. Therefore, the mere fact that the regulatory framework may be deficient in some respect is not sufficient in itself to raise an issue under Article 2 of the Convention. It must be shown to have operated to the patient's detriment (*Lopes de Sousa Fernandes v. Portugal* [GC], § 188).

43. The Court has underlined that even in cases where medical negligence was established, it would normally find a substantive violation of Article 2 only if the relevant regulatory framework failed to ensure proper protection of the patient's life (*Lopes de Sousa Fernandes v. Portugal* [GC], § 187). In this connection, the Court considered that where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as an error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient cannot be considered sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life (*Powell v. the United Kingdom* (dec.); *Dodov v. Bulgaria*, § 82; *Kudra v. Croatia*, § 102; *Lopes de Sousa Fernandes v. Portugal* [GC], § 187).

44. However, it has not excluded the possibility that the acts and omissions of the authorities in the context of public health policies, may, in certain circumstances, engage the Contracting Parties' responsibility under the substantive limb of Article 2 (*Powell v. the United Kingdom* (dec.)) and that an issue may arise under Article 2 where it is shown that the authorities of a Contracting State have put an individual's life at risk through the denial of the health care which they have undertaken to make available to the population generally (*Cyprus v. Turkey* [GC], § 219; *Hristozov and Others v. Bulgaria*, § 106).

45. In two very exceptional circumstances, the Court has accepted that the responsibility of the State under the substantive limb of Article 2 was engaged as regards the acts and omissions of health-care providers: firstly, where an individual patient's life was knowingly put in danger by a denial of access to life-saving emergency treatment (*Mehmet Şentürk and Bekir Şentürk v. Turkey*) and, secondly, where a systemic or structural dysfunction in hospital services resulted in a patient being deprived of access to life-saving emergency treatment where the authorities knew about or ought to have known about that risk and failed to take the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger (*Aydoğdu v. Turkey*).

46. For the Court, in order for a case to be qualified as denial of access to life-saving emergency treatment, the following factors, taken cumulatively, must be met:

- firstly, the acts and omissions of the health-care providers had to go beyond a mere error or medical negligence in that those health-care providers, in breach of their professional obligations, denied a patient emergency medical treatment despite being fully aware that the person's life is at risk if that treatment is not given;
- secondly, the impugned dysfunction had to be objectively and genuinely identifiable as systemic or structural in order to be attributable to the State authorities;
- thirdly, there had to be a link between the impugned dysfunction and the harm sustained; and
- finally, the dysfunction must have resulted from the failure of the State to meet its obligation to provide a regulatory framework in the broader sense (*Lopes de Sousa Fernandes v. Portugal* [GC], §§ 191-196).

47. The Court examined a number of cases raising issues of medical negligence and/or denial of access to treatment in hospital, such as:

- administration of drugs to a disabled child despite his mother's opposition (*Glass v. the United Kingdom* (dec.));
- death of an elderly woman from bronchopneumonia (*Sevim Güngör v. Turkey* (dec.));
- death of a pregnant woman suffering from ulcerative colitis (*Z v. Poland*);

- death in hospital related to pulmonary complications and patient's refusal to consent to treatment (*Arskaya v. Ukraine*);
- death of a pregnant woman due to the doctors' refusal to carry out an urgent operation owing to her inability to pay medical fees (*Mehmet Şentürk and Bekir Şentürk v. Turkey*);
- death of a new-born baby in an ambulance after being refused admission to a number of public hospitals (*Asiye Genç v. Turkey*);
- death after a heart attack caused by the administration of a drug (*Altuğ and Others v. Turkey*);
- death of the applicant's son in a hospital where unlicensed medical acts were carried out on him by doctors who lacked either the necessary licences or qualifications in violation of domestic law (*Sarishvili-Bolkvadze v. Georgia*).

48. In a number of cases the Court examined allegations of denial of access to medical treatment because of the refusal of the State to fully cover the costs of a particular form of conventional treatment. See, for example, *Nitecki v. Poland* (dec.); *Pentiacova and Others v. Moldova* (dec.); *Gheorghe v. Romania* (dec.); *Wiater v. Poland* (dec.).

49. In the case of *Hristozov and Others v. Bulgaria*, where terminal cancer patients complained that they had been denied access to an unauthorised experimental drug, the Court did not find fault with the regulations governing access to such unauthorised medicinal products in situations where conventional forms of medical treatment appeared insufficient, and considered that Article 2 of the Convention could not be interpreted as requiring access to unauthorised medicinal products for terminally ill patients to be regulated in a particular way (§ 108).

## **b. Persons deprived of their liberty and vulnerable persons under the care of the State**

50. The Court has emphasised the right of all prisoners to conditions of detention which are compatible with human dignity, so as to ensure that the manner and method of execution of the measures imposed do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; in addition, besides the health of prisoners, their well-being also has to be adequately secured given the practical demands of imprisonment (*Dzieciak v. Poland*, § 91).

51. The Court accepts that the medical assistance available in prison hospitals may not always be of the same standard as in the best medical institutions for the general public. Nevertheless, the State must ensure that the health and well-being of detainees are adequately secured by, among other things, providing them with the requisite medical assistance. The authorities must also ensure that the diagnoses and care are prompt and accurate, and that where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's diseases or preventing their aggravation (*Pitalev v. Russia*, § 54). However, the Convention cannot be construed as laying down a general obligation to release detainees on health grounds (*Dzieciak v. Poland*, § 91).

52. Since the State has direct responsibility for the welfare of persons deprived of their liberty, where such a person dies as a result of a health problem, the State must offer an explanation as to the cause of death and the treatment administered to the person concerned prior to their death (*Slimani v. France*, § 27; *Kats and Others v. Ukraine*, § 104).

53. The Court has found fault in the medical treatment administered to persons deprived of their liberty when, for example:

- the authorities, despite been fully aware of his problems, failed to properly examine and provide medical treatment to a convict with chronic illnesses; the latter was transferred to

a hospital belatedly and the surgery he received was deficient. He was discharged from hospital, despite the knowledge of the doctors that he needed immediate further surgery for his post-operative complications. They also withheld crucial details of his surgery and developing complications. The prison hospital staff treated him as an ordinary post-operative patient rather than an emergency case with the consequence that surgery was performed too late. Furthermore, the prison hospital was not adequately equipped for dealing with massive blood loss (*Tarariyeva v. Russia*, §§ 88-89);

- there was a lack of cooperation and coordination between the various State authorities; a failure to transport the applicant to hospital for two scheduled operations, the lack of adequate and prompt information to the trial court on the applicant's state of health, the failure to secure him access to doctors during the final days of his life and the failure to take into account his health in the automatic extensions of his detention (*Dzieciak v. Poland*, § 101);
- lack of medical attention given to a HIV-positive person suffering from numerous serious diseases; refusal to transfer her to a medical facility and refusal to examine her request for release promptly when her condition seriously deteriorated and subsequent belated release during which time she died of HIV-related diseases (*Kats and Others v. Ukraine*, §§ 105-112);
- the treatment given to the first applicant, who had suffered from multi-drug resistant tuberculosis, was deficient because the diagnosis and treatment with second-line drugs was belated and the medical staff did not have the requisite expertise in the management of his illness (*Makharadze and Sikharulidze v. Georgia*, §§ 90-93).

54. The Court has adopted a similar approach in respect of the medical treatment of vulnerable persons under the care of the State when the domestic authorities, despite been aware of the appalling conditions that later led to the death of persons placed in social care homes or hospitals, had nonetheless unreasonably put the lives of these people in danger (see, in particular, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], §§ 131 and 143-144, which concerned the death of a young mentally disabled HIV positive Roma due to lack of adequate care, including medical care, in a psychiatric hospital and, by contrast, *Dumpe v. Latvia* (dec.), §§ 56 and 57, which concerned allegations of medical negligence in the care provided to the applicant's son who was suffering from several serious illnesses in a State social care institution).

## 5. Protection of persons in the context of accidents

55. The Court has held that the positive obligations under Article 2 require States to adopt regulations for the protection of people's safety in public spaces, and to ensure the effective functioning of that regulatory framework (*Ciechońska v. Poland*, § 69; *Banel v. Lithuania*, § 68).

56. In this respect, it could not be ruled out, that in certain circumstances, the acts and omissions of the authorities in the context of policies to ensure safety in public places could engage their responsibility under the substantive limb of Article 2 of the Convention. Nevertheless, where a Contracting State has adopted an overall legal framework and legislation tailored to the different contexts with regard to public spaces, in order to protect the persons using them, the Court could not accept that matters such as an error of judgment on the part of an individual player or negligent coordination among professionals, whether public or private, were sufficient of themselves to make a Contracting State accountable from the standpoint of its positive obligation under Article 2 of the Convention to protect life (*Marius Alexandru and Marinela Ștefan v. Romania*\*, § 100).

57. The Court further underlined that the positive obligation is not to be interpreted in such a way as to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of

priorities and resources (*Ciechońska v. Poland*, § 64; *Marius Alexandru and Marinela Ștefan v. Romania\**, § 100).

58. Moreover, it recalled that the choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means (*Ciechońska v. Poland*, § 65; *Marius Alexandru and Marinela Ștefan v. Romania\**, § 102).

59. Ultimately, the question of whether there has been a failure by the State in its regulatory duties calls for a concrete, rather than an abstract, assessment of the alleged deficiencies (*Marius Alexandru and Marinela Ștefan v. Romania\**, § 103).

60. In the context of activities which may pose a risk to human life due to their inherently hazardous nature, such as activities carried out on construction sites, States are required to take reasonable measures to ensure the safety of individuals as necessary, including through regulations geared to the special features of the activity (*Cevrioğlu v. Turkey*, § 57 with further references). In particular, in the absence of necessary safety precautions, any construction site, especially one in a residential area, has the potential for life-endangering accidents that may impact on not only professional construction workers, who are more familiar with the possible risks, but also on the public at large, including vulnerable groups such as children, who may easily become subject to those risks (*Zinatullin v. Russia\**, § 28).

61. The Court has found that the respondent State failed in its duty to protect the right to life in:

- *Kalender v. Turkey*, § 49, which concerned the death of two people in a railway accident;
- *Banel v. Lithuania*, § 69, where the applicants' son died from injuries sustained when part of a balcony broke off from a building and fell on him while he was playing outside;
- *Cevrioğlu v. Turkey*, § 72, which concerned the death of the applicant's ten-year-old son who drowned after falling into an uncovered water-filled hole on a construction site; see also *Binnur Uzun and Others v. Turkey*, § 49, where the applicants' father fell down the shaft of a lift in a building the construction of which had been abandoned.

62. By contrast, the Court found no failure on the part of the respondent State to protect the right to life in:

- *Cecilia Pereira Henriques and Others v. Luxembourg* (dec.), where a labourer was killed in an accident at work when a wall of a building which was being demolished collapsed on top of him;
- *Furdík v. Slovakia* (dec.), which concerned an emergency mountain-rescue operation;
- *Molie v. Romania* (dec.), § 47, which concerned a fatal accident in a school sports facility;
- *Cavit Tınarlıoğlu v. Turkey*, § 107, which concerned life-threatening injuries sustained by the applicant, who was swimming in a bathing area that was not cordoned off, when he was struck by a motor boat.
- *Marius Alexandru and Marinela Ștefan v. Romania\**, § 109, which concerned a traffic accident due to a tree falling on the applicants' car while they were driving on a public main road.
- *Soares Campos v. Portugal\**, § 172, which concerned the death of the applicant's son, who was swept out to sea while taking part on a beach in a gathering linked to a student tradition involving hazing activities.



## D. Temporal limitations

### 1. Beginning of life

63. Unlike Article 4 of the *American Convention on Human Rights*, which provides that the right to life must be protected “in general, from the moment of conception”, Article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define “everyone” (“*toute personne*”) whose “life” is protected by the Convention (*Vo v. France* [GC], § 75).

64. The Court, having regard to the absence of any European consensus on the scientific and legal definition of the beginning of life, held that the issue of when the right to life begins comes within the margin of appreciation which it generally considers that States should enjoy in this sphere (*Vo v. France* [GC], § 82).

65. In the case of *Vo v. France* [GC], where the applicant had to undergo a therapeutic abortion as a result of medical negligence, the Court considered it unnecessary to examine whether the abrupt end to the applicant’s pregnancy fell 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 (§ 85; see also for a similar approach *Mehmet Şentürk and Bekir Şentürk v. Turkey*, § 109).

66. In *Evans v. the United Kingdom* [GC], where the applicant complained that British legislation authorised her ex-partner to withdraw his consent to the storage and use of jointly created embryos, the Court found that, under English law, an embryo did not have independent rights or interests and could not claim – or have claimed on its behalf – a right to life under Article 2 and that therefore the embryos in question did not have a right to life within the meaning of Article 2 (§§ 54-56).

### 2. Issues related to end of life

#### a. Euthanasia

67. The Court has held 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 underlined that the consistent emphasis in all the cases before it has been the obligation of the State to protect life (*Pretty v. the United Kingdom*, § 39).

68. In a recent case which concerned the authorities’ refusal to make medication available to assist the suicide of a mental patient, the Court, reiterating that the Convention must be read as a whole, found it appropriate to refer to Article 2 of the Convention when it was examining the application under Article 8 of the Convention. It held that the latter provision obliges the national authorities to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved (*Haas v. Switzerland*, § 54).

#### b. Withdrawal of life-sustaining treatment

69. In the case of *Lambert and Others v. France* [GC], which concerned the decision of the authorities to discontinue nutrition and hydration allowing a patient in state of total dependence to be kept alive artificially, the Court noted that no consensus existed among the Council of Europe member States in favour of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appear to allow it. In this respect, it noted that while the detailed arrangements governing the withdrawal of treatment vary from one country to another, there was nevertheless a consensus as to the paramount importance of the patient’s wishes in the decision-making process, however those wishes are expressed. It therefore considered that in this sphere concerning the end of life, as in that concerning the beginning of life, States must be afforded a

margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of striking a balance between the protection of patients’ right to life and the protection of their right to respect for their private life and their personal autonomy. The Court underlined, however, that this margin of appreciation is not unlimited and it reserves the power to review whether or not the State has complied with its obligations under Article 2 (§§ 147-148).

70. In addressing the question of the administering or withdrawal of medical treatment, the Court takes into account the following elements: the existence in domestic law and practice of a regulatory framework compatible with the requirements of Article 2; whether account had been taken of the applicant’s previously expressed wishes and those of the persons close to him, as well as the opinions of other medical personnel and the possibility to approach the courts in the event of doubts as to the best decision to take in the patient’s interest (*Gard and Others v. the United Kingdom* (dec.), § 83).

### III. Prohibition of intentional deprivation of life

#### A. The death penalty

##### Article 2 § 1 of the Convention

“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.”

##### HUDOC keywords

Expulsion (2) – Extradition (2)

Life (2-1) – Death penalty (2-1): Prescribed by law (2-1); Accessibility (2-1); Foreseeability (2-1); Safeguards against abuse (2-1); Competent court (2-1)

#### 1. Interpretation of Article 2 § 1 of the Convention in light of Protocols Nos. 6 and 13 of the Convention

71. When the Convention was drafted, the death penalty was not considered to violate international standards. An exception was therefore included to the right to life, so that Article 2 § 1 provides that “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”. However, there has subsequently been an evolution towards the complete *de facto* and *de jure* abolition of the death penalty within the member States of the Council of Europe (*Al-Saadoon and Mufdhi v. the United Kingdom*, § 116).

72. *Protocol No. 6 to the Convention*, which abolished the death penalty except in respect of “acts committed in time of war or of imminent threat of war”, was opened for signature on 28 April 1983 and came into force on 1 March 1985. All the member States of the Council of Europe have now signed Protocol No. 6 and all, save Russia, have ratified it (*Al-Saadoon and Mufdhi v. the United Kingdom*, § 116). *Protocol No. 13*, which abolishes the death penalty in all circumstances, was opened for signature on 3 May 2002 and came into force on 1 July 2003. In 2010 all but two of the

member States of the Council of Europe (Azerbaijan and Russia) had signed this Protocol and all but three of the States which had signed it have ratified it (*ibid.*, § 117).<sup>1</sup>

73. The aforementioned figures, together with consistent State practice in observing the moratorium on capital punishment, have been found by the Court to be strong indications that Article 2 has been amended so as to prohibit the death penalty in all circumstances (*Al-Saadoon and Mufdhi v. the United Kingdom*, § 120).

## 2. State responsibility under Article 2 in extradition and expulsion cases

74. Article 2 of the Convention prohibits the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there (*Al Nashiri v. Poland*, § 577; *F.G. v. Sweden* [GC], § 110).

75. More detailed information can be found in the *Case-Law Guide on Immigration*.

## B. Use of lethal force by State agents

### Article 2 of the Convention

“1. Everyone’s right to life shall be protected 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.”

### HUDOC keywords

Life (2-1) – Use of force (2-2) – Absolutely necessary (2-2): Defence from unlawful violence (2-2); Effect lawful arrest (2-2); Prevent escape (2-2); Quell riot or insurrection (2-2)

## 1. Assessment of evidence

76. The Court must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (*McKerr v. the United Kingdom* (dec.)). As a general rule, where domestic proceedings have taken place, it is not the Court’s task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them (see, among many other authorities, *Edwards v. the United Kingdom*, § 34; *Klaas v. Germany*, § 29). Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts (*Avşar v. Turkey*, § 283; *Barbu Anghelescu v. Romania*, § 52).

1. At the date of the latest update to this Guide, the numbers of signatures and ratifications for Protocol No. 6 and the number of signatures for Protocol No. 13 are still accurate. As regards the number of ratifications for Protocol No. 13, out of all the States which had signed it only one (Armenia) has still not ratified it.

### a. Standard of proof

77. A number of principles have been developed by the Court as regards applications in which it is faced with the task of establishing the facts of events on which the parties disagree: the factual findings should be based on the standard of proof “beyond reasonable doubt”; 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 (*Taniş and Others v. Turkey*, § 160; *Tagayeva and Others v. Russia*).

### b. Burden of proof

78. 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 (*Tagayeva and Others v. Russia*, § 586).

79. 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 (*Salman v. Turkey* [GC], § 100).

80. This principle also applies to cases in which, although it has not been proved that a person has been taken into custody by the authorities, it is possible to establish that he or she was officially summoned by the military or the police, entered a place under their control and has not been seen since. In such circumstances, the onus is on the Government to provide a plausible explanation as to what happened on the premises and to show that the person concerned was not detained by the authorities, but left the premises without subsequently being deprived of his or her liberty (*Taniş and Others v. Turkey*, § 160).

81. Likewise, in cases concerning armed conflicts, the Court has further extended this principle to situations where individuals were found injured or dead, or disappeared, in areas of the State under the exclusive control of the authorities and where there was *prima facie* evidence that State agents could be involved (*Akkum and Others v. Turkey*, § 211; *Aslakhanova and Others v. Russia*, § 97 with further references).

82. In fact, the Court has underlined that, in all cases where it is unable to establish the exact circumstances of a case for reasons objectively attributable to the State authorities, it is for the respondent Government to explain, in a satisfactory and convincing manner, the sequence of events and to exhibit solid evidence that can refute the applicant’s allegations (*Mansuroğlu v. Turkey*, § 80). The Court has also noted the difficulties for applicants to obtain the necessary evidence in support of allegations in cases where the respondent Government are in possession of the relevant documentation and fail to submit it. If the authorities then fail to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation, strong inferences may be drawn (*Varnava and Others v. Turkey* [GC], § 184). The Court’s reliance on evidence obtained as a result of the domestic investigation and on the facts established within the domestic proceedings will largely depend on the quality of the domestic investigative process, its thoroughness and consistency (*Tagayeva and Others v. Russia*, § 586).

83. Finally, when there have been criminal proceedings in the domestic courts concerning those same allegations, it must be borne in mind that criminal law liability is distinct from international law 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 and applied on the basis of the objectives of the Convention and in the light of the relevant 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 (*Tanli v. Turkey*, § 111; *Giuliani and Gaggio v. Italy* [GC], § 182).

## 2. Protection of persons from lethal use of force by State agents

### a. Legal framework

84. In the context of use of force by State agents, the primary duty on the State to secure the right to life entails, in particular, putting in place an appropriate legal and administrative framework defining the limited circumstances in which law enforcement may use force and firearms, in the light of the relevant international standards (*Giuliani and Gaggio v. Italy* [GC], § 209; *Makaratzis v. Greece* [GC], §§ 57-59).

85. In line with the principle of strict proportionality inherent in Article 2, the national legal framework must make recourse to firearms dependent on a careful assessment of the situation (*Giuliani and Gaggio v. Italy* [GC], § 209) and, in particular, on an evaluation of the nature of the offence committed by the person in question and of the threat he or she posed (*Nachova and Others v. Bulgaria* [GC], § 96). Furthermore, the national law regulating policing operations must secure a system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accident (*Giuliani and Gaggio v. Italy* [GC], § 209; *Makaratzis v. Greece* [GC], § 58).

86. The Court, distinguishing between “routine police operations” and situations of large-scale anti-terrorist operations, held that, in the latter case, often in situations of acute crisis requiring “tailor-made” responses, States should be able to rely on solutions that would be appropriate to the circumstances. That being said, it has also underlined that, in a lawful security operation which is aimed, in the first place, at protecting the lives of people who find themselves in danger of unlawful violence from third parties, the use of lethal force remains governed by the strict rules of “absolute necessity” within the meaning of Article 2 of the Convention. Thus, it is of primary importance that the domestic regulations be guided by the same principle and contain clear indications to that extent, including the obligations to decrease the risk of unnecessary harm and exclude the use of weapons and ammunition that carry unwarranted consequences (*Tagayeva and Others v. Russia*, § 595).

### b. Training and vetting of State agents

87. The Court has underlined that law enforcement agents must be trained to assess whether or not there is an absolute necessity to use firearms, not only on the basis of the letter of the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value (*Nachova and Others v. Bulgaria* [GC], § 97; *Kakoulli v. Turkey*, § 110).

88. For example, in cases concerning the use of force to quell a riot or insurrection, the Court’s assessment includes an examination as to whether the security forces were properly equipped (*Güleç v. Turkey*, § 71; *Şimşek and Others v. Turkey*, § 117); whether they received effective training with the objective of complying with international standards for human rights and policing and whether they received clear and precise instructions as to the manner and circumstances in which they make use of firearms (*ibid.*, § 109). In particular, the Court has underlined that opening fire should, whenever possible, be preceded by warning shots (*Giuliani and Gaggio v. Italy* [GC], § 177).

89. Moreover, States are expected to set high professional standards within their law-enforcement systems and ensure that law-enforcement officers meet the requisite criteria. In particular, when equipping police forces with firearms, not only must the necessary technical training be given, but

the selection of agents allowed to carry such firearms must also be subject to particular scrutiny (*Sašo Gorgiev v. the former Yugoslav Republic of Macedonia*, § 51).

### c. Illustrations

90. Applying these principles, the Court has, for instance, characterised as deficient the Bulgarian legal framework which permitted the police to fire on any fugitive member of the armed forces who did not surrender immediately in response to an oral warning and the firing of a warning shot in the air. There were no clear safeguards to prevent the arbitrary deprivation of life (*Nachova and Others v. Bulgaria* [GC], §§ 99-102).

91. Likewise the Court has also identified deficiencies in the Turkish legal framework, adopted in 1934, which listed a wide range of situations in which a police officer could use firearms without being liable for the consequences (*Erdoğan and Others v. Turkey*, §§ 77-79). On the other hand, in another case, it considered that a regulation setting out an exhaustive list of situations in which gendarmes could make use of firearms was compatible with the Convention. That regulation specified that the use of firearms should only be envisaged as a last resort and had to be preceded by warning shots, before shots were fired at the legs or indiscriminately (*Bakan v. Turkey*, § 51).

92. In the case of *Makaratzis v. Greece* [GC], which concerned a chaotic police chase in which the applicant, who had ignored a red light, was seriously injured by gun shots, the Court found that Greece's domestic law did not afford law-enforcement officials clear guidelines and criteria governing the use of force in peacetime. It also found that, in the absence of proper training and instructions, it was unavoidable that the police officers who chased and eventually arrested the applicant enjoyed a greater autonomy of action and were able to take unconsidered initiatives (§ 70).

93. The Court held that the authorities had failed to properly vet a police officer before issuing him a firearm in *Gorovenky and Bugara v. Ukraine*, § 39, where an off-duty police officer, involved in a quarrel, opened fire with his service weapon killing the applicants' relatives. See also *Sašo Gorgiev v. the former Yugoslav Republic of Macedonia*, § 52.

## 3. Permitted exceptions to use force

94. 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 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) (*McCann and Others v. the United Kingdom*, § 148; *Yüksel Erdoğan and Others v. Turkey*, § 86; *Ramsahai and Others v. the Netherlands* [GC], § 286; *Giuliani and Gaggio v. Italy* [GC], § 17).

### a. Standard of scrutiny to be applied

95. As a rule, the use of the term "absolutely necessary" in Article 2 § 2 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 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) (*McCann and Others v. the United Kingdom*, § 149).

96. That being said, the Court has underlined that it is acutely conscious of the difficulties faced by modern States in the fight against terrorism and the dangers of hindsight analysis. In this connection, it has underlined the need to differentiate between the political choices made in the course of

fighting terrorism, that remain by their nature outside of such supervision, and other, more operational aspects of the authorities' actions that have a direct bearing on the protected rights. Therefore, the absolute necessity test formulated in Article 2 is bound to be applied with different degrees of scrutiny, depending on whether and to what extent the authorities were in control of the situation and other relevant constraints inherent in operative decision-making in this sensitive sphere (*Tagayeva and Others v. Russia*, § 481).

97. In the specific context of hostage rescue operations the Court has held that, normally, the planning and conduct of the rescue operation can be subjected to a heightened scrutiny. In doing so, the Court has taken into account the following factors: (i) whether the operation was spontaneous or whether the authorities could have reflected on the situation and made specific preparations; (ii) whether the authorities were in a position to rely on some generally prepared emergency plan, not related to that particular crisis; (iii) that the degree of control of the situation is higher outside the building, where most of the rescue efforts take place; and (iv) that the more predictable a hazard, the greater the obligation is to protect against it (*Tagayeva and Others v. Russia*, § 563).

## **b. General approach**

98. 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 (*McCann and Others v. the United Kingdom*, § 150; *Ergi v. Turkey*, § 79).

99. It goes without saying that a balance must be struck between the aim pursued and the means employed to achieve it (*Güleç v. Turkey*, § 71).

100. For example, the Court has underlined that the legitimate aim of effecting a lawful arrest can only justify putting human life at risk in circumstances of absolute necessity. Therefore in principle there can be no such necessity where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the individual concerned being lost (*Nachova and Others v. Bulgaria* [GC], § 95; *Kakoulli v. Turkey*, § 108).

## **i. The actions of the State agents**

101. 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 (*McCann and Others v. the United Kingdom*, § 200; *Andronicou and Constantinou v. Cyprus*, § 192; *Bubbins v. the United Kingdom*, § 138; *Huohvanainen v. Finland*, § 96).

102. The Court had also added that, detached from the events in issue, it cannot substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life or the lives of others (*Bubbins v. the United Kingdom*, § 139; *Huohvanainen v. Finland*, § 97).

103. When examining the actions of the State agents the principal question to be addressed is whether the person had an honest and genuine belief that the use of force was necessary. In addressing this question, the Court will have to consider whether the belief was subjectively reasonable, having full regard to the circumstances that pertained at the relevant time. If the belief was not subjectively reasonable (that is, it was not based on subjective good reasons), it is likely that

the Court would have difficulty accepting that it was honestly and genuinely held (see *Armani Da Silva v. the United Kingdom* [GC], § 248, albeit in the context of procedural obligations).

## ii. The planning and control of the operation

104. In determining whether the force used is compatible with Article 2, it may therefore be relevant whether a law enforcement operation has been planned and controlled so as to minimise to the greatest extent possible recourse to lethal force or incidental loss of life (*Bubbins v. the United Kingdom*, § 136; *Huohvanainen v. Finland*, § 94).

105. 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 (*Andronicou and Constantinou v. Cyprus*, §182; *Yüksel Erdoğan and Others v. Turkey*, § 86).

106. Its sole concern must be to evaluate whether in the circumstances the planning and control of the operation showed that the authorities had taken appropriate care to ensure that any risk to his life had been minimised and that they were not negligent in their choice of action (*Bubbins v. the United Kingdom*, § 141).

## iii. Illustrations

107. The Court did not consider that the use of force was strictly proportionate or absolutely necessary in the pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention in:

- *Güleç v. Turkey*, § 71, where the applicant's son was killed during a demonstration where the security forces – confronted with acts of violence – and not having any batons, riot shields, water cannon, rubber bullets or tear gas – deployed machine guns; see also *Evrım Öktem v. Turkey*, where a minor was seriously injured by stray bullet fired from a police officer's gun during an operation to break up a demonstration;
- *Kakoulli v. Turkey*, § 121, where an unarmed Greek-Cypriot, who had entered into the buffer zone between northern and southern Cyprus, was shot dead by Turkish soldiers;
- *Wasilewska and Kałucka v. Poland*, § 57, where a suspect was shot dead during a police operation;
- *Trévalet v. Belgium*, § 87, where a journalist was shot by a special operations police unit which had not been informed that his presence in the police operation had been authorised;
- *Nachova and Others v. Bulgaria* [GC], § 109, where two unarmed Roma fugitives were shot dead by military police during an attempted arrest;
- *Tagayeva and Others v. Russia*, § 611, where a number of hostages were killed in the course of a rescue operation in the context of a large scale hostage-taking by terrorists in a school in Beslan, North Ossetia; see, by contrast, *Finogenov and Others v. Russia*, §§ 226 and 236, where a number of hostages were killed in the course of a rescue operation in the context of hostage-taking by terrorists in a theatre in Moscow;
- *Kukhalashvili and Others v. Georgia\**, §157, where indiscriminate and excessive use of lethal force was used by the police during an anti-riot operation in prison.

108. By contrast, the Court held that the use of force was strictly proportionate in the pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention in:

- *Bubbins v. the United Kingdom*, § 141, where the applicant's brother was shot by police officers in his flat following a two-hour siege; see also *Huohvanainen v. Finland*, § 107;



- *Giuliani and Gaggio v. Italy* [GC], § 194, which concerned the fatal shooting of a demonstrator by a member of the security forces at a G8 summit;
- *Perk and Others v. Turkey*, § 73, which concerned the killing of the applicants’ relatives during a police operation against a radical armed movement (see also *Yüksel Erdoğan and Others v. Turkey*, § 100, which concerned the killing of the applicants’ relatives during from an armed clash with police officers);
- *Mendy v. France* (dec.), §§ 31-33, where a mentally disturbed person threatening a man’s life with a knife was shot dead by a police officer during his arrest.

## C. Specific contexts

### Article 2 of the Convention

“1. Everyone’s right to life shall be protected 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.”

### HUDOC keywords

Positive obligations (2) – Life (2-1)

Use of force (2-2) – Absolutely necessary (2-2); Defence from unlawful violence (2-2); Effect lawful arrest (2-2); Prevent escape (2-2); Quell riot or insurrection (2-2)

## 1. Death hastened by use of specific arrest techniques

109. In a number of cases where death was hastened by the use of specific arrest techniques which were not lethal by themselves, the Court examined whether there was a causal link between the force used and the death of the individual and whether State agents protected the right to life by providing that individual with requisite medical assistance (*Scavuzzo-Hager and Others v. Switzerland*, § 55, which concerned the arrest by police officers of a very agitated drug addict who subsequently died; *Saoud v. France*, which concerned the death by gradual asphyxia of a young man who was handcuffed and held face down on the ground by police officers for over thirty minutes; *Boukrourou and Others v. France*, where the applicants’ relative, a mentally disabled person, died during a police operation from heart failure and *Semache v. France*, which concerned the death of an elderly drunk driver who was immobilised by being bound over with his head touching his knees (“double seated embrace”).

## 2. Death in custody

110. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, when 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. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies (*Salman v. Turkey* [GC], § 99; *Tanlı v. Turkey*, § 141; *Tekin and Arslan v. Belgium*, § 83).

111. The Court was not convinced by the respondent State’s explanations regarding the circumstances surrounding the death of the applicants in the following cases:

- *Anguelova v. Bulgaria*, § 121, where the applicant’s relative died from a skull injury a couple of hours after being detained;
- *Kişmir v. Turkey*, § 105, which concerned the death of the applicant’s son in Diyarbakir police headquarters from respiratory failure related to lung oedema;
- *Aktaş v. Turkey*, § 294, where the applicants’ relative died from mechanical asphyxia sustained during custody;
- *Mojsiejew v. Poland*, § 65, which concerned the death of the applicant’s son in a sobering-up centre;
- *Khayrullina v. Russia*, §§ 84-85, where the applicant’s husband died from the injuries he sustained during his unlawful detention in police custody.

### 3. Extra-judicial killings

112. The Court has also been confronted with applications where it is undisputed that the applicants’ relatives died in circumstances falling outside the exceptions set out in the second paragraph of Article 2. In these cases, if the Court, on the basis of the evidence in the case-file, establishes that the applicants’ relatives were killed by State agents or with their connivance or acquiescence, it will find the respondent Government liable for their death (*Avşar v. Turkey*, §§ 413-416; *Khashiyev and Akayeva v. Russia*, § 147; *Estamirov and Others v. Russia*, § 114; *Musayeva and Others v. Russia*, § 155; *Amuyeva and Others v. Russia*, §§ 83-84; and by contrast *Denizci and Others v. Cyprus*, § 373; *Buldan v. Turkey*, § 81; *Nuray Şen v. Turkey (no. 2)*, § 173; *Seyhan v. Turkey*, § 82).

113. However, even in circumstances where the Court cannot establish beyond reasonable doubt that any State agent was involved in the killing, the Court may nonetheless find the respondent State responsible, if it considers that the authorities failed to take reasonable measures available to them to protect the right to life of the applicant in question (*Mahmut Kaya v. Turkey*, §§ 87 and 101; *Kılıç v. Turkey*, §§ 64 and 77; *Gongadze v. Ukraine*, §§ 170-171; and by contrast *Denizci and Others v. Cyprus*, §§ 374 and 377).

### 4. Security or military operations

114. In the particular context of security operations, the Court has held that the responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from State agents has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods for a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising incidental loss of civilian life (*Ahmet Özkan and Others v. Turkey*, § 297).

115. In this context, the Court has found, for example, that:

- the military had undertaken insufficient precautions to protect the lives of the civilian population (*Ergi v. Turkey*, § 81, where the applicant’s sister was killed in the course of an ambush operation conducted by the security forces against the PKK);
- while the security forces’ choice to open intensive fire in response to shots fired at them from a village was “absolutely necessary” for the purpose of protecting life, Turkey had failed in its obligations to protect life under Article 2 because the security forces failed subsequently to verify whether there were any civilian casualties (*Ahmet Özkan and Others v. Turkey*, §§ 306-308, concerning a military raid conducted on a village in order to capture terrorists leading to the death of two children);

- the military operation was not planned and executed with the requisite care for the lives of the civilians (*Isayeva and Others v. Russia*, § 199, which concerned the bombing of a convoy by Russian military jets during the Chechen war, with loss of civilian life); see also *Abuyeva and Others v. Russia*, § 203; and *Benzer and Others v. Turkey*, § 184, where the Court reiterated that an indiscriminate aerial bombing of civilians and their villages could not be acceptable in a democratic society or reconcilable with any of the grounds regulating the use of force set out in Article 2 § 2 of the Convention, the customary rules of international humanitarian law or any of the international treaties regulating the use of force in armed conflicts.
- In the case of *Şirin Yılmaz v. Turkey*, where the applicant’s wife was killed by artillery shells, the Court was unable to conclude that she was, beyond reasonable doubt, intentionally or recklessly killed by the security forces (§ 76; see also *Zengin v. Turkey*, § 44).

116. The Court has further underlined that Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict. In a zone of international conflict Contracting States are under an obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the International Committee of the Red Cross to do so (*Varnava and Others v. Turkey* [GC], § 185). Therefore, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law (*Hassan v. the United Kingdom* [GC], § 104).

## 5. Disappearances

### a. Presumption of death

117. 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. In the same vein, Article 5 imposes an obligation on the State to account for the whereabouts of any person taken into detention and who has thus been placed under the control of the authorities. 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 will depend 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 (*Timurtaş v. Turkey*, § 82).

118. In this respect the period of time which has elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account. It must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died. The passage of time may therefore to some extent affect the weight to be attached to other elements of circumstantial evidence before it can be concluded that the person concerned is to be presumed dead. In this respect the Court considers that this situation gives rise to issues which go beyond a mere irregular detention in violation of Article 5. Such an interpretation is in keeping with the effective protection of the right to life as afforded by Article 2, which ranks as one of the most fundamental provisions of the Convention (*Taniş and Others v. Turkey*, § 201).

119. However, this presumption of death is not automatic and is only reached on examination of the circumstances of the case, in which the lapse of time since the person was seen alive or heard

from is a relevant element (*Varnava and Others v. Turkey* [GC], § 143; *Aslakhanova and Others v. Russia*, § 100).

120. Moreover, a finding of State involvement in the disappearance of a person is not a condition *sine qua non* for the purposes of establishing whether that person can be presumed dead; in certain circumstances the disappearance of a person may in itself be considered as life-threatening (*Medova v. Russia*, § 90).

121. For example, in the context of the conflict in Chechnya, the Court has concluded that when a person is detained by unidentified servicemen without any subsequent acknowledgement of detention, this can be regarded as life-threatening (*Baysayeva v. Russia*, § 119; *Beksultanova v. Russia*, § 83).

122. Likewise, the Court has deemed that the disappearance of a person in south-east Turkey between 1992 and 1996 could be regarded as life-threatening (*Osmanoğlu v. Turkey*, §§ 57-58; *Meryem Çelik and Others v. Turkey*, § 58), particularly if that person was suspected by the authorities of PKK involvement (*Enzile Özdemir v. Turkey*, § 45).

## **b. State liability for the presumed death**

123. Once the Court considers that it has been established beyond reasonable doubt that the disappeared person must be presumed dead following his or her unacknowledged detention by State agents, the responsibility of the State is engaged. Since such circumstances do not provide any justification on any of the grounds listed in Article 2 § 2 of the Convention, the Court finds the respondent Government liable for the presumed death of the disappeared person (*Akdeniz and Others v. Turkey*, § 101; *Orhan v. Turkey*, § 331; *İpek v. Turkey*, § 168; *Bazorkina v. Russia*, § 111; *Magomadov v. Russia*, § 99; *Meryem Çelik and Others v. Turkey*, § 60; *Mikiyeva and Others v. Russia*, § 160; *Kushtova and Others v. Russia (no. 2)*, § 83; and by contrast *Tahsin Acar v. Turkey* [GC], §§ 217-219; *Nesibe Haran v. Turkey*, § 68; *Shafiyeva v. Russia*, § 79; *Kagirov v. Russia*, § 97).

## **c. State responsibility to protect the right to life**

124. The disappearance of a person in life-threatening circumstances requires the State, pursuant to the positive obligation inherent in Article 2 of the Convention, to take operational measures to protect the right to life of the disappeared person (*Koku v. Turkey*, § 132; *Osmanoğlu v. Turkey*, § 75).

125. In this connection, any negligence displayed by the investigating or supervising authorities in the face of real and imminent threats to an identified individual's life emanating from State agents who were acting outside their legal duties may entail a violation of the positive obligation to protect life (*Gongadze v. Ukraine*, § 170; *Turluyeva v. Russia*, §§ 100-101).

## **6. Killings committed by State agents in their private capacity**

126. A Contracting State will be responsible under the Convention for violations of human rights caused by acts of its agents carried out in the performance of their duties (*Krastanov v. Bulgaria*, § 53). Whether a person is an agent of the State for the purposes of the Convention is defined on the basis of a multitude of criteria, one of them being functional (*Fergec v. Croatia*, § 36). The Court has also held that, where the behaviour of a State agent is unlawful, the question of whether the impugned acts can be imputed to the State requires an assessment of the totality of the circumstances and consideration of the nature and circumstances of the conduct in question (*Sašo Gorgiev v. the former Yugoslav Republic of Macedonia*, §§ 47-48).

127. In particular, the Court has found that States are, in principle, not directly responsible for any killing or injury committed by State agents in their private capacity unless those agents made use of their position while committing the unlawful act in question with at least the connivance or

acquiescence by the authorities irrespective of whether the agent concerned had been on or off-duty at the time of the events (*Enukidze and Girgvliani v. Georgia*, § 290; *Kotelnikov v. Russia*, § 93; *Fergec v. Croatia*, § 36).

128. However, in such circumstances, the State’s obligation to take appropriate steps to safeguard the lives of those within its jurisdiction remains (see, for example, the approach taken in *Gorovenky and Bugara v. Ukraine*, §§ 31-40).

## IV. Procedural obligations

### Article 2 § 1 of the Convention

“1. Everyone’s right to life shall be protected by law. ...”

### HUDOC keywords

Effective investigation (2-1)

### A. The scope of the procedural obligations

129. The procedural obligations of the State was first formulated in the context of the use of lethal force by State agents where the Court held 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 Court underlined that the obligation to protect the right to life under this provision, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in the Convention”, requires by implication that there should be 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 (*McCann and Others v. the United Kingdom*, § 161).

130. Since then the Court has accepted that this obligation arises in a variety of situations where an individual has sustained life-threatening injuries, died or has disappeared in violent or suspicious circumstances, irrespective of whether those allegedly responsible are State agents or private persons or are unknown or self-inflicted (see, for example, concerning inter-prisoner violence: *Paul and Audrey Edwards v. the United Kingdom*, § 69; concerning homicides by prisoners benefiting from early release or social re-integration schemes: *Maiorano and Others v. Italy*, §§ 123-26; concerning high-profile assassinations: *Kolevi v. Bulgaria*, §§ 191-215; concerning domestic violence: *Opuz v. Turkey*, §§ 150-150; concerning suspicious deaths or disappearances: *Iorga v. Moldova*, § 26; *Tahsin Acar v. Turkey* [GC], § 226; concerning suicide: *Trubnikov v. Russia*; *Mosendz v. Ukraine*, § 92).

This stems from Article 2 which imposes a duty on that 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. This obligation requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances, even where the presumed perpetrator of the fatal attack is not a State agent (*Mustafa Tunç and Fecire Tunç v. Turkey* [GC], § 171).

131. The Court has further extended the scope of this obligation to circumstances where an individual has sustained life-threatening injuries or where lives have been lost in circumstances

potentially engaging the responsibility of the State due to alleged negligence (see, for example, in the context of healthcare: *Lopes de Sousa Fernandes v. Portugal* [GC], § 214; and road traffic accidents: *Anna Todorova v. Bulgaria*, § 72). In such cases, the Court has held that Article 2 of the Convention must also be considered to require the State to have in place an effective independent judicial system so as to secure legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim (*Sininim v. Turkey*, § 59; *Ciechońska v. Poland*, § 66). In such cases, the Court has transposed, with certain adaptations and in a piecemeal fashion, the general principles regarding the duty to investigate, notably; the minimum required standards<sup>2</sup>.

## B. Relationship between the substantive and the procedural limb

132. The State’s obligation to carry out an effective investigation has in the Court’s case-law been considered as an obligation inherent in Article 2, which requires, *inter alia*, that the right to life be “protected by law”. Although the failure to comply with such an obligation may have consequences for the right protected under Article 13, the procedural obligation of Article 2 is seen as a distinct obligation (*İlhan v. Turkey* [GC], §§ 91-92; *Šilih v. Slovenia* [GC], §§ 153-154). It can give rise to a finding of a separate and independent “interference”. This conclusion derives from the fact that the Court has consistently examined the question of procedural obligations separately from the question of compliance with the substantive obligation (and, where appropriate, has found a separate violation of Article 2 on that account) and the fact that on several occasions a breach of a procedural obligation under Article 2 has been alleged in the absence of any complaint as to its substantive aspect (*Armani Da Silva v. the United Kingdom* [GC], § 231).

## C. The purpose of the investigation

133. The essential purpose of an investigation under Article 2 is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (*Hugh Jordan v. the United Kingdom*, § 105; *Nachova and Others v. Bulgaria* [GC], § 110; *Al-Skeini and Others v. the United Kingdom* [GC], § 163).

## D. The form of the investigation

134. What form of investigation will achieve the purposes of Article 2 may vary depending on the 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 (*Al-Skeini and Others v. the United Kingdom* [GC], § 165).

135. In the context of killings allegedly perpetrated by or in collusion with State agents, civil proceedings, which are undertaken on the initiative of the next-of-kin, not the authorities, and which do not involve the identification or punishment of any alleged perpetrator, cannot be taken into account in the assessment of the State’s compliance with its procedural obligations under Article 2 of the Convention (*Hugh Jordan v. the United Kingdom*, § 141) because, in such cases, the procedural obligation of the State under Article 2 cannot be satisfied merely by awarding damages (*McKerr v. the United Kingdom* (dec.), § 121; *Bazorkina v. Russia*, § 117; *Al-Skeini and Others v. the United Kingdom* [GC], § 165).

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2. See Section Procedural obligations in respect of deaths or serious injuries.

136. The Court has explained that this is because in cases of homicide the interpretation of Article 2 as entailing an obligation to conduct an official investigation is justified not only because any allegations of such an offence normally give rise to criminal liability, but also because often, in practice, in the context of killings allegedly perpetrated by or in collusion with State agents, the true circumstances of the death are, or may be, largely confined within the knowledge of State officials or authorities so that the bringing of appropriate domestic proceedings such as a criminal prosecution, disciplinary proceedings and proceedings for the exercise of remedies available to victims and their families, will be conditioned by an adequate official investigation (*Makaratzis v. Greece* [GC], § 73; *Khashiyev and Akayeva v. Russia*, §§ 120-121).

## E. The nature and degree of scrutiny

137. The nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depends on the circumstances of the particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], § 147). It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria (*Velikova v. Bulgaria*, § 80).

138. Where a suspicious death has been inflicted at the hands of a State agent, particularly stringent scrutiny must be applied by the relevant domestic authorities to the ensuing investigation (*Enukidze and Girvliani v. Georgia*, § 277; *Armani Da Silva v. the United Kingdom* [GC], § 234).

139. In the context of disappearances, having regard to the fact that 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 and that this situation is very often drawn out over time, prolonging the torment of the victim's relatives with 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, in such cases, 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 (*Varnava and Others v. Turkey* [GC], § 148).

140. In cases of contract killing, the Court took the view that the investigation could not be considered adequate in the absence of genuine and serious investigative efforts taken with the view to identifying the intellectual author of the crime, that is, the person or people who had commissioned the assassination. In such cases the domestic authorities' scrutiny had to aim to go beyond identification of a hitman (*Mazepa and Others v. Russia*, §§ 75-79).

141. Where the victim of a killing is a journalist, the Court, referring to Recommendation CM/Rec (2016) 4 on the protection of journalism and safety of journalists and other media actors, has considered that it was of utmost importance to check a possible connection of the crime to the journalist's professional activity (*Mazepa and Others v. Russia*, § 73).

## F. The standards of the investigation

### 1. Independence

142. 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. This means not only a lack of hierarchical or institutional connection but also a practical independence. What is at stake here is nothing less than

public confidence in the State's monopoly on the use of force (*Armani Da Silva v. the United Kingdom* [GC], § 232).

143. The requirements of Article 2 call for a concrete examination of the independence of the investigation in its entirety, rather than an abstract assessment (*Mustafa Tunç and Fecire Tunç v. Turkey* [GC], § 222).

144. Moreover, Article 2 does not require that the persons and bodies responsible for the investigation enjoy absolute independence, but rather that they are sufficiently independent of the persons and structures whose responsibility is likely to be engaged. The adequacy of the degree of independence is assessed in the light of all the circumstances, which are necessarily specific to each case (*ibid.*, § 223).

145. However, where the statutory or institutional independence is open to question, such a situation, although not decisive, will call for a stricter scrutiny on the part of the Court of whether the investigation has been carried out in an independent manner. Where an issue arises concerning the independence and impartiality of an investigation, the correct approach consists in examining whether and to what extent the disputed circumstance has compromised the investigation's effectiveness and its ability to shed light on the circumstances of the death and to punish those responsible (*ibid.*, § 224).

146. In this respect, the Court has emphasised that public prosecutors inevitably rely on the police for information and support and that this is not in itself sufficient to conclude that they lack sufficient independence vis-à-vis the police. Rather, problems arise if a public prosecutor has a close working relationship with a particular police force (*Ramsahai and Others v. the Netherlands* [GC], § 344).

147. The Court has found that independence was lacking in investigations where, for example, the investigators:

- were potential suspects (*Bektaş and Özalp v. Turkey*, § 66; *Orhan v. Turkey*, § 342);
- were direct colleagues of the persons subject to investigation or likely to be so (*Ramsahai and Others v. the Netherlands* [GC], §§ 335-341; *Emars v. Latvia*, §§ 85 and 95);
- were in a hierarchical relationship with the potential suspects (*Şandru and Others v. Romania*, § 74; *Enukidze and Girgvlani v. Georgia*, §§ 247 et seq.).

148. In some cases the Court has interpreted the specific action of the investigative bodies as an indication of a lack of independence, such as,

- the failure to carry out certain measures which would elucidate the circumstances of the case (*Sergey Shevchenko v. Ukraine*, §§ 72-73);
- the excessive weight given to the suspects statements (*Kaya v. Turkey*, § 89);
- the failure to explore certain obvious and necessary lines of inquiry (*Oğur v. Turkey* [GC], §§ 90-91);
- inertia (*Rupa v. Romania (no. 1)*, §§ 123-124).

149. The Court did not find an issue regarding the independence of the investigation in the following circumstances:

- the mere fact that the investigators and the investigated were sharing living quarters in the particular context of military operations conducted abroad (*Jaloud v. the Netherlands* [GC], § 189);
- where the military court which carried out the review of the investigation failed to enjoy full statutory independence but there was absence of direct hierarchical, institutional or other ties between it and the main potential suspect and the specific conduct of that court



did not reflect a lack of independence or impartiality in the handling of the investigation (*Mustafa Tunç and Fecire Tunç v. Turkey* [GC], § 254).

## 2. Adequacy

150. In order to be “effective” as this expression is to be understood in the context of Article 2 of the Convention, an investigation into a death that engages the responsibility of the Contracting Party under that Article must firstly be adequate (*Ramsahai and Others v. the Netherlands* [GC], § 324). That means that, it must be capable of leading to a determination of whether the force used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible (*Armani Da Silva v. the United Kingdom* [GC], § 243). This is not an obligation of result, but of means (*Tahsin Acar v. Turkey* [GC], § 223; *Jaloud v. the Netherlands* [GC], § 186).

151. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death. (*Armani Da Silva v. the United Kingdom* [GC], § 233). In this connection, the Court has held that an effective investigation may, in some circumstances, require the exhumation of the bodies of the deceased, despite the family’s opposition (*Solska and Rybicka v. Poland*, §§ 120-121). Moreover, where there has been a use of force by State agents, the investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified (*Armani Da Silva v. the United Kingdom* [GC], § 233). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk failing foul of this standard (*Al-Skeini and Others v. the United Kingdom* [GC], § 166).

152. In particular, the investigation’s conclusions must be based on a thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines to a decisive extent the investigation’s ability to establish the circumstances of the case and the identity of those responsible (*Mustafa Tunç and Fecire Tunç v. Turkey* [GC], § 175).

153. The Court has found the investigation inadequate when, for example:

- the investigation into a fatal shooting by the police during an attempted arrest had been undermined by shortcomings such as the failure to test the hands of officers in question for gunshot residue; to stage a reconstruction of the incident; to examine their weapons or ammunition; the lack of an adequate pictorial record of the trauma caused to the victim’s body by the fatal bullet; and the failure to separate the officers involved in the incident before their questioning (*Ramsahai and Others v. the Netherlands* [GC], §§ 326-332);
- the forensic investigation was defective (*Tanlı v. Turkey*, § 153);
- the authorities accepted the version of facts presented by the accused State agents without hearing any further witnesses (*Özalp and Others v. Turkey*, § 45) or placed heavy reliance on the report prepared by them (*İkincisoay v. Turkey*, § 78);
- no investigation had been conducted into the flight log which constituted a key element in the possible identification and prosecution of those responsible for the bombing of civilian villages by military aircraft (*Benzer and Others v. Turkey*, § 196);
- the investigation into the contact killing of an investigative journalist focused only on a single line of inquiry without exploring other allegations.

154. By contrast, having regard to the various steps undertaken by the domestic authorities, the Court did not find an issue with respect to the adequacy of the investigation in:

- *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], § 209, which concerned the investigation into the death of the applicants’ son and brother during his military service;

- *Armani Da Silva v. the United Kingdom* [GC], § 286, which concerned the investigation into the fatal shooting of person mistakenly identified as a suspected terrorist;
- *Giuliani and Gaggio v. Italy* [GC], § 309, which concerned the investigation into the fatal shooting of a demonstrator by a member of the security forces during a G8 summit;
- *Palić v. Bosnia and Herzegovina*, §§ 64-66, which concerned the investigation into the disappearance of the applicant's husband during the war in Bosnia and Herzegovina.

### 3. Promptness and reasonable expedition

155. Article 2 requires investigations to be prompt (*Armani Da Silva v. the United Kingdom* [GC], § 237) and to proceed with reasonable expedition (*Giuliani and Gaggio v. Italy* [GC], § 305).

156. The Court accepts that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, but it considers that 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 (*Al-Skeini and Others v. the United Kingdom* [GC], § 167; *Tahsin Acar v. Turkey* [GC], § 224; *Armani Da Silva v. the United Kingdom* [GC], § 237).

157. The Court observes that the passage of time is liable not only to undermine an investigation, but also to compromise definitively its chances of being completed (*Mocanu and Others v. Romania* [GC], § 337).

158. The Court has found that the domestic authorities have, *inter alia*, failed to investigate with sufficient promptness and reasonable expedition in the following cases:

- *Kelly and Others v. the United Kingdom*, § 136: the inquest proceedings into the killing of the applicants' relatives by the security forces in an operation commenced eight years after the deaths;
- *Nafiye Çetin and Others v. Turkey*, § 42: the criminal proceedings instituted with a view to elucidating the facts and identify and punish those responsible for the death of their relative in police custody were pending for almost fifteen years;
- *Mocanu and Others v. Romania* [GC], § 348: the investigation into the killing of Mr Mocanu during 1990 demonstrations against the Romanian regime was pending, overall, for more than twenty-three years;
- *Hemsworth v. the United Kingdom*, § 74: the inquest hearing began 13 years after the killing of the applicants' relatives allegedly by security forces in Northern Ireland;
- *Jelić v. Croatia*, § 91: the investigation into the abduction and killing of the applicant's husband in 1991 was plagued by inexplicable delays;
- *Mazepa and Others v. Russia*, § 81: the investigation into the contract killing of an investigative journalist, notably, as regards the identity of the persons who had commissioned the crime, was still pending after more than eleven years.

159. However, the Court did not consider that the length of the investigation and/or ensuing criminal proceedings were ineffective in cases concerning killings allegedly perpetrated by Hizbullah. Taking note of the nature of the crime, a killing by an unknown perpetrator and the efforts needed to dismantle a criminal organisation, the Court considered that the investigations conducted in these cases, while lengthy, were not devoid of effect and it could not be maintained that the authorities took no action with regard to the killing of the applicants' relatives (*Bayrak and Others v. Turkey*, §§ 54-55; *Adiyaman v. Turkey* (dec.)). See also, in the context of investigations into deaths and disappearances during an armed conflict, *Palić v. Bosnia and Herzegovina*, § 70; *Zdjelar and Others v. Croatia*, §§ 91-94.

#### 4. Public scrutiny and the participation of the next-of-kin

160. 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. This requirement does not, however, go so far as to require all aspects of all proceedings following an inquiry into a violent death to be public as disclosure or for example, publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects on private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2 of the Convention. The degree of public scrutiny required may vary from case to case (*Ramsahai and Others v. the Netherlands* [GC], § 353; *Giuliani and Gaggio v. Italy* [GC], § 304).

161. However, in all cases, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (*Al-Skeini and Others v. the United Kingdom* [GC], § 167). This does not mean that the investigating authorities have to satisfy every request for a particular investigative measure made by a relative in the course of the investigation (*Ramsahai and Others v. the Netherlands* [GC], § 348; *Giuliani and Gaggio v. Italy* [GC], § 304). Moreover, the lack of public scrutiny of police investigations may be compensated by providing the requisite access of the public or the victim's relatives during other stages of the procedure (*Hugh Jordan v. the United Kingdom*, § 121).

162. The Court has found that the investigation was not accessible to next-of-kin or that it did not allow for adequate public scrutiny where:

- the family of the victim had no access to the investigation or the court documents (*Oğur v. Turkey* [GC], § 92) or was not informed of significant developments in the investigation (*Betayev and Betayeva v. Russia*, § 88);
- the wife of the victim was not provided with any information on the progress of the investigation; was not able to examine properly the case-file and was not given any record concerning witness statements or other procedural steps (*Mezhiyeva v. Russia*, § 75);
- the father of the victim was not informed of the decision not to prosecute (*Güleç v. Turkey*, § 82);
- the participation of the next-of-kin in the investigation was conditioned on them having lodged a criminal complaint together with an application to join the proceedings as a civil party (*Slimani v. France*, § 47);
- the prosecution authorities attempted to withhold the investigation documents from the applicants (*Benzer and Others v. Turkey*, § 193).
- the father of the deceased did not have access to documents in the criminal case file or the administrative inquiry and had only been informed of his son's death after an autopsy had taken place, even though the deceased's body had been identified earlier (*Fountas v. Greece*, § 96).

163. The Court did not find an issue with accessibility of the investigation to the next-of-kin or of the public in:

- *Giuliani and Gaggio v. Italy* [GC], § 315, which concerned the investigation into the fatal shooting of a demonstrator by a member of the security forces during the G8 summit;
- *Bubbins v. the United Kingdom*, § 161, where the applicant's brother was shot by police officers in his flat following a two-hour siege;
- *Palić v. Bosnia and Herzegovina*, § 69, which concerned the investigation into the disappearance of the applicant's husband during the war in Bosnia and Herzegovina.
- *Waresiak v. Poland*, § 95, which concerned restrictions applicable to the victim's next-of-kin in criminal proceedings concerning a minor.

## G. Issues related to prosecution and sanction

164. There is no right to obtain a prosecution or conviction or indeed a particular sentence and the fact that an investigation ends without concrete, or with only limited, results is not indicative of any failings as such (*Giuliani and Gaggio v. Italy* [GC], § 306).

165. However, the requirements of Article 2 under its procedural limb go beyond the stage of the official investigation. Therefore, if the investigation has led to the institution of proceedings in the national courts, then the proceedings as a whole including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law (*Öneryıldız v. Turkey* [GC], § 95; *Ali and Ayşe Duran v. Turkey*, § 61).

166. In this respect, the Court recalls that in the normal course of events a criminal trial, with an adversarial procedure before an independent and impartial judge must be regarded as furnishing the strongest safeguards of an effective procedure for the finding of facts and the attribution of criminal responsibility (*McKerr v. the United Kingdom* (dec.), § 134). Nonetheless, it cannot be excluded, for example, that defects in an investigation may fundamentally undermine the ability of a court to determine responsibility for a death (*Ağdaş v. Turkey*, § 102).

167. The Court grants substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by State agents. However, it must exercise a certain power of review and intervene in cases of manifest disproportion between the offence committed and the sanction imposed (*Armani Da Silva v. the United Kingdom* [GC], § 285).

168. For example, the Court has underlined that the procedural obligations arising under Articles 2 and 3 of the Convention can hardly be considered to have been met where an investigation is terminated through statutory limitation of criminal liability resulting from the authorities' inactivity (*Association "21 December 1989" and Others v. Romania*, § 144).

169. Likewise, in the context of death following ill-treatment by State agents, the Court has considered that the suspension of the execution of the convicted police officers' prison sentences was comparable to a partial amnesty and that such measures cannot be considered permissible under its jurisprudence since, consequently, the convicted officers enjoyed virtual impunity despite their conviction (*Ali and Ayşe Duran v. Turkey*, § 69).

170. Moreover, the Court's review is not limited to the severity of the sentences as initially imposed by the domestic courts but includes also the manner of their subsequent implementation (*Enukidze and Girvliani v. Georgia*, §§ 269 and 275, where the Court found a violation of Article 2 under its procedural limb, *inter alia*, because of the unreasonable leniency shown towards the convicts by their early release; *Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*, § 33, where the Court found a violation of Article 2 under its procedural limb because of the unjustified delays in the enforcement of the custodial sentence). In this connection, the Court has stressed that the requirement of effectiveness of a criminal investigation under Article 2 can be also interpreted as imposing a duty on States to execute their final judgments without undue delay. It has found that it is so since the enforcement of a sentence imposed in the context of the right to life must be regarded as an integral part of the procedural obligation of the State under this Article (*Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*, § 32, *Akeliénė v. Lithuania*, § 85, where the Court, having regard to the measures taken by the State to find the absconded convict after his conviction and to have him extradited, found no violation of Article 2 under its procedural limb).

171. Finally, the Court has affirmed that granting amnesty in respect of the killing or ill-treatment of civilians would run contrary to the State's obligations under Articles 2 and 3 of the Convention since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible (*Marguš v. Croatia* [GC], § 127).

## H. The revival of procedural obligations

172. The procedural obligation binds the State throughout the period in which the authorities can reasonably be expected to take measures aimed at elucidating the circumstances of a death and establish responsibility for it (*Šilih v. Slovenia* [GC], § 157). In some cases, however, information purportedly casting new light on the circumstances of a killing may come to light at a later stage. The issue then arises as to whether, and in what form, the procedural obligation to investigate is revived. To that end, the Court has held that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures (*Brecknell v. the United Kingdom*, § 71).

173. The nature and extent of any subsequent investigation required by the procedural obligation will inevitably depend on the circumstances of each particular case and may well differ from that to be expected immediately after the death has occurred (*Harrison and Others v. the United Kingdom* (dec.), § 51). The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases reasonably be restricted to verifying the credibility of the source, or of the purported new evidence (*Cerf v. Turkey*, § 65). Moreover, the standard of expedition in such cases is very different to the standard applicable in recent incidents where time is often of the essence in preserving vital evidence at a scene and in questioning witnesses when their memories are fresh and detailed (*Gurtekin and Others v. Cyprus* (dec.), § 21 with further references).

174. In light of the primary purpose of any renewed investigative efforts, the authorities are entitled to take into account the prospects of success of any prosecution (*Brecknell v. the United Kingdom*, § 71).

175. However, there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity (*Jelić v. Croatia*, § 52).

## I. Investigation of hate crimes

176. In cases where there is an allegation of racially motivated violence, it is particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence (*Menson v. the United Kingdom* (dec.); *Gjikondi and Others v. Greece*, § 118).

177. The Court has underlined that treating racially-induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. Failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention in conjunction with Article 2 (*Nachova and Others v. Bulgaria* [GC], § 160).

## J. Procedural obligations in trans-border contexts

178. The Court has underlined that, in general, the procedural obligation falls on the Contracting State under whose jurisdiction the victim was at the time of death (*Emin and Others v. Cyprus, Greece and the United Kingdom* (dec.)), unless there are special features which require a departure from this general approach (*Rantsev v. Cyprus and Russia*, §§ 241-242).

179. Moreover, Article 2 does not require member States' criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals (*Rantsev v. Cyprus and Russia*, § 244).

180. Nonetheless, even in the absence of special features, the Court has underlined that, 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 (*Rantsev v. Cyprus and Russia*, § 245).

181. In particular, where there are cross-border elements to an incident of unlawful violence leading to loss of life, the Court has observed that the authorities of the State to which the perpetrators have fled and in which evidence of the offence could be located may be required by Article 2 to take effective measures in that regard, if necessary of their own motion (*Cummins and Others v. the United Kingdom* (dec.); *O'Loughlin and Others v. the United Kingdom* (dec.)).

182. In cases where an effective investigation into an unlawful killing which occurred within the jurisdiction of one Contracting State requires the involvement of more than one Contracting State, the Convention's special character as a collective enforcement treaty entails in principle an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice. Thus, Article 2 may require from both States a two-way obligation to cooperate with each other, implying at the same time an obligation to seek assistance and an obligation to afford assistance. The nature and scope of these obligations depend, however, on the circumstances of each particular case (*Güzelyurtlu and Others v. Cyprus and Turkey* [GC], §§ 232-233). For instance, in a recent case it was held that a Member State of the European Union must cooperate with another Member State within the framework of the European Arrest Warrant (EAW) system and duly consider whether to surrender an alleged terrorist fugitive for prosecution (*Romeo Castaño v. Belgium*, §§ 41-42 and 79-82).

183. In this respect, the Court has underlined that this obligation to cooperate could only be one of means, not of result. This means that the States concerned must take whatever reasonable steps they can to cooperate with each other, exhausting in good faith the possibilities available to them under the applicable international instruments on mutual legal assistance and cooperation in criminal matters. Thus, the procedural obligation to cooperate, in this context, will only be breached in respect of a State required to seek cooperation if it has failed to trigger the proper mechanism for cooperation under the relevant international treaties; and in respect of the requested State, if it has failed to respond properly or has not been able to invoke a legitimate ground for refusing the cooperation requested under those instruments (*Güzelyurtlu and Others v. Cyprus and Turkey* [GC], §§ 235-236). For instance, with respect to a person whose surrender has been requested by way of a European Arrest Warrant (EAW), a finding by the courts of the executing State that the conditions of detention in the requesting State would be inhuman and degrading which is based on incomplete and out-of-date material is not a legitimate ground to refuse cooperation (*Romeo Castaño v. Belgium*, §§ 85-90). In cases involving a Contracting State and a *de facto* entity under the effective control of another Contracting State, the duty to cooperate, in the absence of formal diplomatic relations, may require these States to use other more informal or indirect channels of cooperation, for instance through third States or international organisations. In such circumstances, the Court takes into account whether the States concerned used all informal or *ad hoc* channels of cooperation used by them outside the cooperation mechanisms foreseen by the relevant international treaties, while at the same time guided by the provisions of those treaties as an expression of the norms and principles applied in international law (*Güzelyurtlu and Others v. Cyprus and Turkey* [GC], §§ 237-238).

## K. Procedural obligations in respect of deaths or serious injuries occurring as a result of negligence

184. As mentioned above, the Court has extended the scope of the procedural obligations under Article 2 to circumstances where individuals have sustained life-threatening injuries or where lives have been lost due to negligence. In doing so, it has transposed the general principles, notably, the standards of investigation referred to above, albeit tailored to the circumstances of such cases.

### 1. General principles

185. The Court has held that an issue of State responsibility under Article 2 of the Convention might arise in the event of the domestic legal system's inability to secure accountability for negligent acts endangering or resulting in loss of human life (*Banel v. Lithuania*, § 70).

186. Thus, it has held that, in cases where negligence by a private individual resulted in the victim's death or serious injury, the States' duty to take appropriate steps to safeguard the lives of those within its jurisdiction includes an obligation to have in place an effective independent judicial system securing the availability of legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim (*Fergec v. Croatia*, § 32, which concerned the effectiveness of proceedings concerning the explosion of a grenade in a pizza parlour; *Ciechońska v. Poland*, § 66, which concerned proceedings regarding the death of the applicant's husband after being hit by a tree in a health resort; *Anna Todorova v. Bulgaria*, § 72, which concerned proceedings regarding the death of the applicant's son in a road traffic accident; *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, § 38, which concerned the death of the applicant's seven-year old son who froze to death while trying to walk home in a blizzard; *Kotelnikov v. Russia*, §§ 99-101, where the applicant was seriously injured in a traffic accident).

187. In the context of healthcare, the Court has interpreted the procedural obligation of Article 2 as requiring States to set up an effective and 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 (*Šilih v. Slovenia* [GC], § 192; *Lopes de Sousa Fernandes v. Portugal* [GC], § 214).

188. In this connection, the Court has underlined 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" will 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 to be established and any appropriate civil redress to be obtained. (*Calvelli and Ciglio v. Italy* [GC], § 51; *Mastromatteo v. Italy* [GC], § 90; *Vo v. France* [GC], § 90; *Anna Todorova v. Bulgaria*, § 73; *Cevrioğlu v. Turkey*, § 54; *Lopes de Sousa Fernandes v. Portugal* [GC], §§ 137 and 215). Where agents of the State or members of certain professions are involved, disciplinary measures may also be envisaged (*Nicolae Virgiliu Tănase v. Romania* [GC], § 159 and *Zinatullin v. Russia*\*, § 32).

189. The Court has further emphasised in this connection that the choice of means for ensuring the respect for positive obligations under Article 2 is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues for ensuring Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. However, for this obligation to be satisfied, such proceedings must not only exist in theory but also operate effectively in practice (*Cevrioğlu v. Turkey*, §§ 53 and 55; *Lopes de Sousa Fernandes v. Portugal* [GC], § 216).

190. Therefore the Court is called to examine whether the available legal remedies, taken together, as provided in law and applied in practice, could be said to have constituted legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the

victim. In other words, rather than assessing the legal regime *in abstracto*, the Court must examine whether the legal system as a whole adequately dealt with the case at hand (*Valeriy Fuklev v. Ukraine*, § 67).

191. Nevertheless, even in the context of non-intentional infringements of the right to life, there may be exceptional circumstances where an effective criminal investigation is necessary to satisfy the requirement of Article 2 of the Convention (*Cevrioğlu v. Turkey*, § 54; *Lopes de Sousa Fernandes v. Portugal* [GC], § 215). The Court has found such exceptional circumstances to arise in cases where the negligence which led to an infringement of the right to life went, *inter alia*, beyond a mere error of judgment or carelessness. Such as for example:

- in the context of dangerous industrial activities (*Öneryıldız v. Turkey* [GC], § 71);
- in the context of a denial of healthcare (*Asiye Genç v. Turkey*, § 73);
- in the context of military activities (*Oruk v. Turkey*, §§ 50 and 65);
- in the context of transportation of dangerous goods (*Sinim v. Turkey*, §§ 62-64).

192. Likewise, the Court has admitted that, in cases where it is not clearly established from the outset that the death has resulted from an accident or another unintentional act, and where the hypothesis of unlawful killing is at least arguable on the facts, the Convention requires that an investigation which satisfies the minimum threshold of effectiveness be conducted in order to shed light on the circumstances of the death. The fact that the investigation ultimately accepts the hypothesis of an accident has no bearing on this issue, since the obligation to investigate is specifically intended to refute or confirm one or other hypothesis (*Mustafa Tunç and Fecire Tunç v. Turkey* [GC], § 133; *Nicolae Virgiliu Tănase v. Romania* [GC], §§ 160-164, where the Court extensively elaborated on the point).

193. Once it has been established in such an initial investigation that a life-threatening injury has not been inflicted intentionally, a civil remedy is normally regarded as sufficient, save for cases involving exceptional circumstances where it is necessary to pursue an effective criminal investigation (*Nicolae Virgiliu Tănase v. Romania* [GC], § 163; *Zinatullin v. Russia\**, § 35).

194. In the context of healthcare, the Court has held that a requirement of independence of the domestic system set up to determine the cause of death of patients in the care of the medical profession is implicit in this context. This requires not only a lack of hierarchical or institutional connection but also that all parties tasked with conducting an assessment in the proceedings for determining the cause of death of patients enjoy formal and *de facto* independence from those implicated in the events (*Bajić v. Croatia*, § 90). This requirement is particularly important when obtaining medical reports from expert witnesses (*Karpisiewicz v. Poland* (dec.)), as such reports are very likely to carry crucial weight in a court's assessment of the highly complex issues of medical negligence, which gives them a particularly important role in the proceedings (*Bajić v. Croatia*, § 95; *Lopes de Sousa Fernandes v. Portugal* [GC], § 217).

195. In the negligence context the relevant proceedings must be completed within a reasonable time (*Šilih v. Slovenia* [GC], § 196; *Cavit Tınarlıoğlu v. Turkey*, § 115; *Fergec v. Croatia*, § 38).

196. In particular, the Court has held that, in Article 2 cases concerning proceedings instituted to elucidate the circumstances of an individual's death, the lengthiness of proceedings is a strong indication that the proceedings were defective to the point of constituting a violation of the respondent State's positive obligations under the Convention, unless the State has provided highly convincing and plausible reasons to justify that length (*Bilbija and Blažević v. Croatia*, § 107; *Lopes de Sousa Fernandes v. Portugal* [GC], § 219).

197. In the context of healthcare, the Court has emphasised in that connection 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 all users of health-care services (*Oyal v. Turkey*, § 76).

198. Unlike in cases concerning the lethal use of force by State agents or in cases concerning accidents, where the competent authorities must of their own motion initiate investigations, in cases concerning medical negligence where the death is caused unintentionally, the States' procedural obligations may come into play upon the institution of proceedings by the deceased's relatives (*Šilih v. Slovenia* [GC], § 156; *Lopes de Sousa Fernandes v. Portugal* [GC], § 220).

199. In this context also, the Court underlines that this procedural obligation is not one of result but of means only (*Banel v. Lithuania*, § 66; *Lopes de Sousa Fernandes v. Portugal* [GC], § 221). Thus, the mere fact that the domestic proceedings have ended unfavourably for the person concerned does not in itself mean that the respondent State has failed in its positive obligation under Article 2 of the Convention (*ibid.*, § 221; *E.M. and Others v. Romania* (dec.), § 50).

## 2. Illustrations

### a. Cases concerning alleged medical negligence

200. The Court considered that the legal system failed to provide an adequate and timely response consonant with the State's procedural obligations under Article 2 where, *inter alia*:

- domestic proceedings were excessively lengthy (*Byrzykowski v. Poland*, §§ 114-116; *Šilih v. Slovenia* [GC], §§ 202-210; *Zafer Öztürk v. Turkey*, §§ 56-57; *Bilbija and Blažević v. Croatia*, §§ 105-107);
- the medical experts' professional relationship with the accused was such that the medical experts could not be seen as objectively impartial (*Bajić v. Croatia*, §§ 98-102; and by contrast *Karpisiewicz v. Poland* (dec.));
- there was lack of cooperation between the forensic medical experts and the investigating bodies and the experts' opinions lacked reasons (*Eugenia Lazăr v. Romania*, §§ 81-85);
- the domestic legal system did not afford a deceased victim's surviving next-of-kin the ability to claim and receive non-pecuniary damages (*Sarishvili-Bolkvadze v. Georgia*, §§ 90-98).

201. By contrast, the Court considered that there was no failure to provide a mechanism whereby the criminal, disciplinary or civil responsibility of persons could be established in:

- *Vo v. France* [GC], § 95 (involuntary termination of pregnancy);
- *Ursu v. Romania* (dec.) (death caused by cardiac arrest);
- *Maruseva v. Russia* (dec.) (death of a child in the course of a cardiac surgery operation);
- *Sevim Güngör v. Turkey* (dec.) (death of an elderly patient from bronchopneumonia in hospital);
- *Besen v. Turkey* (dec.) (death of the applicant's mother following surgery);
- *Vakrilov v. Bulgaria* (dec.), § 41 (death due to acute cardiovascular and respiratory failure);
- *E.M. and Others v. Romania* (dec.), § 56 (death in hospital due to a bacterial infection following surgery);
- *Buksa v. Poland* (dec.), §§ 15-16 (death of a baby due to an undiagnosed abdominal non-malignant tumour in her liver).

## b. Cases concerning accidents

202. The Court has found that the State had failed to provide an effective judicial response in relation to the death of an individual in an accident where, *inter alia*:

- domestic proceedings were excessively lengthy due to lack of diligence on the part of the national authorities (*Anna Todorova v. Bulgaria*, § 83; *Igor Shevchenko v. Ukraine*, § 61; *Starčević v. Croatia*, § 67; *Mučibabić v. Serbia*, § 135; *Sidika İmren v. Turkey*, § 67; *Fergec v. Croatia*, §§ 41-42);
- there were shortcomings in the manner in which evidence was taken, which negatively affected any prospect of establishing the facts of the case and the responsibility of the accused in subsequent proceedings (*Ciechońska v. Poland*, § 75; *Antonov v. Ukraine*, § 50; *Vovk and Bogdanov v. Russia\**, § 77).

203. By contrast, the Court considered that there was no failure to provide a mechanism whereby criminal, disciplinary or civil responsibility of persons who may be held answerable could be established in:

- *Furdik v. Slovakia* (dec.) (death of a climber);
- *Koceski v. the former Yugoslav Republic of Macedonia* (dec.), § 28 (death of a child in a playground when heavy concrete pillars fell on top of her);
- *Cavit Tınarlıoğlu v. Turkey*, § 125 (serious injuries sustained by an applicant when he was struck by a motor boat while swimming in a bathing area that had not been cordoned off);
- *Mikhno v. Ukraine*, § 151 (military aircraft crash killing spectators at a public air show);
- *Çakmak v. Turkey* (dec.), § 34 (electrocution of the applicants' relative while picking up pinecones from a tree in the garden of a primary school);
- *Aktaş v. Turkey* (dec.), § 29 (death of the applicant's son when his motorcycle collided with a pickup truck).

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The case-law cited in this Guide refers to judgments or decisions delivered by the European Court of Human Rights and to decisions or reports of the European Commission of Human Rights.

Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber.

Chamber judgments that were not final within the meaning of Article 44 of the Convention when this update was finalised are marked with an asterisk (\*) in the list below. Article 44 § 2 of the Convention provides: “The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43”. In cases where a request for referral is accepted by the Grand Chamber panel, the Chamber judgment does not become final and thus has no legal effect; it is the subsequent Grand Chamber judgment that becomes final.

The hyperlinks to the cases cited in the electronic version of the Guide are directed to the HUDOC database (<http://hudoc.echr.coe.int>) which provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), of the Commission (decisions and reports) and to the resolutions of the Committee of Ministers.

The Court delivers its judgments and decisions in English and/or French, its two official languages. HUDOC also contains translations of many important cases into more than thirty non-official languages, and links to around one hundred online case-law collections produced by third parties. All the language versions available for cited cases are accessible via the ‘Language versions’ tab in the HUDOC database, a tab which can be found after you click on the case hyperlink.

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